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An Overview of Colombian Antitrust Law

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Basic legal framework

Colombian antitrust laws and regulations have been enacted and issued in furtherance of article 333 of the political constitution. Pursuant to said article, the government is required to intervene in the Colombian economy in order to prevent unfair competition and anti-competitive conduct, and to ensure free and fair competition in all the local markets.

The legal framework governing antitrust matters in Colombia has two main sets of rules, ie,

- Law 155/59 sets forth the basic principles governing the Colombian antitrust and competition regime; and
- Decree 2153/92 determines the basic structure, scope of authority and powers of the competition authority and sets specific rules governing anti-competitive conducts.

Law 155/59 and Decree 2153/92 have been recently amended by Law 1340/09, which was enacted with the purpose of updating certain aspects of the existing framework and improving the Superintendence of Industry and Commerce's (SIC) ability to enforce the existing laws and regulations.

The Colombian Competition Authority

The national antitrust authority in Colombia is the SIC. The SIC is organically a division of the Ministry of Industry, Commerce and Tourism, but its highest-ranking official, the superintendent of industry and commerce, is appointed directly by the president of Colombia. Although historically antitrust and competition enforcement had been dispersed among a myriad of regulatory agencies, the enactment of Law 1340/09 resulted in the SIC being designated the National Competition Authority, removing most antitrust enforcement powers from other agencies. Only the Civil Aviation Authority and the Superintendence of Finance retain limited merger approval powers, and both of them must consult with the SIC when using those powers.

The SIC has two major sets of enforcement tools. The first one is its ability to impose penalties on companies and individuals in the event of an infraction of rules regarding merger control or anti-competitive conducts. In the case of companies, the SIC may impose fines of up to 100,000 minimum monthly wages (MMW), roughly equivalent to US\$27 million or 150 per cent of the profit resulting from the relevant anti-competitive activity, whichever is a larger amount. In the case of individuals, fines may go up to 2,000 MMW, roughly equivalent to US\$540,000.

The second one is its ability to use its recently acquired leniency powers¹ to reach agreements with individuals or companies that have taken part in anti-competitive agreements or conduct in order to ensure their cooperation in exchange for reduced or forgone penalties. The SIC's leniency powers are subject to the following general rules:

- The SIC may partially or completely forgo any fines that would otherwise be imposed on companies or individuals that decide to cooperate, but only the first company or individual that starts cooperating with the SIC will be entitled to have any potential fines fully forgone by the SIC.

- The 'mastermind' behind the anti-competitive conduct may not receive any benefits from the SIC.
- The SIC will determine the extent of the benefits granted to a given company or individual on the basis of an evaluation of the following factors:
 - The actual effect of the cooperation in the process of proving the existence of a violation and punishing those involved in it. The SIC will look at whether the information was useful in determining the scope of the conduct, the identity of those taking part in it and the actual profit made by them as a result of their participation.
 - The timing of the information, ie, whether the information was received when it was still useful.

Merger control

Under Colombian antitrust law, all entities that carry out the same manufacturing, distribution or consumption activity or are part of the same value chain in the production of a certain product, raw material, good or service, must file a report with the SIC in connection with any transaction that implies the merger, consolidation, acquisition of control or economic integration in Colombia.

For purposes of the analysis of a given merger, the SIC has indicated, via different opinions, that any kind of legal agreement or economic transaction that results in the combination of two or more business units under a common interest will be regarded as a merger.

Under the current regulations, a merger needs to be cleared in advance by the SIC whenever three conditions are met:

- local overlap;
- revenue or assets are equal to or above the legal thresholds; and
- market share is equal to or above 20 per cent.

Local overlap

In order to determine if there is a local overlap, the main criterion used by the SIC is market presence. The existence of market presence in Colombia is determined on the basis of whether the parties hold a market share in Colombia, be it directly or via:

- subsidiaries, affiliates or branches incorporated and domiciled in Colombia;
- distributors or agents appointed for the Colombian territory; or
- imports into the Colombian market.

Whenever the two parties to the transaction are deemed to have market presence in the same market or in the same supply chain, the SIC will consider that there is a local overlap.

