COUNTRY STUDIES

Colombia - Peer Review of Competition Law and Policy

2009

Introduction

“Peer review” is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of all OECD countries and their partners to submit their laws and policies to substantive questioning by other members. Colombia’s competition law and policy have been subject to such review in 2009. This report was prepared by Mr. Diego Petrecolla for the OECD.

Overview

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COMPETITION LAW AND POLICY IN COLOMBIA

A Peer Review

-- 2009 --

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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- to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

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Foreword

The OECD has been active in promoting competition policy in countries across Latin America and the Caribbean (LAC) for many years. The partnership between the OECD and the Inter-American Development Bank (IDB) has advanced these efforts. The annual Latin American Competition Forum (LACF) is the cornerstone of this collaboration on competition matters. It is a unique forum which brings together senior officials from countries in the region, to promote the identification and dissemination of best practices in competition law and policy. Seven meetings have been held to date.

Peer reviews of national competition laws and policies are an important tool in helping to strengthen competition institutions and improve economic performance. Peer reviews are a core element of the OECD's activities. They are founded upon the willingness of a country to submit its laws and policies to substantive reviews by other members of the international community. This process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all.

There is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform. Peer reviews are an important part of this process. Their positive application in the competition field encouraged the OECD and the IDB to include peer reviews as a regular part of the joint Latin American Competition Forum. In 2007, the Forum assessed the impact of the first four peer reviews conducted in the LACF (Brazil, Chile, Peru and Argentina) and the peer review of Mexico, which was conducted in the OECD's Competition Committee. In 2008, the Forum peer reviewed El Salvador. The peer review of Colombia was conducted in 2009.

The OECD and the IDB, through its Integration and Trade Sector (INT), are delighted that this successful partnership has contributed to the promotion of competition policy in Latin America and the Caribbean. This

work is consistent with the policies and goals of both organisations: supporting pro-competitive policy and regulatory reforms which will promote economic growth in LAC markets.

Both organisations would like to thank the Government of Colombia for volunteering to be peer reviewed at the seventh LACF meeting, held in Chile, on 9-10 September 2009. Finally, we would like to thank Mr. Diego Petrecolla, the author of the report, Chile's competition authorities for hosting the LACF and the many competition officials whose written and oral submissions to the Forum contributed to its success.

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Summary

Colombia's competition law is one of the oldest in Latin America. The law was approved by the national Congress in 1959, on the basis of the 1886 Constitution. It was a fully comprehensive law which included the basic legal standard applying to conduct cases (agreements and abuse of dominance) and a system of prior review of mergers and acquisitions. However the implementing regulations issued afterwards were insufficient to implement the law effectively and it was seldom enforced for the purpose of preserving competition, but as the legal basis for applying price controls.

This situation has changed dramatically since the early 1990s, due to the implementation of an economic liberalisation policy, the adoption of a new Constitution which established free competition as a constitutional right, and the promulgation of Decree 2153 (hereafter the 1992 decree), which elaborated on the types of conduct subject to the competition law and refined the legal standards that applied to that conduct.

The liberalisation policy also introduced significant reforms in public services such as the creation of sectoral regulatory bodies (telecommunications, water and sanitation, electricity and gas, public services) provided with a general mandate to strengthen competition and prevent monopolistic practices, in addition to the usual regulatory powers. Thus, these reforms create a decentralised institutional model for enforcing competition policy, in which various economic authorities may apply sanctions for restrictive practices or abuse of market dominance and exerted control over mergers and acquisitions.

By 2004 the shortcomings of this model were becoming apparent and motivated a second reform, focused on updating the competition protection system in order to improve the investment and business climate in the country. The result was the enactment of significant amendments to the competition law approved by Congress in June 2009 and signed on 24 July by the President (Law 1340/09) Two of its principal effects are to set up the SIC as the sole authority to enforce competition rules in all sectors and a substantial augmentation of applicable fines. The law amendment corrects some other shortcomings, but several more remain.

This report assesses the development and application of competition law in Colombia during the past years and the expected outcomes of its recent reform, in the fields of anticompetitive agreements, abuse of dominance, merger and acquisitions, exclusions and exemptions, institutional and procedure aspects, coordination with sectoral regulators, judicial review, international issues and competition advocacy.

With regard to anticompetitive practices, it has been found that the listing of anticompetitive agreements that may be deemed illegal *per se* or by presumption is otherwise too extensive and would give excessively strict and rigid treatment to agreements whose overall effect might not be anticompetitive, particularly if they are vertical agreements. However, the SIC is to be commended for having given emphasis to anticompetitive horizontal agreements in the past, though most of these cases were settled with the acceptance of undertakings from the companies without the imposition of significant penalties, the effect of which is to diminish the deterrent effect of these prosecutions. The fight against cartels will be reinforced by the new law as it authorises the SIC to create a leniency programme, which will be effective if the SIC also establishes a reputation for imposing large, punitive fines on cartel operator, as the new law also provide.

The legal provisions defining a dominant position do not differ substantially from international practice in this area, but those defining abusive conduct appear to. Notably, while they require conducting a factual economic analysis when determining a dominant position, they seem to apply either a presumption of illegality or a *per se* rule to certain types of conduct once the dominant position is proved.

In most respects the rules governing mergers in Colombia are consistent with international standards. However some weaknesses have been noted. For example, prior to the 2009 Law (1340/09), competition jurisdiction was dispersed among a number of sectoral regulatory bodies rather than concentrated in the SIC; regulations are dispersed and incomplete; and reports justifying full authorisation are not published.

In the field of exemptions, there is a system for authorising agreements or understandings in “basic sectors” and in the agricultural sector with the potential to produce significant market distortions. On the other side, there are general exemptions for agreements relating to co-operation in research and development, compliance with optional rules, standards and measures and utilisation of common facilities that amount to a kind of "legality *per se*". Such agreements could be harmful to competition. Both issues could be improved through suitable regulation.

The SIC has administrative autonomy, with its own legal personality and administrative, financial and budgetary independence. However, to the extent that the Superintendent is appointed by the President of the Republic and can be removed from office at pleasure, the Superintendent’s independence from influence by the executive branch is reduced. The position of Deputy Superintendent for Competition is also subject to appointment and removal at pleasure.

The SIC is not concerned exclusively with enforcing competition law. The Superintendent (who holds decision-making powers) and the Deputy Superintendent (who holds or shares with the Superintendent the power to conduct investigations) both have other tasks. The Competition Promotion Division, which is the unit exclusively devoted to competition law enforcement, has no powers of its own. A similar situation exists with respect to the Advisory Council. These aspects have not been addressed in the new law, and remain a challenge for the future.

Also the SIC is charged with the task to enforce the government's pricing control regimes settled by the Ministry of Commerce Industry and Tourism in very specific circumstances defined by law. This power has been used sparingly and occasionally, but in important sectors.

Consideration should be given to options whereby the authority with the greatest investigative and decision-making powers could be more focused on competition law enforcement and independent of the executive branch.

This report finds that the professionals dedicated to competition law enforcement in the SIC have solid professional qualifications and are hard working. There are an insufficient number of them, especially in light of the increased workload under the new law. The human and budgetary resources of the SIC devoted to the protection of competition should be increased.

The SIC possesses two important investigative tools, the powers to issue preliminary injunctions and to make surprise visits, during the period of preliminary investigation. These tools are not subject to judicial review, however, and the new law does not solve this problem. Surprise visits and preliminary injunction orders should be subject to judicial supervision. The SIC lack "dawn raid" power, i.e. the right to entry into premises without asking for permission of the company in question. Dawn raids, however, are an indispensable tool in the fight against hard core cartels.

Colombian law permits the SIC to settle an investigation when a party guarantees that it will suspend or modify the conduct for which it is being investigated. This ability can be a useful tool for a competition authority, but it seems that the rules governing the settlement procedure are not clear and that this procedure has been used too extensively.

The majority of the SIC's resolutions have been upheld by the courts. Under the new law 1340/09 the authorities will face the challenge of deciding the conditions for applying the leniency programme.

1. Foundations and context

1.1. The economic and political context

Colombia is the fifth-largest economy in Latin America (after Brazil, Mexico, Argentina and Venezuela), with a Gross Domestic Product (GDP) for 2008 estimated at US$242.268 billion, representing 6% of the region's GDP. It is a middle-income economy, with nominal GDP per capita estimated at $5,188 for 2008.[1] The country covers an area of 1,142,000 km² (the fourth largest in South America). Its population was estimated at 45.6 million in 2008, 73% of which was urban, with a demographic growth rate averaging 1.3%.

During much of the 20th century the Colombian economy was characterised by the application of industrial policy. There were a series of mergers and acquisitions and the formation of conglomerates was encouraged, within the context of protection of domestic industry and markets. This had a generally positive impact on Colombia's industrial growth, which rose by 830% between 1929 and 1957 and growth continued into the late 1970s, when the limitations of this import substitution model began to become apparent.

The modern era in Colombia's economy began in the early 1990s, when an ambitious policy of economic liberalisation was undertaken. A series of new laws were enacted, as well as a new constitution (1991). The new initiatives included the liberalisation of imports (removal of quantitative restrictions and import licenses, and tariff reductions) and the foreign exchange market, deregulation of foreign investment, fiscal decentralisation, financial, tax and labour reforms, reforms of the pension system and of the health sector, and privatisation and concessioning of public enterprises. The result was a period of significant economic growth in the country.

In 1998-99, however, Colombia's economy experienced an acute economic and financial crisis. This had its roots in the sharp growth in domestic demand which began in 1992 and was fed by heavy inflows of foreign private capital attracted by the economic deregulation programme.[2] Real GDP fell by 4.2%, but beginning in 2003 economic growth resumed. Between 2003 and 2007 real GDP grew at an average annual rate of 5.9%, peaking in 2007 at 7.5%. In 2008 there was again a sharp slowdown, in the

1 Source: CEPALSTAT, based on official statistics.

2 World Trade Organization, 2006.

wake of the international financial crisis. The real increase in GDP was only 2.5%, or five percentage points below that of the previous year.[3]

Colombia is a unitary republic divided into a Capital District (Bogotá) and 32 departments, containing 1,120 municipalities. The national government is organised into three branches: the executive branch, headed by the President of the Republic, the legislative branch, with a bicameral Congress (with representation from the departments), and the judiciary, having three main jurisdictions: constitutional, ordinary, and administrative. The Constitutional Court is the highest tribunal charged with enforcing and interpreting the Constitution. The Supreme Court of Justice is the highest tribunal for cases of ordinary jurisdiction and has three sections: civil, penal and labour. Finally, the highest tribunal for administrative disputes is the Council of State.

The National Economic and Social Policy Council (CONPES) dates from 1958 and is the senior national planning body. It coordinates and oversees the agencies responsible for economic and social policy in the government[4] CONPES reports to the President of the Republic and comprises various Ministers and Directors,[5] the head of the Bank of the Republic, the manager of the National Federation of Coffee Growers and the Director of the National Planning Department (DNP), which serves as Executive Secretariat for the Council.

The agency responsible for the application of competition law is the Superintendency of Industry and Commerce (hereafter "SIC, or "Superintendency"), a technical body that is part of the Ministry of Commerce, Industry and Tourism.

1.2. Introduction to competition policy

The current law on restrictive trade practices, Law 155/59, is 50 years old. It was approved by the national Congress in 1959 (hereafter it is

3 Source: DANE - Ministry of Commerce.

4 The National Economic and Social Policy Council (CONPES) was created by Law 19 of 1958. Further information is available at: http://www.dnp.gov.co/PortalWeb/tabid/55/Default.aspx.

5 Ministers of Foreign Relations, Finance, Agriculture, Development, Labour, Transport, Foreign Trade, Environment and Culture; Directors of Black Community Affairs and of Equity for Women and the Director of the National Planning Department (DNP).

referred to as the 1959 law), on the basis of article 32 of the 1886 Constitution, which assigned to the State the general conduct of the economy and empowered it to intervene in specific circumstances.[6] Article 1 of the law articulates the basic legal standard applying to conduct cases, prohibiting "agreements or understandings that have as their object the limitation of production, supply, distribution, or consumption of primary resources, products, merchandises, or services of domestic or foreign origin, and in general all types of practices, procedures or systems tending to limit open competition and to maintain or determine unfair prices."

Law 155/59[7] also establishes a system of prior review of mergers and acquisitions (which in Colombia are called "economic integrations"), requiring firms engaged in the same economic activity "to inform the national government of transactions they intend to pursue for purposes of merging, consolidating or integrating among themselves, regardless of the legal form of such consolidation, merger or integration", and provides that firms "may proceed" with the transaction if the government has not objected within 30 days following presentation of the full notification documentation. Article 10 of law 1340/09 changed the procedure by dividing the notification process into three stages. The first consists of a request for pre-evaluation and is completed three days after presentation of a brief accompanying report. The second encompasses all procedures arising from the previous stage and is completed within 30 days following presentation of the notification by the interested parties; and the third stage involves the procedures to be completed within three months after the interested parties have provided all information. Without prejudice to the above, the operation will be deemed authorised if the government has not objected within three months following receipt of the full information.

The 1959 law was amended by Decree 3307 in 1963, and implementing regulations were issued in 1964 by Decree 1302. Those regulations, however, were insufficient to implement the law effectively, and it was seldom enforced for the purpose of preserving competition.[8] Instead, it had been used primarily as the legal basis for applying price controls.

6 Cf. De Brigard Ochoa and De Hoyos Vega 2002.

7 Article 4.

8 Cf. Trade Policy Review of Colombia (World Trade Organization 1996); IDB Working Document 36 on regulation and deregulation policies in Colombia (Hommes 1996, pp. 8-9).

This situation began to change in the early 1990s, coincident with the economic liberalisation policy that was underway. The new Constitution adopted in 1991 established competition as a constitutional right, stipulating that (a) "free economic competition" is a collective right or interest[9]; (b) that "economic activity and private initiative are free"[10] and (c) that "the State, under mandate of law, shall prevent the obstruction or restriction of economic liberty and shall prevent or control any form of abuse that persons or businesses make of their dominant market position".[11]

This new Constitution was followed in 1992 by the promulgation of Decree 2153 (hereafter the 1992 decree), which had a pivotal role in establishing a new competition policy in the country. The decree elaborated on the types of conduct subject to the competition law and refined the legal standards that applied to that conduct. It also reformed the SIC, giving it more of the tools and procedures that it needed to enforce the law and to protect consumers.[12] Thus, the new Constitution and the 1992 Decree reshaped and modernised the regime for protecting competition, correcting various problems that had prevented its application. The decree detailed a list of punishable acts, including price-fixing, output restrictions, and the geographic sharing of markets; it granted the Superintendency broad powers to investigate anticompetitive behaviour at its own initiative or at the request of third parties, to impose fines and to oblige firms to notify mergers and acquisitions.[13]

Coincidentally, however, the liberalisation in the early 90s also introduced significant reforms in public services that affected competition policy. It created three regulatory commissions (in telecommunications, water and sanitation, and electricity and gas) having a general mandate to strengthen competition and prevent monopolistic practices, in addition to the usual regulatory powers (rate setting, tendering conditions, technical and commercial regulations). It also created the Superintendency of Public Services, complementary to the regulatory commissions, to protect consumers and supervise State enterprises, with powers to impose sanctions

9 Articles 338 and 88.

10 Article 333.

11 Article 333.

12 Articles 44-52.

13 Cf. Working Paper 19692 of the World Bank Institute (Montenegro 1995, pp. 17-19), written by one of the persons chiefly responsible for the deregulation program.

in the case of restrictive practices. Thus, the effect of these reforms was to create a decentralised institutional model for protecting and promoting competition, in which various economic authorities (the sectoral commissions and superintendencies and the Superintendency of Industry and Commerce) applied sanctions for restrictive practices or abuse of market dominance and exerted control over mergers and acquisitions.

