

# Antitrust Merger Policy in Colombia

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## Brief Introduction to Colombian Competition Law

Like most countries in Latin America, Colombia issued a first tier of antitrust legislation at the end of the 1950s, under the political and academic influence of the United States and the European Union. However, competition laws were not applied in this first era, mainly due to the economic protectionist model, which did not favor a competitive environment.

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The year 2009 marks the fiftieth anniversary of the expedition of the first competition law in Colombia, Law 155 of 1959.<sup>1</sup> This first law, which is still largely in effect, was modified in 1963, developed by Decree 1302 of 1964, and then suffered a major addition with the issuance of Decree 2153 in 1992.<sup>2</sup>

Though Colombia has had a competition law since 1959, the prevalence of the protectionist economic model in Latin America meant these laws were not really effective until the nineties, post-Washington Consensus, when Colombia included a principle of free competition in Article 333 of the 1991 Constitution,<sup>3</sup> changed the economic model in order to open the markets to international trade, and issued Decree 2153 of 1992, which represents a modern approach to competition law.

## I. Evolution and Reforms in the Region

It is clear that competition law in Latin America, specifically in the Andean Countries, is steadily evolving due to integration treaties. Not only was the Central American Free Trade Agreement (CAFTA) approved by the U.S. Congress, but following Peru, the Andean countries are struggling through their own negotiation of a free trade agreement (FTA).

In preparation for the implementation of the FTA with the United States, many Latin American countries have been discussing or passing new antitrust laws. At a supranational level, the Andean Community of Nations (CAN) issued Decision 608, which replaced the old antitrust statute, Decision 285.<sup>4</sup> According to the more recent Decision 616, until Ecuador and Bolivia issue their competition laws, Decision 608 will apply directly within those countries.<sup>5</sup>

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1. Ley 155 de 1959 [Law 155 of 1959], Diario Oficial [D.O.] 30.138, 14 de Diciembre de 1959 (Colom.).

2. See Decreto 1302 de 1964 [Decree No. 1302 of 1964], D.O. No. 31.922, 3 de Mayo de 1964 (Colom.); Decreto 2153 de 1992 [Decree No. 2153 of 1992], Diario Oficial [D.O.] 40.704, 30 de Diciembre de 1959 (Colom.).

3. CONST. COL. art. 333 ("Economic activity and private initiative must not be impeded within the limits of the public good. No one may require permits or licenses to exercise economic activity except when authorized by law. Free economic competition is a right of every person, which entails responsibilities. The enterprise, as a basis of development, has a social function that implies obligations. The state will strengthen cooperative organizations and stimulate business development. The state, by means of the law, will prevent impediments to or restrictions of economic freedom and will curb or control any abuses caused by individuals or enterprises due to their dominant position in the national marketplace. The law will limit the scope of economic freedom when the social interest, the environment, and the cultural patrimony of the nation require it.").

4. Normas para la protección y promoción de la libre competencia en la Comunidad Andina [Rules for the protection and promotion of free competition in the Andean Community], Decision 608 (2005), available at <http://www.comunidadandina.org/normativa/dec/D608.htm>.

5. Entrada en vigencia de la Decisión 608 para la República del Ecuador [Entry into force of Decision 608 by the Republic of Ecuador], Decision 616 (2005), available at <http://www.comunidadandina.org/normativa/dec/D616.htm>.

This decision was implemented by President Correa in Ecuador by means of Decree No. 1614, issued on March 14, 2009, through which he ordered the application of Decision 608 from CAN and appointed his First Subsecretary of Competition within the Ministry of Commerce.<sup>6</sup>

## A. Evolution and Reforms in Colombia

### 1. *Law 962, 2005*

In 2005, Congress issued Law 962, which orders the application of civil procedure to unfair trade cases tried before the Superintendence of Industry and Commerce (SIC).<sup>7</sup> This was a long-awaited reform that has brought stability and clarity to unfair competition cases that had previously been tried with a mixture of administrative and civil procedure, which raised a great deal of procedural and constitutional issues, distracting the authority from the main questions that unfair trade cases pose.