Filing thresholds

If the parties to the transaction are active within the same relevant market, the determination of whether a filing is required depends on the analysis of the parties' assets or revenues in relation to the

thresholds set by the SIC. No filing is required in transactions where the following two conditions are met:

- When the combined annual operational income of the parties (including all other related companies within the Colombian territory) as at 31 December of the year immediately preceding the transaction is below the relevant threshold.
- When the value of the combined assets of the parties (including all other related companies within the Colombian territory) as at 31 December of the year immediately preceding the transaction, is below the relevant threshold.

For transactions taking place during 2010, the legal threshold is an amount equal to 150,000 MMW, which is roughly equivalent to US\$39 million.

The SIC has stated in a number of opinions that all local income and assets are counted towards the determination of both the consolidated operational income and the total value of consolidated assets.

Market share

If the parties to the transaction meet the legal thresholds mentioned above, the transaction must be reported to the SIC prior to closing.

However, if the parties to the merger hold a combined market share in the relevant market of less than 20 per cent, a simple merger notice must be filed and the transaction will be deemed to be cleared as of the date of the filing.

But if the combined market share is equal to or above 20 per cent, the parties will have to file a pre-evaluation request and the merger will need the SIC's approval before it is allowed to proceed to closing.

Market-share assessment in vertical mergers

Neither Law 1340/2009 nor the recently issued Merger Review Guidelines determine the way in which the market share exception must be applied to vertical mergers.

The SIC has recently stated² that there are two possible approaches to the issue. According to the SIC, the first option is to construe the provisions of Law 1340/09 as not applicable to vertical mergers, since they include no specific reference to vertical mergers. Such analysis would result in all vertical mergers needing to go through the pre-closing merger clearance procedure.

The second option is to determine the market share held by each company in its relevant market and, whenever both parties hold market shares below 20 per cent, use the market share exception and proceed to closing after having filed a simple merger notice.

Given the fact that the aforementioned approach to the problem is still not entirely settled, further regulations on the issue are widely expected by the business and legal communities in Colombia.

Merger approval procedure

Once the parties to a given transaction have determined that they need to file for clearance before closing, the approval procedure begins. The process has two potential phases. During Phase I, the parties must file a brief on the transaction with the SIC, which must contain a limited amount of specific information (as per Annex 1 of the Merger Review Guidelines). The main purpose of the information requested under this phase is to obtain general information regarding the transaction and the relevant market in order to make a first assessment of the affected market.

Within the first three days after the initial filing, the SIC will order the parties to make a public announcement – via a newspaper posting – intended to give proper notice of the transaction to third parties and to allow them to submit comments and objections on the transaction. After the publication, third parties will have 10 business days to file before the SIC the information they consider relevant. Within 30 business days following said filing, the SIC must either clear the transaction or proceed to a Phase II inquiry if its preliminary analysis indicates that there are substantial risks to competition.

If the SIC decides to proceed to a Phase II inquiry, the parties will have a 15-day period to submit the additional information indicated under Annex 2 of the Merger Review Guidelines and the SIC will have up to three months, counted as of the date on which the parties filed the additional information, to reach a final decision. At this stage, the SIC may allow the transaction to close, allow the transaction to close provided that certain conditions are met, or reject the application for clearance.

If the SIC does not reach a final decision within the legal term, the transaction will be deemed to be authorised.

Analysis criteria

There are no clearly established standards or guidelines indicating how the SIC should assess a proposed transaction. Typically, the analysis of a given case will take into account the following criteria:

- Market share. HHI analysis is standard. Market share concerns may be disregarded if other factors reduce its importance. The SIC uses the HHI index assuming that there are two plausible ways of defining the relevant market: that the relevant market only comprises the companies that are currently in the same market in the country; and that besides the companies that are currently in the same market, the relevant market should also include certain 'uncommitted entrants' that, in a term shorter than one year, are currently in a position to enter the market in response to an increase in prices.
- Entry barriers: required capital investments, access to technology, presence of strong competitors in the market or in adjacent markets, supply of raw materials and distribution networks. The SIC has stated that if the resulting entity acquires an important participation in the relevant market, but the market does not have any entry barriers, the proposed transaction probably would not deserve any comment by the authority.
- Exclusivity agreements: the SIC has stated that the existence of exclusivity agreements in a given merger's relevant market may be deemed as a factor restricting the entry of new competitors to the relevant market.
- Consumer power: strong consumer power in the market where the merger is taking place is usually deemed to be a factor restricting anti-competitive behaviour in the market.
- Trademark power: the SIC has given a great deal of importance to trademarks as a consumer driver. In this sense, the fact that any trademark involved in a transaction is a consumer driver is an important factor taken into account by the SIC when analysing the transaction.

Remedies

Pursuant to Law 1340/2009, the parties to a given transaction may propose remedies within 15 business days following the SIC decision to proceed to Phase II, with the purpose of neutralising

or eliminating the possible anti-competitive effects that may arise from the merger.

If the proposed remedy is accepted by the SIC, the parties will need to agree to periodic controls and follow-up visits by the SIC in order to verify their compliance.

Efficiency exception

According to article 12 of Law 1340/2009, the SIC cannot reject an application for authorisation if the parties are able to prove:

- that the benefits arising out of the merger will supersede its negative effects on consumers and on the market as a whole; and
- that the merger is the only way to obtain such benefits.

If the parties wish to argue that an efficiency exception applies, they will need to provide the SIC with economic studies based on methodologies of widely accepted technical value that support their arguments. The parties will also be required to agree to guarantee that all the benefits arising out of the merger will be transferred to consumers.

Whenever a merger is authorised under the efficiency exception, the authorisation of the merger is conditioned to the parties' conduct in the market, which must be in accordance with the information submitted with their application. In any case, the SIC may request additional guarantees or remedies from the parties.

Gun jumping under Colombian law

The SIC has not issued standards or guidelines governing coordination between merging firms before clearance in Colombia.

As a general rule, the merger approval is only required for the moment in which competitors cease to compete (typically the closing date) – provided, of course, that the three conditions mentioned above are met. In practice this means that the parties to any given merger are usually able to carry out any activity so long as they continue to effectively compete in the Colombian market.

Foreign-to-foreign mergers

Colombian antitrust regulations are only applicable to mergers taking place in the Colombian market. This means that if the merger activities are undertaken outside Colombia and will not have any effect in the Colombian market, no filing need be made with the Colombian competition authorities.

However, when a foreign merger results in two local competitors being controlled by a single parent company, the transaction will most likely be viewed as having an effect in Colombia and therefore – when the conditions are met – it will require the SIC's approval prior to closing. In the event that timing does not allow for a clearance to be obtained before the foreign closing takes place, it is customary to have the Colombian portion of the transaction carved out pending local clearance.

Anti-competitive conduct

Pursuant to Decree 2153/92, any behaviour that affects or restricts free competition is forbidden and is considered to have an illicit purpose.³ There are three different groups of conduct that are considered restrictive to competition: anti-competitive agreements, (ii) anti-competitive conduct and abuse of dominant position.

Dealings with competitors – anti-competitive agreements

Colombian law prohibits any agreement reached by competitors in a given market with an anti-competitive purpose or effect. A

non-exhaustive list of anti-competitive agreements is included in article 47 of Decree 2153/92, as follows:

- agreements that have the intent or effect of fixing prices or determining discriminatory sales conditions or commercialisation conditions with third parties;
- agreements that have the intent or effect of dividing markets or allocating consumers between producers or distributors;
- agreements that have the intent or effect of allocating production or supply quotas or the allocation, distribution or limitation of sources of raw materials;
- agreements that have the intent or effect of limiting the adoption or development of new technologies and techniques;
- agreements that have the intent or effect of conditioning the sale or supply of a given good or product to the acceptance of additional obligations that are not of the essence of the initial transaction;
- agreements that have the intent or effect of preventing any of the parties from producing a given good or rendering a given service; and
- agreements that have the intent of ensuring that a particular bidder emerges as the winner in a bidding process.