By 2004 the shortcomings of this model were becoming apparent,[14] and a second round of reforms was begun. While the first reform of competition law was part of a growth strategy that was centred on opening the Colombian economy to international competition, this second round was part of a strategy based on increasing competition on the domestic market, as defined in the National Development Plan 2006-2010 (Chapter 4).[15] Under that plan, the focus is on updating the competition protection system in order to improve the investment and business climate in the country, and thus to boost the development of world-class competitors.

The result was the enactment of significant amendments to the competition law,[16] recently approved by Congress and signed by the President on 24 July 2009 (Law N° 1340/09). The stated objective of the legislation is "to update the rules governing the protection of competition to reflect current market conditions, to assist user monitoring and to optimise the tools available to the national authorities for enforcing the constitutional duty to protect free economic competition within the national territory." The new Law 1340/09 is described more fully in Section 8 below, but one of its principal effects is to grant the SIC the sole authority to enforce competition rules in all sectors.

14 Cf. IDB/OECD (2004). *Colombia: Institutional Challenges in Promoting Competition*. Inter-American Development Bank - IDB; Organisation for Economic Co-operation and Development – OECD, Latin American Competition Forum. Second Annual Meeting, Washington D.C. June 2004.

15 The Plan articulates five pillars of the National Competitiveness Policy: (1) to develop world-class sectors or clusters, (2) to boost productivity and employment, (3) to formalise enterprises and workers, (4) to foster science, technology and innovation, and (5) to promote competition and investment through horizontal strategies (CONPES, 2008, pp. 5, 18-19).

16 Bill 333/08/C and 195/07/S, containing rules for the protection of competition.

1.3. Objectives of competition policy

As discussed in the previous section, with the new Constitution of 1991 the objectives of competition legislation are now explicitly spelled out as a constitutional norm: the protection of free economic competition, which has been enshrined as a collective right (article 333).

Box 1. Competition rights in the 1991 Constitution

Title XII: The Economic Regime of the Public Finances.

Chapter I: General Provisions. Article 333:

"Economic activity and private initiative are free, within the limits of the public good. No one has the right to demand prior authorisation or requirements to exercise them, without the authorisation of the law.... Free competition is the right of all who assume its responsibilities.... Business, as a basis for development, has a social function that implies obligations. The State will strengthen voluntary organisations and stimulate business development.... The State, under mandate of law, will prevent the obstruction or restriction of economic freedom and will prevent or control any form of abuse that persons or businesses make of their dominant market position.... The law will restrict the scope of economic freedom when the nation's social interest, state of affairs, and cultural patrimony demand it."

On this point, the Constitutional Court has held that "the Constitution has elevated free competition as a guiding principle for economic activity to the benefit of consumers and entrepreneurial freedom.... The law must prevent persons or businesses holding a dominant market position from exploiting that position abusively";[17] "Competition ...through market institutions, offers the economic Constitution the opportunity to base itself on them with a view to promoting economic efficiency and the welfare of consumers... the object protected by the Constitution is the competition process itself, not competitors, whether large or small;[18] free economic competition is conceived as both an individual right and a collective right, the purpose of which is to achieve a state of real, free and undistorted competition, which will allow entrepreneurs to earn profits while generating

17 Judgement T-240 of 1993.

18 Judgement C-535 of 1997.

benefits for the consumer with goods and services of better quality, greater guarantees, and a real and fair price...".[19]

The 1992 Decree (Article 2) was consistent with these constitutional precepts. It articulated the following objectives: to improve efficiency, so that consumers have free choice and access for goods and services, so that businesses may participate freely in markets and so that there will be a variety of prices and qualities on the market. This article was amended in the new law 1340/09, giving it greater clarity. It now reads:

> *Article 2. Functions. The Superintendency of Industry and Commerce shall exercise the following functions:*
>
> *Ensure the observance of regulations on the protection of competition; deal with complaints or claims over potential violations, and process those that are significant for achieving the following purposes in particular: free participation of businesses in the market, consumer welfare, and economic efficiency.*

In short, the principal objective of the Colombian system for the defence of competition is to protect free economic competition, defined as "the effective possibility that market participants have to compete with others in the market, in order to offer and sell goods and services to consumers and to create and maintain a clientele"[20] – to the extent that this promotes economic efficiency and consumer welfare.

Nevertheless, it appears that other public policies are also relevant. Thus, the 1991 Constitution also established that: (a) the overall management of the economy is in the hands of the State which, by mandate of law, shall intervene in all economic sectors to rationalise the economy in order to improve the quality of life, to distribute opportunities and the benefits of development equitably, to preserve a healthy environment, to achieve full employment of human resources and harmonious development of the regions; (b) activities of the financial sector (banks, insurance companies and others) are of public interest and shall be conducted with State authorisation and supervision; (c) legal monopolies may be established only for social or public purposes, as in the case of alcoholic beverages and

19 Judgements C-815 of 2001 and C-369 of 2002.

20 Cf. Alfonso Londoño Miranda (1998) *Abuso de la Posición Dominante: Perspectivas de Aplicación en Colombia a la Luz del derecho Comparado*, CEDEC N° 2, quoted in De Brigard Ochoa and De Hoyos Vega, 2002.

gambling, the profits from which shall be earmarked for health and education.[21]

The SIC provided some background for these provisions.

*"In 1991 the country introduced a constitutional change that transformed all the social, political and economic aspects of public life, from a 'constitutional State' (*Estado de Derecho*) to a 'social constitutional State' (*Estado Social de Derecho*), thus reconciling the concept of the rule of law and the welfare State, in which the dignity of the individual is the point of intersection (...). The individual is no longer treated in isolation but becomes a social component, with the sole objective of achieving the essential purposes of the State. In this way legal security, proceeding from the principle of constitutional legality and the effectiveness or materialisation of rights that flow from the welfare state, gives the general interest precedence over the individual interest."*[22]

The SIC explained that

"Article 333 of the Constitution enshrined free competition as a right of all persons, but it is not absolute (...) it implies that it is not a prerogative rooted exclusively in the mind of those who compete on the market, but a right of competitors, non-competitors and consumers, among others. For this reason, such objectives as consumer welfare, economic efficiency, innovation, equity, a competitive industrial structure, growth and the protection of small and medium-scale enterprises should and must be protected equitably and in a manner proportionate to their impact on the final purpose, which is the general interest, and this does not mean giving priority to some over others".[23]

21 Articles 333 to 336.

22 Information provided in writing by the Superintendency.

23 Information supplied in writing by the Superintendency.

2. Substantive issues: the content of the law

2.1. Horizontal and vertical agreements

A particular feature of Colombia's antitrust legislation is that it makes no distinction between horizontal and vertical agreements. Consequently, this section treats both types of agreements together.

The basic rule imposing a ban on anticompetitive agreements is article 1 of Law 155/59. That article bans "agreements or understandings that have as their object the limitation of production, supply, distribution, or consumption of primary resources, products, merchandise, or services of domestic or foreign origin, and in general all types of practices, procedures or systems tending to limit open competition and to maintain or determine unfair prices".[24] Note that this formula punishes conduct for its anticompetitive intent rather than for its actual market effects. This was expanded by the 1992 Decree, however, according to which agreements may be held contrary to free competition as a result of either their object or their effect.

The Decree also provided a strict definition according to which a cartel or agreement is "any contract, understanding, collusion, concerted or deliberately parallel practice between two or more firms".[25] It reinforced the general prohibition whereby conduct that affects free competition is deemed unlawful in the terms of the civil code,[26] and it instituted a non-exhaustive list of agreements contrary to free competition, which are listed in Box 2.

The formulation of the 1992 Decree 2153/92,[27] which is still in force, has been modified by the new law. The listed agreements have as a common denominator the fact that they may be punished either for their purpose or for their effects. The only valid defence in this case would be to prove that the alleged conduct did not occur,[28] although the SIC has sometimes admitted the possibility of efficiency criteria as a valid defence for the conduct, pursuant to article 29 of Decree 2153/92.

24 Article 1, amended by Special Decree 3307/63.

25 Article 45.

26 Article 46.

27 Article 43.

28 Cf. Miranda Londoño, *El Régimen General de la Libre Competencia 1999*; Uribe Piedrahita 2006.

Box 2. Agreements between firms: illustrative list of agreements deemed illegal

Agreements that have the following purposes or effects, among others, shall be deemed contrary to free competition:

1. Direct or indirect price fixing;
2. Determining discriminatory sales or marketing conditions for third parties;
3. Distribution of market shares between producers or distributors;
4. Allocation of production or supply quotas;
5. Allocation, distribution or limitation of sources of supply of productive inputs;
6. Limitations to the adoption or development of new technologies and techniques;
7. Conditioning the supply of a product upon the acceptance of additional obligations that by their nature do not constitute the object of the business;
8. Refraining from producing a good or service or effecting its levels of production;
9. Collusion in bidding or tendering or in the award of contracts, the distribution of goods, or the setting of terms in bids;
10. Blocking the entrance of third parties to markets or marketing channels.

Decree 2153/92, article 47 (10) combined with article 16 of Law 590/00 on the promotion of SMEs.

Alternatively and conversely, an agreement may be ruled illegal solely upon verification of anticompetitive effects, regardless of the intent of the violators. In this case the defence will rely on denying the anticompetitive effects of the agreement on free competition, consumer welfare, and economic efficiency. In short, the prohibition in the 1992 Decree of cartels that "have as their object or effect" the fixing of prices, the sharing of markets, the subordination of supply to acceptance of additional obligations, etc., not only makes it unlawful to attempt restrictive practice but also punishes conduct for its anticompetitive effect, regardless of the motive or interest underlying that conduct.[29]

The law does not explicitly spell out the criteria for illegality *per se* and the rule of reason. There is some dispute over this point between local practitioners, since the traditional concepts of *per se* versus *rule of reason* are not sufficient under the administrative responsibility regime in Colombian law. One interpretation holds that rule of illegality *per se* is tantamount to a *de jure* presumption of illegality, and applies only for the agreements and contracts explicitly described in articles 47 (cartels) and 48 (acts) of the 1992 Decree. By contrast, the rule of reason as a test that

29 Cf. Superintendency of Industry and Commerce, March 2008.

balances pro-and anticompetitive effects would be applicable in cases where harmful economic effects of the conduct must be demonstrated, as in:

1. Agreements between firms and acts not explicitly listed in articles 47 and 48 of the 1992 Decree and that fall within the general prohibition of article 1 of the 1959 Law and article 46 of the 1992 Decree;
2. Abuse of dominant position (1992 Decree, article 50); and
3. Mergers or "business integrations" (1959 Law, article 4; 1992 Decree, article 51).

On this point the SIC has advised that "in our system we have not spelled out the assumptions of systems of conduct that are in themselves anticompetitive, nor those for the rule of reason, but competition law experts tend to equate them, to represent them, or to justify their application in our system in their own terms, such as *de jure* and *de facto* presumption".[30] It appears that there is some dispute among competition law practitioners in Colombia as to the criteria for evaluating cartels[31] and, consequently, as to the type of proof that alleged violators may offer in their defence against charges by the SIC. Currently, the question is under review by the highest judicial authority (the Council of State), to which the SIC has appealed a decision by the Administrative Tribunal of Cundinamarca,[32] overturning the SIC's Resolution 29302/00 which found a group of private security companies guilty of forming a price cartel.[33]

With respect to vertical agreements, according to the existing legislation and its application the SIC may punish a vertical agreement restraining competition, pursuant to article 47, regardless of any efficiency gains that might offset its anticompetitive effects. While the SIC has acknowledged

30 Superintendency of Industry and Commerce.

31 Under Article 47.

32 Cf. Uribe Piedrahita 2006.

33 Through Resolution 29302/00, the Superintendent of Industry and Commerce imposed a penalty on the National Association of Private Security Entities (ANDEVIP) and others for violating article 47.1 of Decree 2153 of 1992. Having exhausted administrative channels, the companies and their legal representatives appealed to the Administrative Disputes Tribunal, specifically the Administrative Tribunal of Cundinamarca, which quashed the ruling (judgment of 27/11/03). The SIC appealed that judgment to the Council of State, where a decision is still pending.

that internationally vertical agreements are viewed more favourably than horizontal agreements because of the positive impact they may have on competition and on consumer welfare through the generation of efficiencies, it has also noted that these agreements may still restrain competition and infringe the rules.[34]

A vertical agreement with greater potential to harm competition, namely supplier-customer arrangements that lead to a vertical fixing of minimum prices, would fit under point 1 of the list of conduct in article 47 of the 1992 Decree, and would therefore be illegal *per se.* Here it is recalled that the United States Supreme Court recently overturned the doctrine that vertical price fixing (including floor price) agreements were illegal *per se*.[35]

On this point, the SIC has advised that if the agreement is intended to establish or impose restrictive conditions on the market, rather than to optimise the productive cycle, it will be considered anticompetitive and of illegal purpose. Otherwise, faced with a specific vertical agreement that does not impose restrictive market conditions, the Superintendency will analyse it in light of the structure of the market concerned and its specific circumstances and variables, and will decide solely on the basis of investigation, evidence and analysis as to whether or not it is restrictive of free competition.[36]

While the Colombian legislation sets no thresholds for market shares or thresholds of any other kind for purposes of enforcing competition rules, the SIC may abstain from taking action in cases deemed insignificant, pursuant to the 1992 Decree,[37] whereby the SIC is only required to pursue antitrust complaints that are "significant" or "important". This rule may in effect involve a *de minimis* criterion that avoids extending the presumption of articles 47 and 48 to cases that have no significant impact on market competition because of low market shares, for example.

Finally, it should be noted that in the Colombian antitrust regime, in line with international practice, an investigation can be cut short if the offender and the competition authority reach a settlement. Under Colombian law, the

34 Replies submitted by the Superintendency of Industry and Commerce to the OECD Peer Review questionnaire, 2009.

35 Leegin Creative Leather Products v. PSKS, Inc, decision of 29 June 2007.

36 Superintendency of Industry and Commerce, 2002.

37 Article 2.1 and article 12.2.

settlement procedure is known as "offer of guarantees".[38] The authority may order an investigation to be closed "when in its judgment the presumed offender offers sufficient guarantees that it will suspend or modify the conduct for which it is being investigated". This does not imply that the defendant is entering a confession or admitting that its conduct was illegal. For its part, the authority takes no position on the substance of the case and imposes no penalties.