### 2. *Law 1340, Issued July 24, 2009*

During the past eighteen years, SIC, acting as general and residual competition authority, has applied Decree 2153 of 1992 in numerous cases related to anti-competitive agreements, unilateral anti-competitive conduct, abuse of dominance, and merger control. The experiences gathered by SIC, both positive and negative, have helped develop the area and served as input for a reform of the competition laws, which Congress finally achieved on July 24, 2009 by issuing Law 1340, after more than twenty-four months of discussions.<sup>8</sup>

The principal feature of the new law is the appointment of SIC as the National Competition Authority. The new law grants SIC the sole power to apply competition laws in all areas, including specialized sectors, such as public utilities, banking, insurance, transportation, shipping, etc. This reform gives SIC the antitrust enforcement capacity granted by Colombian law to the Superintendence of Public Utilities, the Superintendence of Banks, the Superintendence of Ports and Transportation, the National Television Commission, and the Aeronautic Authority.

The law increases the fines that SIC can impose on companies that breach competition laws. Currently, the fines can go up to \$450,000 for the companies and \$60,000 for the administrators. According to the new law, sanctions for the companies could go up to \$20 million and the sanctions for the administrators can reach \$450,000. This is undoubtedly an important change in antitrust enforcement that will draw the attention of the administrators and companies that could be subject to costly fines.

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6. Decree 1614, 14 de Marzo 2009; *see also* Registro Oficial No. 558, 27 de Marzo de 2009; Decision 608, *supra* note 4.

7. Ley 962 de 2005 [Law 962 of 2005], Diario Oficial [D.O.], art. 1, 8 de Julio de 2005 (Colom.), *available at* <http://web.presidencia.gov.co/leyes/2005/julio/ley962080705.pdf>.

8. *See* Ley 1340 de 2009 [Law 1340 of 2009], Diario Oficial [D.O.] 47.420, arts. 3, 4, 12, 16, 17, 24 de Julio de 2009 (Colom.).

The new law expands the statute of limitations for antitrust investigations from three to five years. This will provide SIC a longer period to investigate potential antitrust violations.

Under the new law, if the investigated party wants to offer SIC a settlement, it will only have the opportunity to propose it during the first stages of the procedure, so that SIC does not have to go through the whole investigation only to have to analyze a settlement proposition at the end.

It also includes a leniency program aimed at pressing collaboration from the companies and the administrators involved in anticompetitive conduct. Effective and timely cooperation from companies and persons involved in the investigated conduct can earn them partial or total immunity from the sanctions that SIC can impose.

Finally, the law modifies the merger review procedure in order to give it more transparency. It also implements a two-tiered review that allows for a fast-track authorization (thirty days) in less difficult cases and a longer review period (three months) in more complex cases. If SIC fails to decide within the review period, the merger is deemed automatically authorized.

Undoubtedly, the described changes will foster the increasingly active role competition law has nowadays in the Colombian economy.

## B. Principal Cases

One must note that SIC is in charge of controlling anti-competitive and unfair trade practices, applying consumer protection laws and administering the registry of trademarks and patents. SIC is an administrative authority. In 1998 it was also given judicial authority to decide unfair trade and consumer protection cases.

From 2004 to 2009, SIC has shown intense activity on all fronts. The most noteworthy cases during the past years have been related to mergers and anticompetitive practices. Despite the existence of many competition authorities and regimes before the new 2009 law, one must recognize that so far it has been SIC who has produced the main developments in Colombian competition law.

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

Among many other transactions, SIC cleared some big acquisitions: the sale of the national telecommunications company Telecom to the Spanish operator Telefonica,<sup>9</sup> the transaction between Procter & Gamble and Gillette,<sup>10</sup> the sale of the supermarket chain Carulla to the French controlled chain Éxito,<sup>11</sup> the sale of the main national newspaper El Tiempo to

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9. SIC File No. 6025829, approved by official memorandum (Apr. 5, 2006).