Single firm conduct – anti-competitive acts

Colombian antitrust regulations provide that the following acts are deemed, per se, to be restrictive of competition:

- any breach of regulations included in consumer protection statutes concerning advertisement;
- influencing a company to increase the prices of its goods or services or influencing such company to refrain from reducing its prices; and
- refusal to deal with a given market participant in retaliation for such participant's pricing policies.

Single firm conduct – abuse of dominant position

Under Decree 2153 of 1992, a competitor in a particular market holds a dominant position thereto when it may, directly or indirectly, set any market conditions in the relevant market. The SIC has indicated that a competitor holds a dominant position when it is unlikely that potential competitors may significantly challenge it.

In addition, said decree provides that the following acts exercised by competitors in a market where they hold a dominant position are deemed to be unlawful:

- predatory or below-cost pricing with the intent of eliminating competitors or preventing them from entering a given market;
- inclusion of discriminatory provisions in agreements concerning similar operations;
- any conduct with the intent or effect of conditioning the sale or supply of a given good or product to the acceptance of additional obligations that are not of the essence of the initial transaction; and
- the sale of products or rendering of services in a specific area of the Colombian territory in different conditions than those offered in other areas of Colombia with the intent of reducing or eliminating competition and with no correlation with the specific cost structure.

Enforcement in connection with anti-competitive conducts

In case the SIC finds that any market participant has undertaken any of the foregoing acts, the SIC may order the relevant competitors to

cease any anti-competitive conduct. In addition, the SIC may use its enforcement powers to impose the fines described previously.

The breaching competitor may provide adequate guarantees as to the end of the relevant anti-competitive activities, which will put an end to any investigation conducted by the SIC. However, applications for cease-and-desist agreements will only be admitted by the SIC prior to the end of the evidentiary stage of the proceedings. Furthermore, any breach of the terms of a cease-and-desist agreement will be regarded as a standalone anti-competitive practice and will be subject to the same penalties.

Notes

- 1 Prior to the enactment of Law 1340, in July 2009, the SIC had no leniency powers.
- 2 SIC opinion 30888 of 21 May 2010.
- 3 Under Colombian law, illicit purpose in an agreement will result in the agreement being de facto null and void.

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Founded in 1934, Brigard & Urrutia has maintained an international oriented practice. All of its partners and associates are fluent in at least one language other than Spanish and most members of the firm hold, aside from their local law degrees, a post-graduate diploma from a leading university in the United States or Europe.

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Carlos Umaña Trujillo has been a Brigard & Urrutia partner since 1990. He graduated in 1983 from Colegio Mayor de Nuestra Señora del Rosario University. In 1985, he obtained a Masters degree in comparative jurisprudence from New York University School of Law. He advises national and international clients on matters relating to public services law, administrative law, free competition, commercial law and insurance.

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Alejandro worked at Brigard & Urrutia from 2002 to 2007. In 2008, he joined White & Case LLP as a foreign associate. He returned to Brigard & Urrutia in 2009. Recent representations include: Empresa de Telecomunicaciones de Bogotá SA ESP, Bogotá's telecom company and one of the largest telecom operators in Colombia, in securing the antitrust clearance for its proposed share issuance to a strategic investor; Sinochem Ltd, in the process of securing antitrust clearance for its acquisition of a local oil company; Nokia and Siemens AG in the local closing of a global joint venture that created Nokia Siemens Networks, including all the steps needed to obtain the required antitrust approval; Ericsson and Marconi (today Telent plc) in the local execution and closing of a global deal pursuant to which Ericsson acquired Marconi's mobile network business, including all the steps needed to obtain the required antitrust approval; Siemens AG in the local aspects of its global acquisition of a business unit from Bayer AG, including all the steps needed to obtain the required antitrust approval; Huntsman in the local aspects of the global acquisition of a business unit from Ciba, including all the steps needed to obtain the required antitrust approval; and LAEFM Colombia Ltda (a local subsidiary of Latin America Enterprise Fund

Managers LLC) in its incorporation and closing of the first private equity funds in Colombia.



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