In this area as well there has been some controversy, especially when the SIC in its rulings has attempted to regulate procedural aspects relating to the exercise of this power, such as the stage of the investigation at which a settlement may be offered and negotiated with the SIC. Its regulation was ruled unconstitutional by the Constitutional Court citing a shortcoming in the issuance procedure, but without commenting on the content of the regulation. [39]

Cases highlighted by the authority[40]

- The Superintendency of Industry and Commerce imposed a fine of 5 million pesos (2,260 US$) on Intersystem Ltda. as well as on two individuals for collusion in public tendering. The firms agreed not to compete in certain public procurement for providing services of grade systematisation for Bogotá District schools.[41]
- The Superintendency imposed a fine of 2,769 million pesos (1,375,241 US$) on the biggest cement company in Colombia (Cementos Argo), and the local affiliated of the Mexican Cemex SA and the Swiss Holcim ltd Colombia and its legal representatives for participating in a price cartel for Portland cement and dividing up the national market during 2005.[42]

38 Governed by Decree 2153/92, articles 4.12 and 52.

39 Cf. Miranda Londoño, El Ofrecimiento de Garantías en el Derecho de la Competencia 2006; Uribe Piedrahíta y Castillo Cadena 2006.

40 The annex presents an analysis of cases solved by SIC.

41 Resolution 01055 of 2009, appeal for review.

42 Resolution 051694 of 2008 (pending the outcome of an administrative appeal).

2.2. Abuse of dominant position

In Colombia, the competition regime does not prohibit monopolies.[43] However, even in the case of monopolies designated or authorised by law, the Constitution[44] limits them with the provision that "Economic activity and private initiative are free, within the limits of the public good. No one has the right to demand prior authorisation or requirements to exercise them, without the authorisation of the law. .... The State, under mandate of law, will prevent the obstruction or restriction of economic freedom and will prevent or control any form of abuse that persons or businesses make of their dominant market position."

Thus, pursuant to the Constitution[45] the State has the obligation to avoid and control the abuse of a dominant position in the national market, and in this sense it prohibits not a position of market dominance but rather an abuse of that position. In the development of this constitutional precept, the antitrust regime[46] prohibits conduct that constitutes abuse of dominant position and indicates the penalties for violation of those rules. It also gives to the SIC the power to enforce those rules and to impose sanctions for their violation in all sectors in which responsibility has not been granted to another agency.

The abuse of a dominant position falls under the general prohibition of article 1 of the 1959 Law (155/59) [47] and the 1992 Decree (2153/92),[48] Article 50 of which lists various types of conduct constituting an abuse of dominance.

The authority must of course demonstrate the existence of a dominant position, for which the legislation sets no thresholds of market share or any other criteria for defining a dominant position. The assessment of a dominant position is made on a case by case basis, in light of the particular circumstances of the firm and market in question.

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43 Some monopolies are not only permitted but reserved to the State, particularly those in alcohol and gambling for which administration is confined to certain public entities (which may concession them).

44 Article 333.

45 Article 333.

46 Contained essentially in the 1959 Law and the 1992 Decree.

47 1959 Law.

48 Article 46, 1992 Decree.

Box 3. Conduct deemed to constitute abuse of dominant position

Dominant position: "the possibility of determining, directly or indirectly, the conditions of a market" (article 45 of Decree 2153/92).

Article 50 of Decree 2153/92

1. Predatory pricing (reducing prices below cost for the purpose of eliminating various competitors or preventing their entry or expansion);
2. Imposing discriminatory provisions for equivalent transactions that place one consumer or supplier at a disadvantage vis-à-vis another consumer or supplier under analogous conditions.
3. Provisions that have the object or effect of conditioning the supply of a product upon the acceptance of additional obligations that by their nature do not constitute the object of the business, without prejudice to other provisions
4. Sales to one buyer under conditions different from those offered to another buyer with the intent of reducing or eliminating competition in the market
5. Selling or providing services in any part of the country at a price different from that offered in another part of the country, when the intent or the effect is to reduce or eliminate competition in that part of the country, and the price does not correspond to the cost structure of the transaction.
6. Obstructing or impeding third parties' access to markets or marketing channels (item added by Law 590/00 on the promotion of SMEs).

If a dominant position is shown to exist, evidence of any of the types of conduct stipulated in article 50 leads to a virtually automatic sanction. There is no obligation to develop in-depth economic analysis to determine whether that conduct has a negative effect on economic efficiency or on consumer welfare. Accordingly, once the dominant position is proven, the acts prohibited under article 50 seem to be presumed illegal.

Finally, it should be noted that article 48[49] lists the following two types of unilateral conduct as being *per se* contrary to free competition: (i) influencing a firm to increase the prices of its goods or services or to desist in its intention of decreasing those prices; (ii) refusing to sell or provide services to a firm or discriminating against it for purposes of retaliation against its pricing policies. According to the Decree, both are unlawful, regardless of whether the presumed offender has a dominant market position

[49] Points 2 and 3.

and regardless of the effects on competition and consumer welfare.[50] In response to a query on this issue from a distributor, the SIC answered that "if another firm exerts any type of influence in order to force you to raise the prices of the products sold by your firm, or if that other firm refuses to sell to your firm or discriminates against you because of your pricing policy, that could constitute anticompetitive conduct."[51]

On the basis of article 48, the SIC imposed a fine on the Nariño Association of Retail Distributors of Fuels and Petroleum Derivatives (ADICONAR) for "conduct intended to influence firms engaged in retail fuel distribution to abandon their intention to reduce prices to the public, thereby restricting free market conditions and introducing artificial price distortions as a primary element of competition."[52]

Finally, in cases of abuse of dominance, like in cartel cases, the SIC may accept a settlement to conclude the investigation early, if the party terminates or modifies the conduct in question and offers sufficient guarantees.

Cases highlighted[53]

The case identified by the competition authority as its most significant dominance case relates to predatory pricing. The SIC launched an investigation at its own initiative against the firm Chicles Adams SA (now Cadbury Adams) for predatory pricing in the chewing gum market in 2005. The SIC imposed the maximum possible penalty for abuse of dominance, amounting to a fine of 680 million pesos (292,400 US$) on the company and $100 million pesos (43,000 US$) on its legal representative. The SIC took the defendant's dominant position and predatory conduct as proven, as well as its impact in reducing the market share of the competitor that it had targeted with its strategy. The penalty was confirmed upon review by the courts.[54]

50 This rule is in contrast with that in the United States, where, as noted above in section 2.1, the U.S. Supreme Court overturned the rule that vertical price-fixing – which amounts to influencing prices – was illegal *per se*.

51 Superintendency of Industry and Commerce 2002.

52 Superintendency of Industry and Commerce, *Radicación* No. 01061192 of 8 July 2002.

53 This case is analysed in the Annex.

54 SIC Resolutions 03370-06 and 22624/05.

2.3. Mergers and acquisitions

Mergers or economic concentrations are known as "business integrations" and are defined as any act of concentration, merger or consolidation between two or more economic agents engaged in the same productive, distribution, supply or consumer activity.[55] Thus, according to these terms, the law would seem to apply only to horizontal mergers, but as discussed further below, the SIC has managed to extend coverage to vertical transactions by means of an expansive interpretation of this language.

Colombia has in place a prior review system for mergers, to which all individuals and legal persons, in all sectors of the economy, are subject, regardless of the legal form of consolidation, in so far as it results in the control of one independent firm by another (i.e., if it does not involve firms of the same economic group).[56] Mergers concluded outside the country must be notified if two firms are selling their products in the Colombian market, and provided they have a presence in Colombia (through subsidiaries or controlled companies). The SIC considers that indirect participation through independent distributors does not amount to market concentration.

Previously the SIC was the authority for prior review of mergers in all economic sectors, with the exception of finance, television, air transport and vertical integrations in the health care sector. Under the 2009 law (1340/09), however, the SIC is the only authority with powers of prior review of mergers in all sectors, except only for mergers in the financial sector, where SIC must provide an assessment on the competition effects of the merge and may suggest remedies.

The principal rules governing prior review of mergers ("business integrations") are the 1959 Law,[57] Decree 1302/64 (“the 1964 Decree”),[58] the 1992 Decree[59] and Title VII of the *Circular Unica* (Single

55 SIC decision 2005-00351 of 12 July 2008.

56 “The forms of business integration may be of various kinds, but the outcome with which the law is concerned is always the same, regardless of the legal form of the integration, if it falls under the assumptions of the rules on restrictive trade practices or if it could produce effects in the Colombian market, it must be notified to the SIC” (SIC Advisory 00001365 of 2000).

57 Article 4.

58 Articles 6, 7 and 8.

59 Articles 2, 4.14, 12.4, 45.4 and 51.

Circular) (2001) of the SIC, as amended in 2006 (the "Single Circular")[60] and from July 2009 Law 1340/09. Breach of the obligation to notify mergers leads to corrective measures and sanctions, which include fines on the firms and their directors. The maximum fine is the same that applies to substantive violations.

Prior review of mergers has been a feature of Colombian competition law since 1959,[61] but the regime was effectively applied only beginning in the late 1990s. Between 1959 and 1998, not a single merger attracted opposition or conditions on the part of the SIC. By contrast, between 1998 and 2007 it objected to 7 transactions and imposed conditions on 29.[62]

According to the 1959 Law (155/59), consolidations, mergers, acquisitions or takeovers between firms in the same business activity must be notified in advance to the SIC if their respective or combined assets amount to 20 million pesos or more (8,800 US$). That threshold is now very low, and would imply that nearly all mergers would have to be reported to the SIC. To correct this distortion, the SIC has established two systems of authorisation, based on its powers under the 1992 Decree,[63] as amended in the Single Circular.[64] According to that Circular, mergers between firms with combined annual operating revenues or total assets of less than 100,000 legal minimum monthly wages (US$ 23 million) do not have to be notified or reported to the SIC; nor will the SIC perform any analysis of the operation, which will be deemed tacitly authorised. The only obligation for firms in this situation is to confirm in the minutes of their governance body that the transaction meets the requirements of that system (general authorisation system).

On the other hand, if the transaction exceeds the threshold of 100,000 minimum monthly wages and meets a set of rules defined by the SIC for the “special authorisation system,” firms must file detailed

60 Resolution 22195/06.

61 In this regard Colombia was one of the first countries, if not the first, to adopt a prior review regime.

62 Miranda Londoño and Gutierrez Rodriguez, *El control de las concentraciones empresariales en Colombia 2007*, based on SIC data.

63 Article 2.21: To instruct interested parties in the manner in which they must comply with antitrust provisions, to set rules to facilitate that compliance, and to indicate procedures for their enforcement.

64 The Single Circular was amended by the Resolution of 2006.

information to allow the SIC to decide whether to object, submit to conditions or authorise the transaction. In examining requests for authorisation, the SIC conducts an economic analysis that looks at the affected market and the participants' market shares, calculates concentration indices, identifies entry barriers, analyses the efficiencies generated by the operation, if necessary, considers the "failing firm" hypothesis (again, if necessary), and evaluates possible remedies (structural and behavioural) that might offset any harmful effects on competition.

The 1992 Decree (2153/92)[65] includes an exception whereby the SIC may not object to mergers if their proponents can demonstrate that are likely to produce "significant improvements in efficiency such as producing cost savings that cannot be achieved by other means and if they can guarantee that there will be no decrease in market supply".[66] However, the SIC reports that it has not yet issued an authorisation based on the efficiency-gains exception.

Resolution 13544 of 26 May 2006 specifies conditions for an integration operation, applicable to the "failing firm" exception, which are the following:

> *"1. The allegedly failing firm is doomed to exit the market in the near future because of its economic problems (...). 2. There is no practical or achievable alternative that is less anticompetitive (...). 3. The damage to competition produced by the operation is comparable to what would be caused by withdrawal of the firm's assets from the market." (Cementos del Caribe, Metroconcreto, Concretos de Occidente, Agrecon Logitrans, Cemento Andino y Concrecem)*

A notified merger may be authorised, rejected or authorised with conditions, such as transfer of assets, maintaining separate business units, providing competitors with open access to logistics and production facilities, terminating customer loyalty schemes, transferring technology, price and cost surveillance, maintenance of separate trademarks, and disclosure of commercial information. "Authorisation with conditions" is nowhere defined in the regulations, however; it has been interpreted via SIC doctrine, and until Law 1340/09 (articles 10 and 11), the point in the procedure at

65 Decree 2153, Article 51.

66 The initial wording of Law 155/59, regulated by Decree 1302/64, included authorisation on efficiency grounds, but placed the burden of proof on the government.

which the interested parties may offer commitments or conditions in order for a transaction to be authorised had not been specified.

As noted above, the rules are not clear regarding the application of the merger control law to vertical and conglomerate mergers. Law 155/59 of 1959 requires firms engaged in the same productive, supply, distribution or consumption activity involving a given article, raw material, product, merchandise or service to report any planned transactions for merger, consolidation or integration among themselves.[67] Law 1340/09 (art. 9) indirectly mentions this type of merger, by referring to "firms participating in the same value chain".

The SIC has interpreted this language broadly in a series of resolutions and advisories (*"conceptos")*. A 2003 Resolution required firms to report their transaction if "their respective activities are the same or largely similar".[68] According to that interpretation, transactions must be notified under the following conditions: (a) the firms are engaged in the same activity (as producers, suppliers, distributors or consumers); (b) the activity refers to a specific article (a raw material, product, merchandise, service) and (c) that activity takes place within the same market.[69] Still, there are divergent interpretations as to whether "same activity" means participating in the same market or at the same stage in the production chain. In any event, a number of vertical mergers have been examined within this framework[70] but no conglomerate transactions. When the issue has come before the courts it has generally been resolved in favour of the SIC.[71]

Finally, under Law 155/59 of 1959,[72] the SIC currently does not disclose either to the parties or to the general public the economic studies serving as

67 Article 4.

68 Superintendency of Industry and Commerce, 2003, Resolution 8307/03.

69 Superintendency of Industry and Commerce, 2006, *Concepto* 06078347 of 15 September 2006.

70 Agribrands Purina Colombia - Incubadora del Centro; Terminal Marítimo Muelles - El Bosque– Operadores Portuarios; Siderúrgica Boyacá – Laminados Andinos; Sociedad Centurión – El Olimpo Ltda. and Agrícola Casaloma; Sociedad Portuaria Regional de Santa Marta; Noel – Suiso; Agri Avícolas Integrados and others; Promotora Bananera. – Arizona Investment Corporation; Productora de Papeles – Carvaja; Suministros de Colombia. – Minerales Industriales.

71 Miranda Londoño and Gutierrez Rodriguez 2007.

72 Article 4.3 of Law 155/92.

the basis for granting full authorisation of a notified merger. This failure to substantiate the grounds for authorising a transaction deprives the other branches of the government and the general public of the opportunity to evaluate the SIC's exercise of its power to ensure that the collective right to free economic competition is being preserved. This situation also means that specialists and businesses in general have no in-depth knowledge of the technical criteria underlying SIC decisions, and this increases legal uncertainty. The new law (1340/09) allows the non-confidential versions of these studies to be published.

Cases highlighted by the authority [73]

- Procter & Gamble Colombia Ltda. y Colgate Palmolive Compañía. This was an international merger with effects in Colombia. The market involved was the laundry soap market where P&G Columbia would reach a 71% market share after the operation was completed. The increase in the HHI would have been 2,430 points resulting in a level of 5,326. SIC rejected the operation by resolution 28037/04, confirmed by resolution 29807/04.
- Mexichem Colombia S.A. y Productos Derivados de la Sal S.A. (Prodesal). The markets involved were certain basic chemicals. The market shares after the merger varied between 50% and 82%. The operation was originally rejected by resolution 23541/08, and later approved with conditions after a review request, by resolution 34452/08.
- Industrias Arfel S.A. - Aluminio Reynolds Santo Domingo S.A. The markets involved were in the aluminum sector. The market shares and the increases in the HHI post merger were very high, reaching in some cases market shares of 100% and HHI increases of 4,000 points. The merger was rejected by resolution 19729/08 but latter approved with conditions by resolution 5886/08, after a request of revision by the parties involved.