10. SIC Resolution No. 28037 (Nov. 12, 2004); SIC Resolution No. 29807 (Nov. 29, 2004).

11. SIC Resolution No. 34904 (Dec. 18, 2006).

the Spanish Planeta Group, the sale of the national steel producer Acerías Paz del Río to the Brazilian conglomerate Grupo Votorantim,<sup>12</sup> the sale of the only PVC resin producer Petco to the Mexican manufacturer Mexichem,<sup>13</sup> the subsequent sale of the main PVC tube manufacturer Amanco also to Mexichem,<sup>14</sup> the acquisition of Petro Rubiales by Pacific Stratus Energy,<sup>15</sup> the sale of Aluminio Reynolds Santodomingo to the Arfel Group,<sup>16</sup> the sale of the main cigarette manufacturer Coltabaco to Phillip Morris,<sup>17</sup> and the sale of Bavaria to SabMiller.<sup>18</sup>

However, SIC did not clear all of the important transactions. SIC objected to the Procter & Gamble-Colgate transaction, which related mainly to the Fab brand,<sup>19</sup> and the Postobón-Quaker transaction, which related to the Gatorade brand.<sup>20</sup> In both cases, the main debate between SIC and the petitioners regarded the definition of the relevant market. In the P&G-Colgate transaction SIC decided, at the last moment, to narrow the relevant market of powder soap, departing from the market for washing products (including powder and bar soap) presented by the companies.

In the Postobón-Quaker transaction, SIC narrowed the relevant market to include only isotonic beverages. In this case SIC not only forbade the transaction, but also launched an investigation in order to establish whether the parties had closed the transaction before SIC approved the deal. One should note that under Colombian Law, the authority must clear economic integrations before they produce effects in the market.<sup>21</sup> Failure to inform SIC of the transaction is considered a breach of competition laws that will result in fines on the companies.<sup>22</sup> If, in addition to that, SIC concludes that it must prohibit the transaction, a judge could decide that the deal is absolutely void because of an illicit object, which has important economic consequences under the Colombian Civil Code.

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12. SIC Resolution No. 35379 (Dec. 21, 2006); SIC Resolution No. 2489 (Feb. 2, 2007).

13. SIC Resolution No. 21345 (July 16, 2007); SIC Resolution No. 29154 (Sept. 14, 2007).

14. SIC Resolution No. 21345 (July 16, 2007); SIC Resolution No. 29154 (Sept. 14, 2007).

15. SIC File No. 07131359, approved by official memorandum (Mar. 2, 2008).

16. SIC Resolution No. 05886 (Feb 27, 2008); SIC Resolution No. 019729 (June 17, 2008).

17. SIC File No. 40129635, approved by official memorandum (Mar. 3, 2005).

18. Oficio 5083695, del 23 de Septiembre de 2005 de la SIC (Colum.). The media recently disclosed that Philip Morris will attempt the acquisition of the only other cigarette manufacturer in Colombia, Protobaco, which would give the U.S. manufacturer 100% of the production capacity in Colombia. British American Tobacco immediately issued public statements opposing the transaction for antitrust reasons. It promises to be a very interesting legal battle.

19. SIC Resolution No. 28037 (Nov. 12, 2004).

20. SIC Resolution No. 16453 (July 23, 2004).

21. See SIC Concepto No. 00001365 (Mar. 2, 2000), available at <http://www.sic.gov.co/Conceptos/Conceptos/Concepto00001365.php>.

22. Ley 1340 de 2009 [Law 1340 of 2009], Diario Oficial [D.O.] 47,420, art. 25, 24 de July de 2009 (Colom.); Decree No. 2153, art. 2, no. 2; art. 4, nos. 15-16 (1992).