2.4. Exclusions and exemptions

The 1991 Constitution provides that the principle of free economic competition applies to all persons engaged in economic activities and to all sectors of the economy, including publicly owned or managed enterprises

73 Conditions imposed in the following mergers are described in Table 14.

and small and medium-scale enterprises (SMEs).[74] There are, however, some exceptions to this principle of universality.

One of the most significant exceptions is found in the 1959 Law (155/59) and its implementing regulations.

> *"Article 1. Agreements or understandings are prohibited if their direct or indirect object is to limit the production, supply, distribution or consumption of raw materials, products, merchandise or services of domestic or foreign origin, and in general any class of practice and procedure or system tending to limit free competition and to maintain or determine unfair prices.*
>
> *The government may however authorise agreements or understandings that, despite limiting free competition, are intended to defend the stability of basic sectors producing goods or services of interest for the general economy" (Law 155/59, article 1, amended by Decree 3307/63).*
>
> *"…. For purposes of the paragraph of article 1 of Law 155/59 of 1959, basic sectors producing goods or services of interest for the general economy and social welfare are understood to mean all those activities that are or could in future be of fundamental importance for the rational restructuring of the national economy and for supplying goods or services indispensable to the general welfare, such as:*
>
> *(a) The production and distribution of goods to meet the basic needs of the Colombian people for food, clothing, health and housing.*
>
> *(b) The production and distribution of fuels and the provision of banking, education, transport, electricity, water, telecommunications and insurance services." (Regulatory Decree 1302/64, article 1).*

These exemptions predate the 1991/2 reforms and have not been changed by the new law (1340/09). However, their scope was regulated and to some extent limited by the Single Circular, according to which interested

74 Note, however, that, according to articles 2.1 and 12.2 of the 1992 Decree the SIC shall prosecute violations of competition law that are "significant" or "important." Thus, the Superintendency can refrain from taking action against firms that engage in anticompetitive conduct but whose market share is insignificant, many of whom would be SMEs.

parties must: (i) provide a detailed description of the restrictive practice (agreement, understanding, practice, procedure or system), in particular its contribution to the stability of the sector and those aspects that are harmful to competition; (ii) demonstrate that the sector is basic and of interest to the national economy, considering its importance for the economy; and (iii) provide an oversight mechanism to be implemented by the SIC.

That circular also provides that: (i) the SIC may order the termination of the agreement if market conditions that gave rise to it have been overcome and the sector has stabilised; (ii) authorisation may not be requested for the conduct under investigation, if it has been declared unlawful or if there has been a cease-and-desist order or an undertaking of modification; (iii) failure to observe the terms of the authorisation issued by the SIC will mean an infringement of competition rules, in which case the stipulated penalties will apply.

The SIC has used this procedure on only one occasion. In 2003,[75] the SIC authorised an agreement among textile firms whereby five firms (Industrias Safra, Manufacturas Eliot, Sajatex, Protela S.A. and Textilia) undertook to purchase from the sole national supplier (Enka de Colombia S.A.) an average monthly volume of 1,000 tons of textured filament, at the volume, quality, delivery and price conditions negotiated with each of them. At the same time the Ministry of Commerce, Industry and Tourism applied antidumping duties against imports of this product from Taiwan and Malaysia.[76].

While this regime for authorising agreements applies to several economic sectors, including the agriculture sector, in 2005 a special regulation for agriculture was promulgated, whereby in deciding whether to authorise or terminate an agreement for stabilising an "agricultural sector intended to meet basic food needs" the SIC must seek the nonbinding opinion of the Ministries of Agriculture and Rural Development and of Commerce, Industry and Tourism.[77] In addition, an Interagency Agricultural Monitoring Group was established, comprising officials of the Minister of Agriculture and Rural Development and the Superintendent of Industry and Commerce.[78]

75 Resolution 04332 of 25 February.

76 Resolution 908/02.

77 Decree 3280/05.

78 Resolution 347/05.

Under this framework, the SIC supervises sectoral agreements that combine agricultural producers and marketers operating in different stages of the agri-food chains. There are currently 28 productive chains, many of them the subject of Competitiveness Agreements promoted and facilitated by the Ministry of Agriculture. They exist in sectors such as cotton, rice, meat (poultry, pork, beef), balanced food and dairy products, cocoa, flowers and rubber.[79] It should be noted, however, that this procedure for authorising agreements would not be necessary if the competition rules did not contain a presumption of illegality *per se* for nearly any type of understanding between firms (see discussion of this point in Section 2.1 above).

The 1992 Decree[80] also establishes a general exemption applicable to all persons and economic sectors, whereby the following conduct will not be deemed a violation of free competition: (i) research and development cooperation involving a new technology; (ii) agreements on compliance with optional rules, standards and measures that do not limit market entry for competitors; (iii) those that refer to procedures, methods, systems and forms of utilisation of common facilities. This same exemption is found in the regulatory framework for the health sector[81] but only in the case of items (i) and (iii) above.

In only one SIC case was this exemption found to be applicable. This involved an investigation of several domestic and international airlines[82] involving a suspected price fixing agreement. The SIC found that the conduct was lawful because it involved "procedures, methods, systems and forms of utilisation of common facilities covered by the exception defined in article 49 of Decree 2153/92".[83]

Finally, Law 81 of 1988 empowers the government to control prices, and the SIC has a role in this regime. It and the mayors have the power to investigate and punish violations of price control rules. In practice, the

79 Cf. Internet site of the Ministry of Agriculture (http://www.minagricultura.gov.co).

80 Article 49.

81 Decree 1663/94, article 7.

82 Alaico, Aerolíneas Argentinas S.A., Aerovías Nacionales de Colombia AVIANCA S.A., Iberia – Líneas Aéreas de España Sucursal Colombia, British Airways, Air France, American Airlines, LanChile, Lufthansa, Challenge Air Cargo, Tampa and Aerolíneas Centrales de Colombia S.A. – ACES.

83 Resolution 25559 of 14 August 2002.

government has not made widespread use of its price-setting powers, but it has exercised it occasionally in products such as gasoline, certain drugs, gas (natural and liquefied), drinking water, basic sanitation, and electricity. The SIC's role in this regard is to apply the provisions on price controls established by the Ministry.

Cases highlighted by the authority

At the end of 2008, in the context of special treatment for agriculture and under the supervisory powers of the SIC, antitrust sanctions were imposed on five milk processing companies for offering unfair prices to producers in violation of Agriculture Ministry resolutions.[84] The firms involved were Freskaleche, Lácteos del Cesar, Prolinco, Coolechera and Colanta and their legal representatives, and the fines imposed amounted to a total of 690 million Colombian pesos (358,800 US$).[85] The producer price for milk is subject to a controlled pricing system.[86]

2.5. Related regimes[87]

2.5.1. Unfair competition

The SIC also has responsibility for enforcing legislation governing unfair competition, a power that is shared with the ordinary courts. Unfair competition is regulated by Law 256/96 of 1996 ("the 1996 Law"), which contains a general prohibition on such conduct, defines the elements constituting it and sets out an illustrative list of conduct deemed unfair.

> *Article 7: General Prohibition. Acts of unfair competition are prohibited. Market participants must in all their actions respect the principle of commercial good faith (...). Under article 10*bis.*2 of the*

84 331 and 337 of 2005.

85 Resolutions 51785/08, 033915 and others. The resolutions are not yet definitive pending an appeal ruling.

86 Law 81 of 1988 empowers the government to control prices. The SIC and the mayors have the power to investigate and punish violations of price control rules. In practice, the government has not made widespread use of its price-setting powers, except for a few products such as gasoline, certain drugs, gas (natural and liquefied), drinking water, basic sanitation, and electricity.

87 Gutiérrez Rodríguez et al., 2006.

Paris Convention, approved by Law 178 of 1994, unfair competition is defined as any act or deed undertaken in the market, for competitive purposes, that is inconsistent with sound commercial customs, the principle of commercial good faith, or honest practices in industrial or commercial matters; or when it affects, or is intended to affect, the freedom of decision of the buyer or consumer, or the competitive functioning of the market.

Such conduct includes: (i) misleading customers; (ii) disrupting the market; (iii) abusing another party's reputation; (iv) violation of secrecy; (v) inducement to breach of contract; and (vi) unfair exclusivity agreements.

According to Law 256/96 of 1996, the power of enforcement lies with specialised commercial law courts, or in their absence the civil circuit courts. However, the SIC also has jurisdictional and administrative powers in unfair competition by virtue of Law 446/98 of 1998[88] which granted it exceptional jurisdictional functions in matters of unfair competition in order to reduce congestion in the court system and facilitate access to justice.

Table 1 provides a comparative illustration of the main features of the administrative regime for the defence of competition and the judicial regime prohibiting unfair competition.

Table 1. Administrative regime for the defence of competition and judicial regime for unfair competition

	Defence of competition	**Unfair competition**
Legal good protected	General interest	Private interests
Procedure	Administrative	Judicial
Launch of investigations or proceedings	*Ex officio* or in response to a complaint, as free competition is a collective right	Private lawsuit
Nature of the action	Public	Private-jurisdictional
Object of the action	To impose administrative sanctions and order those investigated to cease or modify their conduct.	To declare or prevent unfair competitive conduct, to order that such conduct cease or be modified, and to compensate for any damages.

88 Law 446/98.

2.5.2. Consumer protection

The 1991 Constitution[89] enshrines the rights of the consumer and stipulates that "the law shall regulate quality control for the goods and services offered and provided to the community, as well as the information that must be provided to the public in their marketing. Persons who, in the course of producing and marketing goods and services, threaten the health and safety of consumers and users, and their access to adequate supplies, are liable for their conduct." The Constitution provides for regulations to protect the consumer. Such regulations were in fact established in a 1982 Decree[90] and were further developed in the SIC's Single Circular.

As it did in the case of unfair competition, Law 446 of 1998 granted the SIC exceptional jurisdiction for consumer protection. It empowers the SIC to take the following actions: (a) in the case of advertising that is misleading or that violates consumer protection rules, to order the advertiser to cease and desist and to publish a correction, at its own expense; (b) to enforce observance of warranties for goods and services as established in the consumer protection rules or in contracts, if they are broader; (c) to issue orders for the immediate and preventive suspension of the production and marketing of goods or services for 30 days, extendable for an equal term, while the corresponding investigation proceeds, where there are serious indications that the product or service is hazardous to the life or safety of consumers; (d) when public needs so dictate, to conduct investigations of suppliers' or consumers' organisations for violation of any legal provisions governing consumer protection and to impose the corresponding penalties.[91]

Competition policy and consumer protection policy are complementary. The relationship between them is direct and presents no contradictions or conflicts, because they both serve the same purpose – to protect the general interest, as represented by the market and the consumer – and in Colombia they are enforced by the same authority.

On the basis of a ruling by the Supreme Court of Justice,[92] the Superintendency now has the duty to empower consumers so that they will be aware of their rights and how to enforce them and will be able thereby to redress a perceived imbalance created by new commercial conditions. In

89 Article 78.

90 Decree 3466.

91 Article 145, Law 446/98.

92 Chamber of Civil Cassation, 30 April 2000.

redressing that asymmetry, the State plays a fundamental role, acting in defence of consumers through investigations and decisions and providing to consumers the tools with which they can be more active. Consequently, the SIC is now pursuing various activities to strengthen and to publicise consumer rights as well as the mechanisms for enforcing them.

There is also a Colombian Consumers' Confederation, a private not-for-profit entity, constituted as an advisory body to the national government[93] and recognised by the Ministry of Justice. Its purpose is to protect consumers and users of goods and services.

3. Institutional aspects

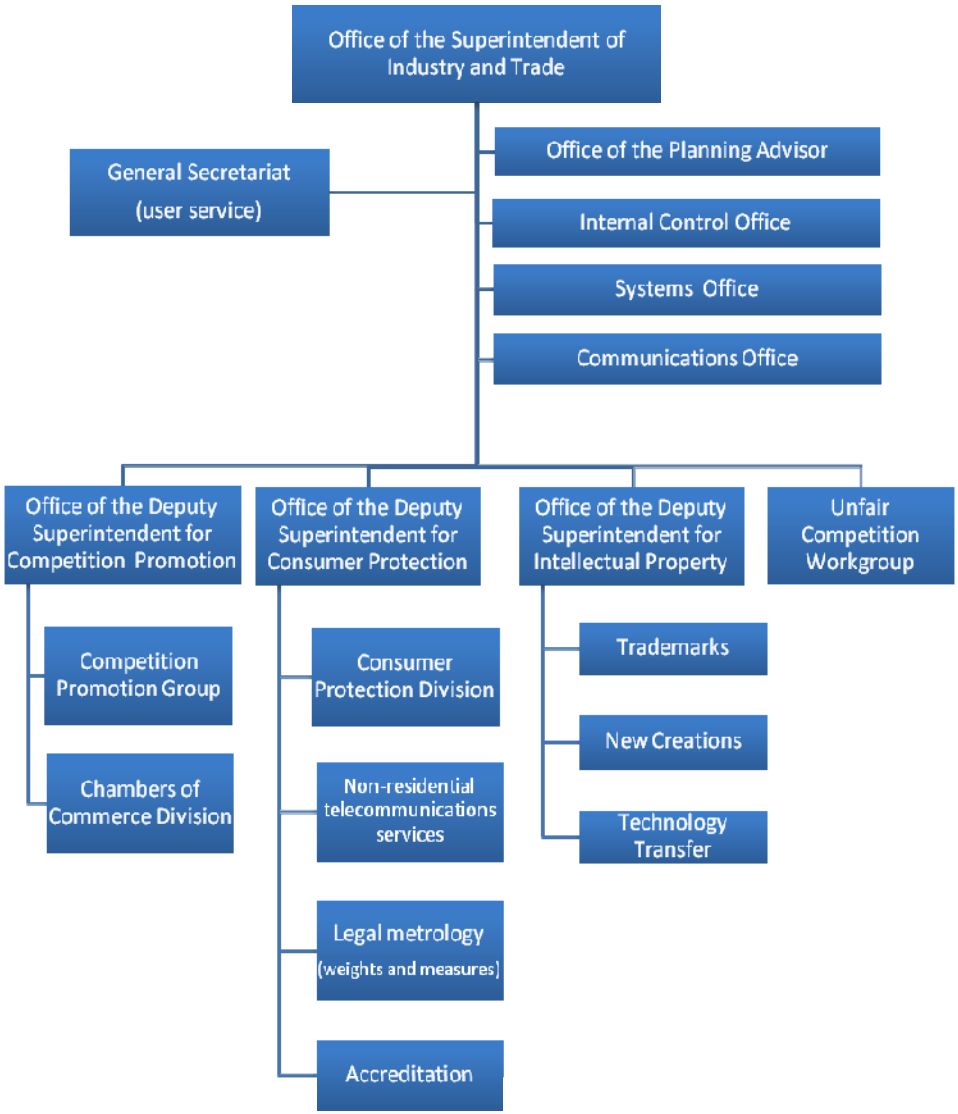
3.1. The Authority

The following diagram shows the allocation of responsibilities within the SIC.

The functions of the SIC, as the authority for upholding the system for the defence of competition, are to enforce the law, to investigate violations, to advise the government on competition policy formulation and to authorise mergers and acquisitions. The SIC is a technical entity with its own legal personality, reporting to the Minister of Commerce, Industry and Tourism. It enjoys administrative, financial and budgetary autonomy. It has powers of inspection, supervision and control conveyed by law (described more fully in Section 3.5 below). Consistent with its administrative, financial and budgetary autonomy, the SIC issues its resolutions without any instructions from a superior body, and its resolutions can be challenged and reviewed only by the courts.

The SIC's field of activity is not confined to enforcing the free competition system; it is also the authority for application of four other key economic policies: (i) intellectual property legislation; (ii) supervision of public registries delegated to the chambers of commerce; (iii) consumer protection; and (iv) the national quality subsystem.

93 Article 22 of Decree 1441 of 1982, issued pursuant to Law 73 of 1981.


Office of the Superintendent of Industry and Trade
General Secretariat (user service)
Office of the Planning Advisor
Internal Control Office
Systems Office
Communications Office
Office of the Deputy Superintendent for Competition Promotion
Office of the Deputy Superintendent for Consumer Protection
Office of the Deputy Superintendent for Intellectual Property
Unfair Competition Workgroup
Competition Promotion Group
Chambers of Commerce Division
Consumer Protection Division
Non-residential telecommunications services
Legal metrology (weights and measures)
Accreditation
Trademarks
New Creations
Technology Transfer

Reporting to the Superintendent of Industry and Commerce are three Deputy Superintendents (*Superintendentes Delegados*): (i) Deputy Superintendent for the Promotion of Competition; (ii) Deputy Superintendent for Intellectual Property; and (iii) Deputy Superintendent for Consumer Protection. The Deputy Superintendent for the Promotion of Competition has responsibility for supervision of the chambers of commerce and enforcement of competition law. On the latter point, he heads the Competition Promotion Division, which currently has a complement of 20 professional and administrative staff devoted exclusively to competition law enforcement.

The Decree 2153/92 (described further in Section 8 below) gave the SIC new powers, including decease orders and imposition of fines for infraction to the competition law.[94] Before imposing these remedies, however, the Superintendent must consult a Competition Advisory Council,[95] comprising five experts in business, economic or legal matters, appointed and removable by the President of the Republic. The Council is advisory and its opinions are not binding on the Superintendent. The Superintendent may at his discretion convene the Council on any other matter relating to competition.

The Superintendent is appointed and removable by the President of the Republic, and the Deputy Superintendents are appointed and removable by the Superintendent. The rule describes the qualification needed for these positions as follows:

> *For the post of Superintendent: a professional qualification in law, business administration, public administration, economics, industrial engineering, foreign or international trade; a masters degree in areas related to the functions of the post, plus 60 months' professional experience related to the functions of the post; or a postgraduate specialisation in areas related to the functions of the post, plus 72 months' professional experience in those areas;*
>
> *For the post of Deputy Superintendent* (Superintendente Delegado): *a professional qualification in law, business administration, public administration, economics, industrial engineering, or foreign or international trade, plus 60 months' professional experience related to the functions of the post.*

94 Items 11, 13 and 15.1 of article 4 of Decree 2153/92.

95 Article 24 of the 1992 Decree.

3.2. Procedures

3.2.1. Conduct investigations and cases

The procedures employed by the SIC in investigating restrictive trading practices are prescribed in the 1992 Decree.[96] The Code of Administrative Dispute Procedures and the Code of Civil Procedures (relating essentially to rules of evidence) also apply in competition cases when they are not in conflict with the Decree. The imposition of antitrust penalties by the SIC requires no prior intervention by the executive branch or the judiciary, and once imposed they may be appealed only through the courts.

The Superintendency may begin a preliminary inquiry *ex officio* or as the result of a complaint submitted to the Competition Protection Division. When a complaint is received, it is given to the Deputy Superintendent, who decides either (a) to open a preliminary inquiry or (b) to dismiss the complaint, depending on its significance.[97] The preliminary inquiry is conducted by the Competition Promotion Division. It is treated as confidential and does not involve the suspected offenders. At this stage the Competition Promotion Division conducts a series of procedures to determine whether there is sufficient evidence to open a formal investigation. Those procedures include the power to conduct "unannounced administrative visits" (“dawn raids”) to the premises of the alleged offenders to collect information and documentation, and this may be done without a court order.

Once the preliminary inquiry is concluded, the Deputy Superintendent may open a formal investigation or he may decide that the case be dropped. If a formal investigation is opened, the alleged violators will be notified and given a time limit within which to prepare and submit evidence in their defence.[98] The authority may order inspections *ex officio*. Once the evidence is compiled, the Deputy Superintendent for the promotion of

96 Article 52.

97 Note that the Deputy Superintendent has this power. In other respects, the Superintendent is the final authority.

98 The forms of notification are those stipulated in the Code of Administrative Dispute Procedures or the Code of Civil Proceedings. The most common are: (i) personal notification of orders to open an investigation or to close a preliminary inquiry, the final decision, the act deciding administrative appeals; (ii) notification by publication of an edict, if personal notification is not possible.

competition presents to the Superintendent a substantiated report as to whether the alleged behaviour actually occurred.

The substantiated report is transmitted to the alleged violators to submit their observations within a stated time limit. At the end of that time if no observations are presented, the Superintendent will make a final determination based on the information contained in the case file. The substantiated report produced by the Deputy Superintendent is not binding, however. The decision is subject to appeal for reconsideration, which will be decided by the Superintendent. The final Resolution of the Superintendent may impose fines (on the firms or on the persons involved) or order cessation or modification of the conduct, or alternatively it may find that there was no violation, and proceedings will be dismissed. The Advisory Council must be convened and consulted before a cease-and-desist order or a fine is imposed.

During the process the Superintendent may issue preliminary injunctions, such as "immediate suspension of conduct that may violate the provisions",[99] for the purpose of avoiding injury from the conduct under investigation. Also, as noted above, at any time prior to the final decision by the Superintendent the alleged violators may propose a settlement, offering sufficient guarantees that they will suspend or modify the conduct in question.

Under the 1992 Decree the maximum fine that the Superintendency may impose on a business was 2000 minimum monthly wages (around US$427,000) and on individuals 300 minimum monthly wages (around US$64,080).[100] These maximums are obviously quite low. The new law 1340/09 addresses this problem, raising the fines to 100,000 minimum monthly wages (around US$ 24,600,000).

When the administrative proceeding is completed, the decision issued by the Superintendent may be submitted for judicial review by the Administrative Tribunal of Cundinamarca[101] and may be appealed subsequently to the Council of State.[102] The process for judicial review of

99 1992 Decree, article 4.11.

100 The Minimum Monthly Wage (SMMV) for the year 2009 is 496,900 pesos, equivalent to US$213.6 at the average exchange rate for the first half of 2009 (0.00043US$/peso).

101 Article 131.2 of the Code of Administrative Dispute Procedures.

102 Article 129 of the Code.

decisions of the SIC involves an action for nullity and restoration of rights, stipulated in the Code of Administrative Dispute Procedures.[103] Currently, pursuant to the Code of Administrative Dispute Procedures,[104] the sanctioning powers of the Superintendency expire three years after the conduct in question was committed or terminated (in the case of repeat conduct), and therefore the evidence must be sought and compiled as promptly as possible. Article 27 of the new law (1340/09) extends the expiry period to five years after the conduct or most recent constitutive act.

3.2.2. Merger review

There is currently no single rule in Colombian law governing the entire procedure for reviewing mergers. The procedure applied by the SIC is based on several sources, including the 1959 Law,[105] the 1964 and 1992 Decrees,[106] the Single Circular[107] and the Code of Administrative Dispute Procedures. As from July 2009, Law 134/09 will take effect, which substantially changes the procedure for controlling mergers, since it has been amended in line with the aforementioned Single Circular.

Until now, the procedure has consisted of the following stages: (a) submission of the application or notification by the merging parties; (b) examination of admissibility and compliance with formal requirements (if formal requirements are missing the applicants will be asked to supply them); (c) examination of the merits of the application, which includes requesting information from different market agents (competitors, business associations, regulatory bodies and others); (d) requesting supplementary information from the applicants, as necessary (applicants may be asked for supplementary information only once); (e) preparation and presentation to the Superintendent of the substantiated report recommending authorisation, objection or conditional authorisation; (f) decision of the Superintendent, based on the substantiated report from the Deputy Superintendent, which however is not binding; (g) notification to the applicants; (h) resolution by the Superintendent on any administrative appeals against the decision.

103 Article 85.

104 Article 38.

105 Law 155/59.

106 Decrees 1302/64 and 2153/92.

107 Amended by Resolution 22 195/06.

Until now, the authority has had 30 working days (approximately 45 calendar days) to decide on a merger application, beginning with the date it is submitted. The process often takes longer, however, because if the authority asks the firms for further information, the time limits are suspended until the information is supplied. If the applicants fail to respond to the authority's requests, the application may be dismissed. At the end of the 30 days, "positive administrative silence" applies, and (in the absence of a pronouncement by the Superintendent) the transaction is deemed authorised in the terms in which it was presented. The Superintendent may object to a concentration if the necessary information on the background, procedures and purposes of the transaction has not been supplied.[108] Failure to notify a merger will lead to investigation for breach of regulations governing restrictive commercial practices and may result in fines and an order to undo the transaction. The SIC has been active in this regard, as will be seen from the statistics provided in Section 3.3 below.

3.2.3. Private compensation

The appropriate route for seeking damages for anticompetitive behaviour is to file a civil suit in the courts. This may involve either an individual or a "class-action" suit. The substantive and procedural aspects of suits for antitrust damages are governed by the general rules of civil liability.[109] Class-action antitrust suits are covered by Law 446/98 of 1998,[110] which classifies free competition as a collective right and interest.[111] The law[112] authorises a private party to file a "popular action" to prevent contingent damages, to end the threat or violation against collective rights and interests, or to restore the status quo where possible. A popular action is not intended to obtain compensation or indemnity as such, but rather to protect the collective interest in free competition. On the other hand the class-action contemplated in that law[113] is clearly aimed at obtaining compensation.

108 Article 8 of Decree 1302/64.

109 Articles 2341 ff of the Colombian Civil Code and articles 396 ff of the Code of Civil Procedure.

110 Law 472.

111 Article 4 (i).

112 Article 2.

113 Article 3 of Law 472.

3.3. Enforcement statistics: conduct cases

The following statistics on conduct cases were provided by the SIC:

Table 2. Complaints filed for restrictive trade practices, 2006-2009

	2006	2007	2008	2009 (March)
Complaints under review at the beginning of the period	52	62	150	134
New complaints received during the period	32	128	111	29
Complaints handled during the period	22	40	127	25
Complaints under review at the end of the period	62	150	134	138

Source: texts and interviews

Recently the Competition Promotion Division provided information updated to April 30, 2009, according to which there were 71 complaints submitted by the public under consideration, 44 preliminary inquiries (informal, confidential investigations undertaken at the initiative of the Deputy Superintendent), 24 formal investigations underway, and 6 proceedings for disregard of orders or instructions.

Table 3 shows that the investigation of horizontal agreements was the main area of activity: between 2003 and 2007, there were 23 horizontal agreements investigated, representing 46% of all investigations. At the other extreme, only one vertical agreement was investigated. Failure to report mergers accounted for a significant proportion (20%).

Table 3. Antitrust proceedings, by year and type of conduct

	2003	2004	2005	2006	2007	Grand total	
Horizontal agreements	6	6	6	2	3	23	46%
Other conduct	4	2	1	0	0	7	14%
Failure to report mergers	6	2	1	0	1	10	20%
Abuse of dominance	4	1	1	1	2	9	18%
Vertical agreements	0	1	0	0	0	1	2%
Grand total	20	12	9	3	6	50	100%

Source: SIC

Table 4 shows that there were 50 investigations conducted between 2003 and 2007: of these 44% were dismissed, 38% were terminated early with settlements, and only 9 resulted in fines or cease-and-desist orders, of which 4 corresponded to fines or orders for failure to report mergers.

Table 4. Antitrust violations 2003-2007, by outcome and conduct

CASES (2003-2007)	Resolved with fines and orders	Dismissed	Closed with undertakings	Grand total
Horizontal agreements	1	10	12	23
Other conduct	1	4	2	7
Failure to report mergers	4	5	1	10
Abuse of dominance	2	3	4	9
Vertical agreements	1	0	0	1
Grand total	9	22	19	50
In %	18%	44%	38%	100%

Source: SIC

Table 5 breaks down the cases closed with settlements, and shows that of the 19 cases closed early without penalty, on the basis of settlements or guarantees, 12 (63%) corresponded to horizontal agreements, followed by abuse of dominance.

Table 5. Cases closed with settlements (guarantees)

	2003	2004	2005	2006	2007	Grand total	
Horizontal agreements	4	1	4	1	2	12	63%
Abuse of dominance	2	0	0	0	2	4	21%
Other conduct	0	1	1	0	0	2	11%
Failure to report mergers	1	0	0	0	0	1	5%
Vertical agreements	0	0	0	0	0	0	0%
Grand total	7	2	5	1	4	19	100%

Source: SIC

Table 6 provides more aggregated information for a longer period, showing that between 2000 and 2009 there were 140 cases resolved, 30% with sanctions and 33% with settlements. The number of investigations for which resolutions were issued varies considerably from one year to the next and was highest between 2001 and 2004.

Table 6. Antitrust cases resolved between 2000 and 2009, by outcome

CASES	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009*	total	in %
Sanctions	2	5	8	3	6	3	0	0	9	7	43	30%
No sanctions	2	8	5	10	8	4	2	4	5	4	52	37%
Settlements	6	11	7	7	4	4	1	5	1	0	46	33%
Total	10	24	20	20	18	11	3	9	15	11	141	1OO%

Source: data provided by the Competition Policy Division, during interviews. Information to 30/4/09.

3.4. Enforcement statistics: mergers

Table 7 shows the number of cases relating to merger authorisation requests, or notifications. The workload remained stable in recent years, at around 80 *conceptos* per year (these are formal advisories issued by the authority in response to requests for authorisation of mergers or acquisitions).

Table 7. Actions relating to merger authorisation requests

	2006	2007	2008	2009 (March)
Authorisation requests under review (beginning of period)	9	14	14	13
Authorisation requests under review (end of period)	14	14	13	10
Advisories requested	117	88	83	16
Advisories issued	112	88	84	19

Source: Superintendency of Industry and Commerce

The following *figures 1 and 2* show the trend in merger authorisations requests procedures. It will be seen that the greatest number were filed in 2005 and 2006, with around 100 requests, representing 19% and 20% respectively of all notifications received in those years. These figures show that, of the 493 requests examined, 95.7% elicited no objections.