There are no statistics regarding foreign-to-foreign transactions. The general record of SIC for merger review is as follows:<sup>23</sup>

Year	Notified	Authorized	Remedies	Objected
1998	132	132	0	0
1999	118	118	0	0
2000	126	123	2	0
2001	121	93	3	0
2002	104	70	9	1
2003	62	47	3	0
2004	97	90	2	3
2005	103	98	3	0
2006	112	98	4	3
2007	83	62	3	1
Total	1058	931	29	8

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

- In August 2006, SIC issued a new merger regulation that raised the thresholds for notification of mergers.<sup>24</sup> It is now mandatory to inform those operations in which the value of the assets or sales of the merging companies in Colombia (individually or jointly considered) are equal to or exceed \$20 million. The application of these thresholds has reduced the number of informed transactions by forty percent.
- Since the Pavco-Ralco transaction, SIC started to impose structural, as well as behavioral, conditions in order to reduce restrictions on competition and to authorize complex concentration operations.<sup>25</sup> Structural conditions require divestiture of brands, installed capacity, etc. Behavioral conditions, on the other hand, require steps such as the elimination of exclusivity. Nowadays, SIC applies all kinds of conditions but prefers the structural ones. This practice will continue; for, the new 2009 law allows for the application of conditions.
- SIC authorized the "Cementos Andino"-Cementos Argos" transaction based on the Failing Industry Doctrine.<sup>26</sup> Even though this kind of defense had been considered before, it was not until the cement merger that SIC laid down the characteristics and requisites for application of the doctrine.
- SIC developed a doctrine for review of vertical concentrations. It also concluded that operations such as the sale of a brand or the

23. This table was built based on SIC Concept No. 05120167/2005 (Dec. 7, 2005). The information is available at [http://www.sic.gov.co/Servicios\\_en\\_Linea/promocion.php](http://www.sic.gov.co/Servicios_en_Linea/promocion.php) and on the resolutions, press-releases and official memoranda of the SIC website.

24. SIC Resolution No. 22195 (Aug. 25, 2006), available at <http://www.sic.gov.co/Normatividad/Resoluciones/Lista%20resoluciones.php>.

25. See SIC Resolution No. 04861 (Feb. 27, 2004); SIC Resolution No. 05013 (Mar. 10, 2004).

26. SIC Resolution No. 13544 (May 26, 2006).

creation of a new company by two previous competitors amount to an economic concentration that needs authorization from SIC. As mentioned before, under the new 2009 law, it is clear that SIC will review vertical integrations if they meet the thresholds.

- During the past two years, SIC has claimed jurisdiction over mergers between public utilities companies. It has also disputed the review of mergers between cable TV companies. As previously mentioned, the new law leaves no doubt in the sense that SIC is the merger authority in the mentioned sectors of the economy.

SIC has also issued important decisions on the front of anti-competitive practices. The four main supermarkets in Colombia (Éxito, Carulla, Olímpica and Carrefour) were charged with abuse of dominant position, following an accusation by their suppliers. SIC presided over a complex negotiation that ended with the settlement of the case and the signing of a “good practices” agreement between the main associations for commerce and industry.

Something similar happened in the “credit card case,” in which the two companies that own the credit cards networks were charged with the cartelization of the commissions.<sup>27</sup> The case also ended with a settlement in which not only the investigated companies, but also the banks that own the credit cards networks, agreed to important disclosure requirements and other measures in order to guarantee that each network will set the commissions independently.

But not all investigations have ended in settlement. SIC imposed the largest fine in its history (over one million dollars) on rice grinders who were found guilty of establishing a cartel in order to buy rice at low cost from the producers. A fine was also imposed on Cadbury Adams for predatory pricing. Recently, SIC has issued sanctions against the cement and chocolate industries, which are pending on the decision of a reconsideration plea filed by the companies.

All of these decisions seem to strengthen the position of SIC and its role in public opinion.

## II. Merger Control in Colombia

The merger control legislation in Colombia is set forth mainly in Law 155, 1959; Decree 1302, 1964; Decree 2153, 1992; Law 1340, 2009; and Circular No. 10 of the SIC.<sup>28</sup> It is expected that SIC will issue a set of merger guidelines shortly in order to develop and explain the implications of the new Law 1340, 2009. Merger regulation for specific sectors is contained in other statutes.

Mergers in the financial and insurance sectors are governed by the

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27. SIC Resolution No. 06817 (Mar. 31, 2005).

28. Circular Externa No. 10 [External Circular No. 10], Diario Oficial [D.O.] 44.511 (Colum.); Título [Title] VII 2.1 (Aug. 6, 2001) (Colom.), available at <http://www.sic.gov.co/pdf/Circular%20unica/Titulo%20VII%20Promocion%20de%20la%20Competencia.pdf>.

organic statute for the financial system—Decree 663, 1993.<sup>29</sup> Legislation for mergers between airlines is basically contained in article 1866 of the Commerce Code and article 3.6.3.7.3 of the Colombian Aeronautic Regulation (RAC).<sup>30</sup> Mergers between television operators are governed by Law 182, 1995.<sup>31</sup>

#### A. The National Competition Authority - SIC

SIC is the main authority for merger control in Colombia. As mentioned before, SIC is an administrative entity controlled by the government. The president of Colombia is free to appoint and remove the superintendent from office at his discretion.

Pursuant to article 2 of Law 1340, 2009, SIC has the power to review mergers in all sectors of the economy, with two exceptions: (i) reorganization operations in the financial sector are reviewed by the Financial Superintendence, which must hear the opinion of SIC and must apply the conditions that SIC recommends, if any; and (ii) operational agreements between airlines, which are reviewed by the Aeronautic Authority.

It is important to point out that the law; especially Law 1340, 2009, has also given SIC other powers and responsibilities:

- SIC has the power to investigate and sanction anticompetitive practices in all sectors of the economy.
- SIC applies consumer protection law, an area in which it exercises administrative and judicial powers, which allow it to impose sanctions for violation of the law and provide for compensation of damages to consumers.
- SIC is the trademark and patent authority. It also maintains the industrial property registry.
- In 1998, SIC was given administrative and judicial functions to decide unfair trade cases. Pursuant to Law 1340, 2009, SIC also decides administrative unfair trade cases in special sectors like television and public utilities.

According to article 9 of Law 1340, 2009, all transactions that consist of acquisitions, mergers, consolidations, or integrations (whatever the legal form of the transaction) between companies dedicated to the same activities or participating in the same vertical value chain, whose assets and sales individually or jointly meet merger control thresholds, and have a 20% or more market participation, require authorization. The 2009 law has made it totally clear that SIC will review both horizontal and vertical transactions. Currently, there is a discussion as to whether merger control applies to conglomerate mergers in which there is no market overlap. It

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29. Decreto 663 de 1993 [Decree 663 of 1993], 2 de Abril de 1993, Diario Oficial [D.O.] No. 40.820, 5 de Abril de 1993 (Colom.).

30. CÓDIGO DE COMERCIO [CÓD. COM.] [Commercial Code] art. 1866; Decree 410, 1971, Diario Oficial [D.O.] No. 33.339, 16 de Julio de 1971 (Colum.).

31. Ley 182 de 1995 [Law 182 of 1995], Diario Oficial [D.O.] No. 41.681, 20 de Enero de 1995 (Colum.).



seems that is not the case, however, since the 2009 law did not refer to those cases.

SIC's position is that a merger transaction amounts to an entrepreneurial concentration requiring authorization from the competition authority when the companies involved cease to participate independently in the market and are, therefore, *permanently* controlled by the same management or decision center, whatever the legal structure. SIC has not issued any particular doctrine on when joint ventures are caught. Given SIC's interpretation, however, it seems that only joint ventures that create a sort of permanent undertaking should be subject to merger control.

Colombian law offers two definitions of control. One is found in the Commerce Code and applies to corporations; the other is in the competition law and refers to undertakings in a broader way. According to the broader definition, control is the possibility of influencing, directly or indirectly, the business policy of a company or undertaking; the initiation, variation, or termination of the activities of the company; or the use of assets essential to the company's operations.

The definition of corporate control includes both internal and external control. Pursuant to article 261 of the Commerce Code, internal control exists when a company, directly or through other subsidiaries, owns more than fifty percent of the capital stock of another company or owns or commands enough voting stock to appoint the majority of its directors.<sup>32</sup> External control, on the other hand, exists when, by way of a contract or other relationship different from the ownership of stock, one person or company can exercise a dominant influence over a corporation.