Figure 1. Number of merger authorisation requests, by year

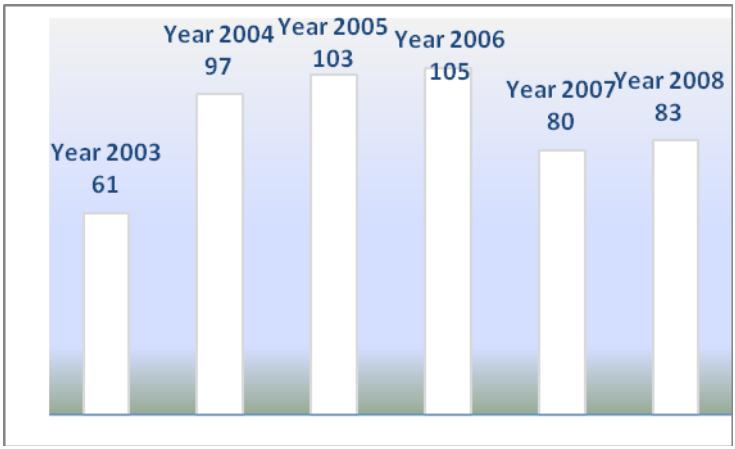
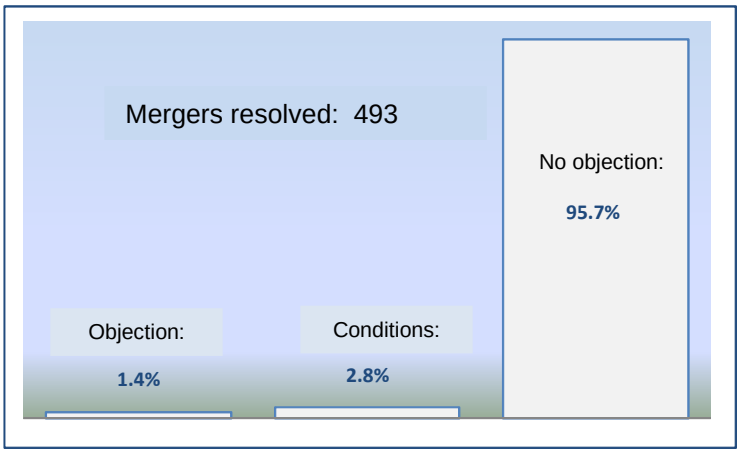


Figure 2. Number of mergers resolved 2003/2008, by outcome



Source: SIC

3.5. Investigative powers

Table 8 lists the SIC's investigative powers, also indicating whether they can be exercised by the Superintendent, the Deputy Superintendent for Competition or both.

Table 8. Use of investigative powers, competent decision-making levels

Investigative Powers	Competent Level
Initiate preliminary inquiry *ex officio* or at the request of a third party	Deputy Superintendent
Summon physical persons to give statements or provide testimony under oath	Deputy Superintendent
Conduct surprise administrative visits to obtain documentation (without a court order)	Deputy Superintendent
Conduct market monitoring or preventive studies in selected sectors	Shared power
Request information from economic agents involved in the proceedings	Shared power
Request information from third parties	Shared power
Request information from government agencies, including the tax authorities, financial supervisors, and the statistics office	Shared power
Extend the investigation time limits	Shared power
Alter the normal procedural time limits	Shared power
Issue provisional measures or preliminary injunctions in the course of investigations	Superintendent

Note that the list does not include the power of reaching compromises with parties that come forward in the context of a leniency programme, which is an important tool for detecting and punishing cartels. The new law authorises SIC to create a leniency programme, however, and the SIC considers that this implicitly also authorises it to reduce fines, where appropriate.

The SIC possesses two important investigative tools, namely the powers to issue preliminary injunctions and to make surprise visits. These tools are not subject to judicial review, however, and the new law does not solve this problem. Surprise visits and preliminary injunction orders should be subject

to judicial supervision. The SIC lack "dawn raid" powers, i.e. the right to enter premises without asking for permission of the company in question. Nonetheless, dawn raids are an indispensable tool in the fight against hard core cartels.

3.6. Human and Budgetary resources

The SIC's resources are scarce, when viewed in relation to its workload, and this situation will be made worse by the new Law 1340/09, which will increase the burden on the SIC by making it responsible for enforcing the competition law in all sectors of the economy. Nevertheless, the staff of the SIC, and especially the Competition Promotion Division, were found to be performing their work at a high professional level and with great commitment and dedication. *Table 9* provides quantitative information on the division's personnel for the last six years.

Table 9. Human resources

Year	Number of persons	% of SIC staff employees
2008	20	5.42%
2007	22	6.11%
2006	20	5.42%
2005	18	4.88%
2004	28	7.59%
2003	16	4.34%

Thus, the Competition Promotion Division (the unit responsible for all antitrust investigations and the authorisation of mergers) currently has a staff of 20 persons, of whom four perform administrative functions. Within the entire Superintendency there are additional staff members who work in some aspect of competition enforcement: seven contract staff in the agricultural group, three in the health group and seven in the Superintendent's office. Thus, in total the SIC has 37 persons devoted to competition law enforcement. For the most part they are specialists with at least five years experience in the institution. Staff turnover is low.

The 2008 budget for the SIC was 34,451 billion Colombian pesos, of which 30,919 billion pesos were executed, equivalent to around

US$16 million.[114] This too seems low, especially in light of the several responsibilities held by the Superintendency in addition to competition. Until 2007 the SIC´s budget was financed from the general government fund. The financing policy changed in 2008, when all revenues generated by the agency's own activities, derived primarily from industrial property registration fees (72%), remained in the SIC. Fines of all kind accounted for about 17% of revenues in 2008. In fact during 2008 fines were directed to the general fund but they returned to the agency. This mechanism is eliminated by Law 1340/09, and fines, fees and other revenues will remain in the agency.

4. Judicial review

Appeals from resolutions of the SIC may be submitted for judicial review to the Administrative Tribunal of Cundinamarca and subsequently appealed to the Council of State. Both substantive and procedural aspects of the Superintendency's decisions are subject to review.

Since 2002 only four merger decisions by the SIC have been challenged, and the SIC was upheld in all four. In recent years only one decision by the SIC in a conduct case has been overruled by the Administrative Tribunal of Cundinamarca, and the SIC has appealed that decision to the Council of State, where a decision is still pending. [115]

5. International aspects related to law enforcement

The 1992 Decree established the effects doctrine, whereby anticompetitive conduct committed outside the country but having effects in Colombia is susceptible to administrative investigation under the country's competition laws. To facilitate application of this principle, competition chapters have been inserted into various free trade agreements, such as those with the United States, Canada and the European Free Trade Association (EFTA). Competition chapters are now under negotiation in the free trade agreement with the European Union. None of these provisions is yet in force. On the other hand, Decision 608/05 of the Andean Community, on the

114 There is no disaggregated information on the budget for the Competition Promotion Division.

115 Resolution 29302 of November 2000, which imposed sanctions on the Association of Private Insurance Entities – ANDEVIP et al., for price-fixing. That case is discussed in section 2.1 above.

protection and promotion of free competition, is now in force as a Community and supranational standard that prohibits and punishes conduct restrictive of free competition (agreements and abuse of dominant position) that affect the Andean region.

In this context, the SIC has opened investigations into restrictive trade practices against foreign firms with a national presence, notwithstanding the argument that such conduct was imposed by the parent corporation. The SIC is guided by the principle of equal treatment for national and foreign firms – the principle of non-discrimination established in the GATT and in Decision 608 of the Andean Community.

In its economic analysis, the SIC takes account of the international environment (competition from imported products, entry of foreign competitors) to the extent that relevant information can be obtained and in a manner consistent with international guidelines for the delimitation of markets and competition.

The regulations do not provide specific mechanisms for obtaining information on foreign companies or products. The SIC seeks to obtain such information through formal and informal co-operation with other authorities, using the various instruments at disposal such as competition chapters in free trade treaties or bilateral agreements.

The competition chapters in the various free-trade agreements contain commitments to share information and to sign cooperation agreements in the future. The Andean Community has encouraged the development of Community standards on competition in an attempt to remedy the problems that globalisation has caused with some of the principal trading partners.

The SIC has no powers with respect to trade remedies such as antidumping or countervailing duties, a matter that is within the jurisdiction of the Ministry of Commerce, Industry and Tourism. However, the SIC has the right to participate, with voice but without vote, in the Council where decisions on these investigations are made.

6. The limitations of competition policy: sectoral regimes

As noted in Section 1.2 above, there are a number of laws regulating competition in specific economic sectors and establishing special authorities for this purpose. Since special laws take precedence over general laws, sectoral regulation prevails over general regulation. The sectoral regimes that impose the greatest constraints on the enforcement of general standards (which operate with only residual effect) are the following.

- Household utility services

  Law 142 of 1994[116] created the regulatory regime for household utility services, establishing rules and principles on economic competition in domestic sewerage, water, power, gas, and basic public switched telephone services (as well as local mobile telephony in rural areas), and the distribution of fuel gas. The law creates three regulatory commissions (for water and basic sanitation, power and gas, and telecommunications) as well as the Superintendency of Domestic Public Services, with powers of supervision and enforcement and the authority to punish infractions of economic competition rules in those sectors.[117] The new Law 1340/09 makes the SIC the sole authority for the defence and promotion of competition in this sector.

- Power sector (non-household)

  There are about 40 electric power generating utilities, and private firms produce about 60% of the country's electricity. There are perhaps 60 marketing firms, some ten transmission firms and about 30 distribution firms. Law 143 of 1994 established the regime for the generation, interconnection, transmission, distribution and marketing of electricity and it contains rules on competition, with enforcement powers assigned to the Energy and Gas Commission (CREG).[118] The new Law 1340/09 makes the SIC the sole authority for the defence and promotion of competition in this sector.

- Telecommunication services (non-household)

  The National Telecommunications Enterprise had a monopoly in the sector until 1998, when liberalisation began. Currently, its successor, Colombia Telecomunicaciones (owned by Telefónica de España) has around 50 to 60% of the market for national long-distance traffic and 45% of international long distance. There are a large number of local telephone operators, but competition among them is significant only in the major markets of Bogotá, Cali and Barranquilla.

  Decree 1900/90 contains a chapter on competition in telecommunications. Decree 2122/92 created the Telecommunications Commission, empowering it to promote competition, and empowers the

116 Amended by Law 689 of 2001.

117 World Trade Organization 2006.

118 Idem.

Ministry of Communications to punish violations of competition in the sector, without prejudice to the competence conveyed on other authorities, such as the National Communications Commission. The new Law 1340/09 makes the SIC the sole authority for the defence and promotion of competition in this sector.

- Financial and insurance sector

  The number of entities in this sector has declined sharply since the 2002 crisis. Currently, Bancolombia and the banks belonging to the Grupo Aval hold around 40% of the banking sector's assets. Two insurance companies have around 40% of the assets in the life insurance branch.

  This sector is governed by Decree 663/93, which gives the Banking Superintendency the power to supervise, control and punish violation of its provisions, including sanctions on anticompetitive conduct by supervised entities, and control over mergers and acquisitions. This decree was recently amended by Law 1328 of 15 July 2009, giving the SIC jurisdiction on restrictive trade practices and unfair competition. This is reiterated in Law 1340/09, which, nonetheless, establishes that authorisation for mergers and acquisitions involving entities supervised exclusively by the Financial Superintendency will remain within the latter's jurisdiction, but requiring a prior analysis by the SIC.

- Television

  For both open and subscriber television services, the sector is governed by Law 182/95, which includes provisions for the protection of competition and empowers the National Television Commission to enforce them. The new Law 1340/09 makes the SIC the sole authority for the defence and promotion of competition in this sector.

- Air transport

  Air transport is in the hands of private enterprises (with the exception of SATENA, which is a State-owned commercial company belonging to the Ministry of National Defence). Concentration in the market has increased significantly with the exit of several airlines since 2003. The combined domestic market share of Avianca and Aerorepública amounts to around 70%.

  Case highlighted: in 2001, Avianca and Aces reported a business merger to the SIC, which issued an objection.[119] The airlines challenged the

119 Resolution 19534/01.

Superintendent's ruling. During the appeal process the ad hoc Superintendent (appointed as a stand-in for the Superintendent, who disqualified himself from intervening) declared that the SIC had no jurisdiction to examine the transaction and sent the case to the Aeronautics Authority, which approved the merger in December of that year.[120] This episode led to the Superintendent's resignation.[121] The new Law 1340/09 makes the SIC the sole authority for the defence and promotion of competition in this sector.

As noted above, the new law 1340/09 has overcome the duplication of competition law enforcement authorities by placing all such authority in the hands of the SIC (Chapter 3, article 6 of the new law).

7. Competition advocacy

The powers of the SIC relating to competition advocacy are not set out in detail in the laws and regulations. The Superintendency has nevertheless engaged in this activity on a limited basis, as described below.

7.1. Participation by the competition authority in legislative and administrative processes

The preparation of general laws and regulations in regulated economic sectors falls to the legislative, executive and regulatory authorities (Congress, the national government, and the regulatory commissions). Nonetheless, the SIC may participate in the process of formulating these rules, because it is part of the executive branch (under the Ministry of Commerce, Industry and Tourism), and in light of the principle of collaboration.

The SIC has not participated in the design of privatisation processes, and has been merely consulted (for a nonbinding opinion) in telecommunications regulation, within the framework of successful cooperation with the Telecommunications Regulatory Commission. In contrast, it has participated in all issues relating to the authorisation of business integration operations, particularly in the energy sector (electric power producers and natural gas producers and distributors, among others).

120 Resolution 4888.

121 SIC.

When it comes to legislative processes that have not involved regulated economic sectors, the SIC has submitted comments on the following draft laws as they relate to the promotion and defence of competition, among other issues:

- Establishing the Postal Services Regime and other provisions;[122]
- Affecting trailer truck activity;[123]
- Affecting surveillance and private security in Colombia;[124]
- Establishing principles and concepts on the Information Society and the organisation of information and communications technologies in Colombia, creating the National Spectrum Agency and issuing other provisions (Electromagnetic Spectrum Agency and ICTs).[125]

The SIC has taken an active role in the legislative process resulting in Law 1340 of 24 July 2009, [126] described in greater detail in section 8 below. Consequently, on 15 September 2009, Decree 3523 of 2009 was issued, which alters the structure of the SIC and specifies the functions of its dependencies, repealing the provisions on this issue established by Decree 2153/92.

7.2. Promoting a culture of competition

The authority's activity in promoting a culture of competition has been limited to a few local and international workshops and seminars.

8. Recent amendment of competition law[127]

The new competition legislation (N° 1340/09) approved by President on July 24 2009) amends Decree 2153/92 and introduces a series of regulatory and institutional innovations, including the following:

122 Bill TL 01/08 S addendum 87/08S.

123 Bill TL 119/08S.

124 Bill TL188/08S.

125 Bill TL 112/07C-340/08S.

126 Law 1340/09.

127 This bill was approved by Congress during the week of June 15.

- It extends the jurisdiction of the SIC, to embrace full powers to investigate anticompetitive conduct, abuse of dominant position, and business mergers in all sectors of the economy without exception. Thus, the SIC is now the sole competition authority in Colombia. In order to accomplish this goal sectoral regulators should provide technical support when requested by SIC (article 6).

- It clarifies the application of the competition law to business associations, for it explicitly says that any kind of agent can be investigated and sanctioned, without regard to legal identity (article 2).