As mentioned before, transactions that do not imply the acquisition of control are not caught by the merger antitrust legislation.

## B. Authorization of the SIC

According to article 9 of Law 1340, 2009, merger transactions that require previous authorization from SIC in Colombia have the following characteristics: (i) the companies party to the transaction engage in the same activities or participate in the same vertical value chain; (ii) in the year prior to the transaction, the companies, individually or in concert, made sales or own assets in Colombia in an amount sufficient to meet SIC thresholds; and (iii) the companies have an individual or joint participation of at least twenty percent in the relevant market. Right now, Resolution 22195, 2006 defines the notification threshold as an amount equivalent to \$20 million, expressed in terms of monthly minimum wages. In an effort to focus on relatively significant operations, one can expect that SIC will increase the threshold.

SIC considers mergers that do not meet the above-mentioned thresholds generally authorized, which only need to leave a note in the minutes of

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32. COD. COM. art. 261; Decree 410 de 1971 [Decree No. 410 of 1971], *Diario Oficial* [D.O.] No. 33.339, 16 de Junio de 1971 (Colum.).

their board of directors stating that the transaction falls within the General Authorization System.

As mentioned before, it is mandatory for merging parties to request authorization (when the thresholds are met) and obtain clearance from the authority before the merger operation produces its effects in the Colombian market. This means that it is possible to negotiate and sign the contracts and documents that carry out the transaction, if such documents and contracts provide for authorization as a condition precedent to their effectiveness. There is no compulsory waiting period. Clearance is not required when companies that belong to the same corporate group carry out the transaction.

### C. Foreign Mergers

Colombia adheres to the effects theory, meaning foreign transactions that produce effects in the Colombian market are subject to SIC review. The same legislation governs both domestic and foreign mergers. SIC doctrine requires authorization of foreign mergers where both parties to the merger market their products, directly or indirectly, in Colombia. Under the former doctrine of SIC, clearance was not necessary for foreign mergers when the products of one or both of the merging parties were sold in Colombia by independent companies that assumed the risk and made the decisions associated with the import and sale of the products. Nevertheless, one can consider this doctrine overruled after the SABMiller-Bavaria merger. In this case, SIC requested an antitrust filing, even though independent importers sold the products and brands of SABMiller.

### D. Procedure Before SIC

Law 1340, 2009 substantially changed the procedure for merger control.

#### 1. *Notification and Clearance Timetable*

As mentioned before, Colombian merger control requires previous notification of merger operations. This means that SIC must clear the operation before it enters into effect in Colombia. Parties may execute agreements but must declare that performance is dependent on SIC clearance. Both parties are responsible for making the notification and presenting all relevant information to SIC.

##### a. Mergers Carried Without Previous Clearance

Mergers executed without previous clearance from SIC are infractions of antitrust laws. The companies and their administrators are subject to fines. SIC may impose maximum fines equivalent to \$20 million for the companies and \$450,000 for the administrators. In addition, SIC can issue an order to reverse the operation if it finds that the transaction produces an undue restriction on competition. Further, one should be aware that a judge can void an operation carried out in violation of competition laws,

resulting in significant economic consequences. It is important to understand that SIC is not a judicial authority. SIC must obtain such a declaration through ordinary processes before courts of general jurisdiction.

It is, therefore, important that the foreign merger has no effect in Colombian territory until it has been approved by SIC. There is not yet a clear doctrine regarding the closing of foreign transactions before obtaining clearance with SIC, with a carve out provision for Colombia. However, it is advisable to include such a clause, as well as any other elements that help to assure SIC that the transaction will not have effects in Colombia before it has been cleared.