- It clarifies the criteria for judging the significance of a complaint for purposes of processing it or dismissing it. The law specifies that the competition authority in order to decide whether to process or dismiss a complaint must choose those cases relevant to reach any of the three following goals: free participation of firms in the market, consumer welfare, and economic efficiency (article 3).

- It increases the value of fines to a maximum of 24,600,000 US$ (article 25).

- It provides the legal basis for a leniency programme. Under this programme it will be possible to provide leniency and receive information and evidence even after the investigation has been initiated. Its benefits may include total or partial exemption from fines (this exemption is not available to the instigator), according to the quality and usefulness of the information provided, the effectiveness of the collaboration supplied and the step of the process when it is made available (article 14).

- It re-orders and streamlines rules governing mergers, including a fast-track process:

    - Obligation to notify. According to the new law, turnover thresholds for notification will be established by SIC. Additionally a "*de minimis*" clause has been established where parties with 20% or less of joint market share are automatically authorized to merge (article 9).

    - Fast-track process. Under the new law the process has a series of steps:

        a) Merging parties must file a "pre-assessment request" with a merger briefing in order to determine whether the operation must be notified.

b) If there is obligation to notify, the SIC must communicate that requirement within 3 days.

c) If the SIC has communicated that notification is required, the merging parties must provide more information within 10 days.

d) Within 30 days of receipt of the information required in step (c), SIC must decide to allow the parties to merge or to notify the parties to provide full information within 15 days

e) Three months after the parties have provided full information, the merger will be considered authorized if the SIC does not object or conditioned it (article 10).

- It establishes rules for making the authority's decisions public and for maintaining the confidentiality of documentation supplied by parties under investigation (article 15).
- It allows third parties (competitors, consumers, consumers' associations) to participate in restrictive business practices proceedings. Third parties may provide concerns and evidence in favour or against the investigated conduct. Third parties will not have access to confidential documents. Third parties will be acknowledged of settlement proposals and will have access to the motivated report (article 19).
- On competition advocacy, it establishes mandatory consultation of the SIC for a nonbinding opinion on proposed regulatory changes that could have an impact on free competition, and obliges sectoral regulators to provide technical support to the authority when requested (article 7).

9. Conclusions and recommendations

Colombia's competition regime deserves praise for its vitality and flexibility. It seems to have made steady progress during the past several years, in spite of laws that were deficient in many respects and not having sufficient resources. The Colombian system for defending competition has both strengths and weaknesses. Law 1340/09 of 2009 on which debate began two years earlier, has corrected some shortcomings, but several others remain. Many of these will require more legislation, though some can be rectified by regulation and changes in practice by the SIC.

Context and objectives of the law

One of the great strengths of Colombia's system for defending competition is its constitutional status. In its rulings, the Constitutional Court has struck a fine balance between the protection and promotion of free competition and other fundamental rights enshrined in the Constitution, and this makes it easier for the authorities to apply the law. There is also a suitably flexible system for amending and updating the law in concordance with the government's overall strategic plans, which at this time are focused on enhancing the overall competitiveness of the economy.

Anticompetitive agreements

The listing of anticompetitive agreements in the 1992 Decree that may be deemed illegal *per se* or by presumption includes all the agreements known as "hard-core cartels" (price-fixing, output restrictions, market sharing and collusive tendering), for which there should be minimal tolerance.[128] However, this list is otherwise too extensive and would give excessively strict and rigid treatment to agreements whose overall effect might not be anticompetitive: several of the enumerated agreements, particularly if they are vertical agreements, may entail efficiency gains that more than offset any restrictions on competition. This issue is not resolved in the new law and remains a point of dispute among competition experts in Colombia.

The ability of the SIC to abstain from processing "insignificant" complaints may offer some protection against excess in this area. Nevertheless, the 1992 Decree should be amended so that practices identified as illegal and punishable by presumption are reduced to a short list, confined to restrictions that are clearly anticompetitive with no redeeming compensatory effect, i.e., so-called "hard-core cartels". The key point is to identify those cases where, in considering sanctions, the competition authority must demonstrate harmful effects on free competition, economic efficiency, and consumer welfare – in other words, to determine those cases in which the defendants may present proof of the absence of harmful effects.

Apart from this needed legislation, there should be increased emphasis both within the SIC and elsewhere on prosecuting hard core cartels. This requires a multi-pronged approach. The SIC is to be commended for having given emphasis to anticompetitive horizontal agreements in the past. The

128 OECD 1998.

data in Section 3.3 above show that cases involving horizontal agreements were the most numerous of all types of conduct cases. However, most of these cases were settled with the acceptance of undertakings from the companies (discussed further below), without resolving the issue in substance and without imposing financial or other penalties, the effect of which is to diminish the deterrent effect of these prosecutions.

The new law authorises the SIC to create a leniency programme, which it should proceed to do. But a leniency programme cannot be effective unless the SIC also establishes a reputation for imposing large, punitive fines on cartel operators. Its ability to do so was enhanced by the new law, which raised the maximum fines available to the Superintendency. Competition advocacy is also important in this context. The public and other parts of government should be made aware of the importance to them of finding and prosecuting hard core cartels.

Regarding leniency, the success of the programme may be compromised by the fact that while law permits the exemption of the whistleblower from antitrust penalties it does not affect the whistleblower's liability for damages in a civil suit. Depending on the violation, the amount of damages could far outweigh any fines applicable under the competition law, and this could deter firms from coming forward under protection of the leniency programme.[129] Countries have dealt with this issue in different ways, and if it becomes a problem in Colombia the SIC might usefully consult with other agencies on how they approach the problem.[130]

Abuse of dominance

The legal provisions defining a dominant position[131] do not differ substantially from international practice in this area, but those defining abusive conduct appear to. Notably, while the law requires conducting a factual economic analysis when determining a dominant position, it seems to apply either a presumption of illegality or a *per se* rule to certain types of conduct once the dominant position is proved. In other jurisdictions, the preferable standard in cases of abusive dominance is the *rule of reason*, which requires an economic analysis of the effects of the conduct at issue.

129 On this matter see OECD 2005.

130 Leniency programmes were the subject of one of the sessions of this year's Latin American Competition Forum in Santiago, Chile, 9-10 September.

131 Article 50 of the 1992 Decree.

Changing this situation may require a change in enforcement practices by the SIC.

Mergers and acquisitions

In most respects the rules governing mergers in Colombia are consistent with international standards.[132] However, some weaknesses have been noted: (i) supervisory authority was split off from the SIC to sectoral regulatory bodies (for finance, television, air transportation and health); (ii) regulations are dispersed and incomplete in some important aspects (vertical concentrations and conglomerates, conditional authorisations); (iii) the reports justifying full authorisation are not published; (iv) the rules are confusing for the business community.

Some of these aspects have been improved by the new law sanctioned in July (No. 1340/09). Still, there is need for clearer provisions regarding the rules governing vertical and conglomerate mergers, (the new law refers indirectly to firms in the same productive chain), and the regulations and instruction documents need to be revised to make them more understandable to the business community. In this regard, the SIC makes a strong effort to provide guidance as to how the law will be applied in individual cases, by means of the issuance of "*conceptos*," or advisories. These advisories are case-specific, however. The SIC should also undertake to issue merger guidelines explaining its analytical methodology, as many other countries have done. Further, the SIC should also publish non-confidential versions of the reports justifying all of its decisions (objections, conditions and authorisations), which businesses need in order to understand the enforcement criteria and to reduce their compliance costs. The latter would be possible following appropriate regulation of the new Law 1340/09.

Regarding review procedures, the new Law 1340/09 provides for new procedures that will speed review of *de minimis* mergers, in line with the best practices of the OECD and the International Competition Network (ICN).[133] A defect in notification procedures, however, is that one of the criteria for determining whether a merger must be notified is a 20% market-share threshold. This is contrary to international best practices because the

132 OECD 2005, International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup, undated.

133 International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup. Undated; OECD 2005 Council Recommendation [C(2005)34].

requirement to define a market introduces an element of uncertainty. If possible, this problem should be corrected in implementing regulations.

Exclusions and exemptions

An important weakness, remedied in the new law 1340/09, was the dispersion of the powers to enforce competition rules among several authorities, as discussed above. The new law centralises enforcement in a single authority, specialised in the defence of competition, with the only exception being the authorisation of business mergers and acquisitions in the financial sector.

A second important problem is the system for authorising agreements or understandings in "basic sectors" which include the agricultural sector, discussed in Section 2.4 above, according to which the authorisation of stabilisation agreements and pacts in the agriculture sector requires a prior and justified opinion from the Ministry of Agriculture and Rural Development, which is binding on the SIC. The Single Circular reduced room for discretion in the exercise of these powers by establishing a set of requirements for authorisation. Still, the potential for significant market distortions resulting from agreements of this kind continues to exist. There is no requirement, for example, that the proponents of such an agreement demonstrate that there is no other instrument less harmful to competition that would succeed in stabilising the sector in question. This is a key element for the case-by-case authorisation of any kind of immunity under competition laws. At a minimum, this requirement should be added to the Single Circular.

The 1992 Decree creates general exemptions for agreements relating to co-operation in research and development, compliance with optional rules, standards and measures and utilisation of common facilities (also discussed in Section 2.4 above) that amount to a kind of "legality *per se*". Such agreements could be harmful to competition, however. The Decree should be amended so that these agreements are subject to the rule of reason, permitting the SIC to sanction them if on balance they are harmful to competition.

Finally, the government through the Ministry of Commerce Industry and Tourism and other Ministries have the power to control prices in very specific circumstances defined by law (Law 81/88, article 60 and Decree 210/03, article 28, number 11), and while it has used this power sparingly it has employed it on occasion in important sectors. The SIC is the agency charged with enforcing the ministry´s pricing regimes in these instances. Price controls, however, are not normally the responsibility of a competition authority. Whether price controls are justified and under what circumstances are issues that are beyond the scope of this report.

Institutional aspects

Independence of the SIC

The SIC has administrative autonomy, with its own legal personality and administrative, financial and budgetary independence. However, to the extent that the Superintendent is appointed by the President of the Republic and can be removed from office at pleasure, the Superintendent's independence from influence by the executive branch is reduced. The position of Deputy Superintendent for Competition is also subject to appointment and removal at pleasure.

An additional weakness is that the SIC is not concerned exclusively with enforcing competition law. The Superintendent (who holds decision-making powers) and the Deputy Superintendent (who holds or shares with the Superintendent the power to conduct investigations) both have other tasks. The Competition Promotion Group, which is the unit exclusively devoted to competition law enforcement, has no powers of its own, either to investigate anti-competitive conduct, or authorise of mergers and acquisitions. In the first case, it operates under the direction of the Deputy Superintendent, and in the second under the orders of the Superintendent. A similar situation exists with respect to the Advisory Council, which also does not operate autonomously, although its opinion may be heard in certain cases. These aspects have not been addressed in the new law, and remain a challenge for the future.

Consideration should be given to options whereby the authority with the greatest investigative and decision-making powers could be more focused on competition law enforcement and independent of the executive branch. To this end a collegial body could perhaps be established on a permanent footing, comprising professionals selected on merit for a term of at least four years. They could be appointed by the President, but their term should be long enough so that they are not at risk of being dismissed when there is a presidential changeover.

Resources

The professionals working in competition law enforcement in the SIC have solid qualifications, and they are hard working. There are an insufficient number of them, however, especially in light of the increased workload under the new law 1340/09. The human and budgetary resources of the SIC devoted to the protection of competition should be increased.

But further, it appears that since 2008 all of the SIC's budget is to be generated by its own activities (see Section 3.6 above). Most problematic, it appears that the fines that the Superintendency imposes are returned to the

agency as part of its budget. This creates an obvious incentive, whether real or apparent, on the part of the SIC to increase its fines in order to enhance its budget. This conflict should be eliminated by directing the SIC's fines to the government's general fund, and correspondingly, a substantial part of the agency's budget, if not all of it, should be financed from the general fund.

Investigation procedures

As noted above in Section 3.5, the SIC possesses two important investigatory tools, the powers to order preliminary injunctions and to make surprise visits during the preliminary inquiry stage These tools are not subject to judicial review, however, and the new law (1340/09) does not resolve this problem. Surprise visits and preliminary injunction orders should be subject to judicial supervision. The SIC lack dawn raids capacity, i.e. the right of entry into premises without asking for permission of the company concerned. Nonetheless, dawn raids are an indispensable tool in the fight against hard core cartels.

Settlement procedures

Colombian law permits the SIC to terminate an investigation upon an "offer of guarantees" by a party that it will suspend or modify the conduct for which it is being investigated. The ability to settle a case can be a useful tool for a competition authority, permitting it to achieve a favourable outcome in a case while conserving scarce resources. Not all countries, particularly in Latin America, give their competition authorities such settlement capacity. It seems, however, that while this procedure is often used in Colombia it sometimes is not effective. Moreover, the rules governing the settlement procedure are not clear, and as noted above in Section 2.1, and at least one attempt by the SIC to impose regulations in this area was nullified by the courts.

It should be possible, for example, that a settlement require not only that the offending conduct be terminated, but when appropriate also to require that the party take affirmative steps to rectify the harm that the conduct caused and to ensure that it will not be repeated. Such undertakings should be enforceable, and failure by a party to observe them should result in fines. Further, it should be possible for a settlement agreement to include a fine on the offending party, again when appropriate. These procedures apparently are not now possible under current Colombian law. Following the amendment introduced by Law 1340/09, a declaration of no fulfilment of commitments will give rise to a sanction for violations of the competition laws, which could include instructions to verify that the conduct under investigation has ceased.

Judicial review

The majority of the SIC's resolutions have been upheld by the courts. As the SIC institutes more enforcement actions, however, it will no doubt find that more of its decisions will be appealed. Further, under the new Law 1340/09 the authorities will face the challenge to decide the conditions for applying the leniency programme. It would be advisable for the Superintendency to begin a programme of institutional co-operation with the judiciary, as many other countries have done, for the purpose of familiarising the judges with the principles of competition analysis.

International issues

As discussed in Section 5, there has been progress in negotiating competition chapters in free-trade treaties and in implementing the supranational regime within the Andean Community and this will substantially enhance the authority's capacity to deal with cross-border conduct or mergers. Efforts in this direction should be pursued, and should include bilateral co-operation agreements between agencies.

Sectoral regimes

The new Law 1340/09 represents a clear "before and after," creating a single competition authority for all sectors including regulated sectors. The challenge for the future is to institute formal and informal mechanisms with sectoral regulators to maximise co-operation and technical support between agencies.

Competition Advocacy

Finally, the SIC has not been sufficiently active in the important area of competition advocacy. The new Law 1340/09 seeks to rectify the situation by defining this power more closely. The task for the Superintendency is to work toward the development of a “competition culture” in Colombia, in which all parts of society, public and private, understand and appreciate the importance of competition for consumers and the country’s economy. The SIC must ensure that knowledge of competition policy in Colombia is disseminated beyond the tight circle of competition law practitioners. This will require a variety of outreach and training efforts tailored to different target audiences.

Table 10. Violations of competition law, by type and outcome, 2003-2007

	CASES	Horizontal agreements	Vertical agreements	Abuse of dominance	Unreported mergers	Other conduct	TOTAL
2007	Opened	3	0	4	3	5	15
	Dismissed	1	0	0	1	0	2
	Closed with settlements	2	0	2	0	0	4
	Resolution issued (fines/orders)	0	0	0	0	0	0
2006	Opened	4	0	1	0	6	11
	Dismissed	1	0	1	0	0	2
	Closed with settlements	1	0	0	0	0	1
	Resolution issued (fines/orders)	0	0	0	0	0	0
2005	Opened	4	0	2	3	0	9
	Dismissed	1	0	0	0	0	1
	Closed with settlements	4	0	0	0	1	5
	Resolution issued (fines/orders)	1	0	1	1	0	3
2004	Opened	7	0	1	3	0	11
	Dismissed	5	0	1	0	1	7
	Closed with settlements	1	0	0	0	1	2
	Resolution issued (fines/orders)	0	1	0	2	0	3
2003	Opened	5	0	1	0	1	7
	Dismissed	2	0	1	4	3	10
	Closed with settlements	4	0	2	1	0	7
	Resolution issued (fines/orders)	0	0	1	1	1	3

Source: Competition Promotion Group, Superintendency of Industry and Commerce.

Table 11. Investigations resulting in sanctions between 1999 and 2004

Price-fixing agreements (Article 47 91) of Decree 2153/92)	
1.	Resolution No 27759 of 20 December 1999 Parties investigated: Corporación Lonja de Propiedad Raíz de Bogotá, Rafael Angel H. and Cía Ltda., Luque Ospina & Cía Limitada, Cáceres & Ferro S.A. and Isabel de Mora Finca Raíz Ltda.
2.	Resolution No 27760 of 19 December 1999 Parties investigated: Lonja de Propiedad Raíz de Cali and Valle del Cauca, Bienes y Capitales S.A. and Inmobiliaria del Pácifico Ltda.
3.	Resolution No 27762 of 20 December 1999 Parties investigated: Asociación de Procesadores Independientes de Leche and the companies Ceuco de Colombia Ltda, Alimentos El Jardín S.A., Cooperativa Lechera Colanta Ltda, Parmalat Colombia Ltda., Algarra S.A., Delay Ltda., Industria Pasteurisadora y Lechera El Pomar S.A., Derilac S.A., Doña Leche Alimentos Ltda, Productos Naturales de Cajicá S.A. La Alquería y Pasteurisadora La Pradera S.A., and their respective legal representatives.
4.	Resolution No 29302 of 2 November 2000 Parties investigated: Asociación Nacional de Seguridad Privada Capítulos Valle, Cauca y Nariño hereinafter Andevip and the companies Seguridad Atlas Limitada, Seguridad de Occidente Ltda., CT Seguridad Limitada, Seguridad Segal Ltda., Grancolombiana de Seguridad Valle Ltda., Colombiana de Protección Vigilancia y Servicios Proviser Ltda., Royal de Colombia Ltda., Seres Ltda., Compañía de Vigilancia y Seguridad Atempi de Antioquia Ltda., Internacional de Seguridad Valle Ltda., Seguridad Berna Limitada, Seguridad Shatter de Colombia Ltda., Seguridad Orión Ltda., Vigilancia y Seguridad Limitada Vise Ltda.
5.	Resolution No 07951 of 15 March 2002. Parties investigated: Mera Hermanos Ltda.; Servisur Ltda.; Jesús Eudoro Troya as owner of the service station Estación de Servicio Andina and José Vicente Enríquez Erazo, as owner of the service station Estación del Puente.
6.	Resolution No 07950 of 15 March 2002. Parties investigated: Estación de Servicios Caldas Limitada; César Quintero Jurado, as owner of the service station Estación de Servicio Manisales; Claudia Cristina Gómez Londoño as owner of the business Lavautos and Carlos Arturo Muñoz Loaisa, as owner of the business Central de Combustibles.

7.	Resolution No 08027 of 18 March 2002. Parties investigated: Silvia Tello Vélez as owner of the business Servicentro La Sultana; Terpel de Occidente S.A.; Carlos Eduardo Quintero Arisala, as owner of the business Texaco No 10 Star Mart; Isabel Cristina Isaza Valencia, as owner of the business Texaco No 5; Dagoberto Castaño Henao, as owner of the business Estación de Servicio Belalcázar; Monica Lozano Escobar, owner of the business Texaco Imbanaco No 17; Autocentro Capri Ltda and Globollantas Ltda.
8.	Resolution No 25402 of 6 August 2002 Parties investigated: Maersk Colombia S.A. and Agencia Marítima Internacional Ltda.
9.	Resolution No 21821 of 1 September 2004 Parties investigated: Cooperativa de Transportadores de Zipaquirá; Cooperativa Colombiana de Transportadores Ltda. -COOPECOL-; Transportes Rápido Nietos Ltda.; Cristalería Peldar S.A., and Vidriería el Rubí Ltda.
Agreement to fix selling conditions (Numeral 2 of article 47 of Decree 2153/92)	
10.	Resolution No 08732 of 20 March 2002 Parties investigated: La Estación Terminal de Distribución de Producción de Petróleo de Bucaramanga S.A.; Multiservicios la Báscula Ltda; Rosa Emilia Londoño de Gaviria as owner of the business La Aurora and Rafael Antonio Ortis Mantilla as owner of the business Estación Servicios la Pedregosa.
11.	Resolution No 34397 of 25 October 2001. Parties investigated: Inversiones Vidal Urrea S. en C.S.; Leonor Espinosa de Sosa owner of the Hotel Calypso Beach; Lord Pierre Hotel Ltda; Inversiones Campo Isleño S.A., Hotel Caribe Campo San Luis S.A.; Hotel Internacional Sun Rise Beach de San Andrés S. A. and Sociedad Hotel Tiuna Ltda., all members of ASHOTEL.
Agreement for collusion in tendering (Article 47 (9) of the 2153/92)	
12.	Resolution No 21822 of 1 September 2004 Parties investigated: Consorcio Implementación Técnica, comprising Juan Carlos Sanabria Rodríguez, Jorge Enrique Forero Díaz and Informática & Tecnología Ltda., and members of the Consorcio Computadores 2002, comprising Fabio Eduardo Patiño Jaramillo and RT ColomboItálica de Inversiones Ltda

Source: Competition Promotion Group - SIC

Table 12. Mergers rejected 2003-2008, by firm and economic sector

Year	Firms to be merged Controlling/Controlled	Resolution	Economic sector
2004	POSTOBON /QUAKER	16453/04	Non-alcoholic beverages
2004	PROCTER&GAMBLE/ COLGATE PALMOLIVE	28037/04	Mass consumption goods: de personal hygiene and care and home cleaning
2005	CONCRETOS OCCIDENTE/ HOLCIM COLOMBIA	35516/05	Construction materials (cement, concrete, plaster, sand, others)
2006	DUPONT/ PLASTILENE	923/06	Chemicals and plastics
2006	GRUPO GERDAU – ACERÍAS PAZ DEL RIO	35379/06	Metalworking (iron, aluminium, bronze and other construction materials)
2007	AGA-FANO/ FABRICA NACIONAL DE OXIGENO	7805/07	Medicinal and industrial gases
2007	CLOROX / COLGATE PALMOLIVE	2437/07	Chemicals: bleach

Table 13. Mergers accepted with conditions 2003-2007, by firm and economic sector

Year	Firms to be merged Controlling/Controlled	Resolution	Economic sector
2003	COMCEL/ OCCEL		Mobile telephony
2003	DSM NV/ ROCHE VITAMINAS	22866/03	Pharmaceuticals
2003	MEXALIT (COLOMBIT)/ ETERNIT	34712/03	Construction materials: cement, concrete, plastics and others
2004	PAVCO/ RALCO	4861/04	Construction materials and systems
2005	ROBIN HOOD/ MEALS	5487/05	Food and dairy products
2005	VALORES SIMESA (refractories) MINERALES INDUSTRIALES/ SUMICOL	29661/05	Minerals: clay (kaolin)
2005	TELEVISA/ EDITORA CINCO	33268/05	Audiovisual products
2006	FENOCO/ CARBONES DEL CARIBE AND OTHERS		Train fuel (coal)
2006	CEMENTOS DEL CARIBE, METROCONCRETO y OTRAS/ COMCRECEM	13544/06	Construction materials (cement, concrete, sand)
2006	ÉXITO – CARULLA	34904/06	Retail trade
2007	BAVARIA, LATIN DEVELOPMENT CORP., CERVECERÍA UNIÓN, MALTERÍA TROPICAL, CERVECERÍA LEONA	9192/07	Non-alcoholic beverages (juices and soft drinks)
2007	MEXICHEM COLOMBIA S.A./ PAVCO S.A.	21345/07	
2008	INDUSTRIAS ARFEL S.A. y ALUMINIO REYNOLS Santo Domingo	19729/08	
2008	MEXICHEM DE COLOMBIA MEXCOL and PRODCUTOS DERIVADOS DE LA SAL PRODESAL	34452/08	

Source: Competition Promotion Group, SIC

Table 14. Conditions imposed 2003-2008

Structural	Conduct-related
DSM NV – ROCHE VITAMINAS (2003) Divestiture: DSM must end its exclusive contract with BASF and transfer its business to a third party, guaranteeing it a market share.	CEMENTOS DEL CARIBE, METROCONCRETO OTRAS – COMCRECEM (2006) Geographic price discrimination: observe the same pricing policy and commercial conditions in certain departments for type-I Portland cement and pre-mixed concrete, so the price will be equal to or no higher than the lowest price applied in other departments where Argos operates.
PAVCO-RALCO (2004) Divestiture: dispose of the business to an unrelated third party.	PAVCO-RALCO (2004). Pavco must not interfere in the use of the trademarks transferred.
ROBIN HOOD – MEALS (2005) Divestiture: rights to the Heladito and Golisundae trademarks. Dispose of the soft ice cream business to an unrelated third party.	MEXALIT (COLOMBIT) – ETERNIT (2003) Preserve the economic viability and reputation of the business activity and its competitiveness
TELEVISA – EDITORA CINCO (2005): Divestitures: rights to the "*Tu hijo y tu*" trademark, the new-parents magazine business, to an unrelated third party.	VALORES SIMESA MINERALES INDUSTRIALES – SUMICOL (2005) Conditions for supplying competitors and customers: i) advise current and future customers of sales and marketing conditions for the product, as well as competitors of Corona; ii) refrain from exclusivity contracts between themselves or with Minerales Industriales or companies of the Corona group; iii) sell the product (kaolin) to competitors under conditions no more onerous than to its related companies; iv) unless there is just cause, sell the product to its competitors, provided there is sufficient volume.
ÉXITO – CARULLA (2006) Divestitures: some commercial locations.	

Source: Competition Promotion Group, SIC

Table 15. Mergers authorised without objection, 2003-2008, by market

Affected markets and number of transactions in each market

Advertising	1	Coffee	1	Iron working	3	Retail trade	14
Agriculture	9	Cold storage facilities	1	Kaolin (clay)	1	Rice	1
Alcoholic beverages	1	Commerce	2	Labels and stickers	1	Security	1
Aluminium	1	Communications		Medical centres	1	Self adhesives	1
Animal feed		Concrete	6	Medical services	1	Soaps	2
Automobiles	4	Construction	7	Metalworking industries	1	Soft drinks	5
Automotive paints	1	Construction materials	3	Mobile telephony	1	Steel	5
Bananas	2	Cosmetics	1	Music	1	Steelmaking	4
Bottled sodas	1	Dairy products	2	Oil exploration	1	Stockings	2
Bread	1	Dyes		Packaging	2	Sugar	5
Brewery	1	Electrical sector	8	Palm oil	1	Tannery	1
Bricks	3	Electrical wares	1	Paper supplies and stationery	4	Telecommunications	10
Building contractors	2	Electronics	1	Personal cleanliness	1	Temporary employment agency	1
Cable TV	4	Engineering	4	Petroleum	4	Textiles	3
Cement	4	Flour	1	Pharmaceuticals	9	Tobacco	1
Cheeses	2	Foodstuffs	4	Plastics	2	Tourism	50
Chemicals	7	Furniture	1	Ports	10	Transport	3
Chocolate	2	Gas	1	Poultry	6	Vehicle brakes	1
Cleaning products	1	Gasoline	1	Prepaid medical care	1	Vehicle parts	1
Clearinghouses	7	Health	3	Publications	3	Vehicle rental	1
Clinical laboratory	1	Household appliances	2	Publishing houses	9	Vinyl paints	1
Coal	1	Investment houses	34	Real estate	1	Wood products	1
						Other markets	68

Source: Competition Promotion Group, SIC

Annex

Selected anticompetitive cases

Rice mills: demand side cartel on paddy rice

In 2004 SIC initiated an investigation on price fixing to rice producers by five rice mills (Molinos Roa S.A., Molina Flor Huila S.A., Arroz Diana S.A., Procesadora de Arroz Ltda y Unión de Arroceros S.A.) and its legal representatives. The joint market share of the investigated companies accounted for 64% of the sales in the rice market.

Among the evidence produced by SIC it should be mentioned: 1) identical buying prices to producers during a period of six months (Jan-Jun 2004); 2) identical variation in time and value of buying prices, in six occasions, accounting for 100% of the variations produced in the period; 3) evidence of meetings among the mills to define buying prices; 4) lack of economic explanations for the observed variations (no demand movements; no relationship between inventories and seasonal demand), 5) the investigation showed that all the characteristics that make successful cartel behavior were present in this market (high concentration, high barriers to entry, homogeneous products, similar production functions and the existence of a trade association). With these evidence SIC concluded that the observed symmetry in the behavior of prices was due to deliberate coordination among rice mills.

Through Resolution 22625 of September 15, the five rice mills and their representatives were fined for a total amount of 2,461 million of Colombian pesos (about US$ 1,072,565).

Cocoa industry: demand side cartel on cocoa price

During 2006 SIC investigated a demand side cartel between Compañía Nacional de Chocolates and Casa Luker in the cocoa market. Cocoa is the

main input in the chocolate market and its demand was 100% concentrated in those two firms.

SIC considered as an indiciary element of the existence of a cartel the parallel behaviour in prices paid to the producers by Nacional and Luker between January 2005 and February 2006, in the whole national territory. In order to determine the existence of the alleged conduct SIC used the conscious parallelism approach. They did determine that price behaviour was identical during the investigated period and that there was no alternative explanation than coordination for this behaviour.

Each firm was imposed a fine of US$ 327,954. Legal representatives were also fined.

Chicles Adams: predatory pricing in the chewing gum market

In 2004 SIC investigated a predatory pricing conduct done by Adams after the entrance of Tumix in the market. The relevant market was defined as chewing gum for adults, leaving aside other types of candies. They were not considered substitutes due to their differences in characteristics and prices.

Adams dominant position was proven using the following elements: a) Adams accounted for a 75% of market share and 80% of installed capacity; b) The concentration index (HHI) was 5000 points; c) SIC considered as a barriers to entry that the possibility of supply side substitution was not easy due to: differences in the production process, high initial investment requirements, very specialized assets, the need of high investments in publicity, the presence of high idle capacity in the market, the difficulty in the access to distribution channels and economies of scale in the production process.

Regarding the investigated conduct, SIC was able to prove that Adams sold the product involved at a price below its average variable costs between August 2002 and December 2003, in order to avoid the entrance of Tumix in the market. SIC imposed fines of US$ 292,000 on Adams and of US$ 43,000 on the firm´s legal representative.

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