#### b. Process and Timing

- The petitioners file a pre-evaluation petition with a succinct description of the transaction.
- Within the following three days, SIC must determine whether it needs to review the transaction. SIC will end the proceedings if it decides the transaction does not require review.
- Within the three-day period, if SIC finds that review is necessary, it will provide notice through a publication in a newspaper of sufficient circulation to enable interested parties to file any information pertinent to the analysis of the transaction.
- The petitioners can request that SIC refrain from publication to preserve public order, in which case SIC can accept the petition while maintaining the confidentiality of the transaction and procedures.
- SIC has thirty working days (forty-five calendar days in most cases)<sup>33</sup> during which it studies the transaction to determine whether the transaction poses a risk to competition, prompting a continuation of the review proceedings, or not, in which case SIC will approve it.
- If the procedure continues, SIC must inform the regulatory and the control agencies in the sectors relevant to the transaction. The agencies have the opportunity to present their technical advice regarding the transaction to SIC within ten working days of the notification. Also, the agencies are free to participate in the proceedings at any point. While the agencies' views are not binding on SIC, it must justify a decision to depart from the opinions.
- The authorities and other interested parties must file any information they deem relevant to the analysis with SIC within fifteen days of the decision to continue the proceedings. They are free to propose conditions and other measures that might reduce the anti-competitive effects associated with the transaction.
- SIC can request that the authorities and interested parties explain or supplement any information they have filed regarding the proceedings.

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33. According to article 62 of Law 4, 1913, when laws and official acts refer to terms of days, they are understood as working days, unless explicitly stated otherwise.

- Within this fifteen-day period, the petitioners can access the information filed by the authorities and third parties and attempt to rebut it.
- Within three months following the final filing date, SIC must make one of three possible decisions—simple authorization, conditioned authorization (i.e., clearance predicated on the application of suitable remedies), or objection.
- Under Colombian law, if SIC exceeds the deadline, the transaction is automatically approved and SIC surrenders its authority over the case. This is known as positive administrative silence. However, one should note that this scenario is unlikely given that there have been only a couple of such instances in twenty years.
- If the parties to the merger remain inactive for two months at any point during the proceedings, SIC will consider the petition for authorization of the transaction abandoned.

## 2. Presentation of the Petition

There is no standard format to request SIC authorization. However, Decree 1302, 1964 defines the specific information that the merging parties must provide in the petition. SIC has expanded and developed this list of information through its general regulation found in Circular Letter No. 10. The list is very detailed. It includes information concerning the terms of the transaction, the merging companies, competitors, consumers, market conditions, barriers to entering the market, and any other information that may allow SIC to assess the effects of the transaction properly. One should note that SIC is free to delay its review until the information-gathering process is complete.

### E. Review Test

Article 11 of Law 1340, 2009 provides that SIC must prohibit or object to mergers that will generate an undue restriction on competition. Of course, all mergers tend to restrict competition. As such, SIC's objective is to determine those mergers that will produce an *undue* restriction on competition.

Under article 5 of Decree 1302, 1964, mergers exhibiting the following characteristics are presumed to produce an undue restriction on competition:

- Where the merging parties engaged in anti-competitive activity prior to the transaction, and
- Where the merged entity would acquire the capacity to impose unfair prices on consumers through the transaction.

One should consider that, according to article 12 of Law 1340, 2009 and Law 2153, 1992, SIC cannot object to mergers in which the parties can demonstrate, using recognized methods, the following: (i) that the positive effects of the transaction will exceed its negative impact on consumers, and (ii) that there is no viable alternative to generate the positive effects of the

transaction. This is known as the efficiency exemption; it is designed to justify authorization of mergers that increase market concentration, but also generate efficiencies that can be passed on to consumers. The efficiency exception was already in effect in article 51 of Decree 2153, 1992. However, SIC is yet to recognize this exemption in a merger review.

In at least two cases, SIC has accepted the so-called “failing-industry defense.” Using this mechanism, SIC authorized the mergers in order to save companies that were facing imminent bankruptcy.

The law does not explain the procedures or rationale utilized by SIC during its evaluation, and the authority has not published any documents that would provide any guidance. One can, however, identify some of the general elements in SIC’s analytic process:

1. SIC determines the general market in light of the relevant product and geographic markets. SIC defines the product market narrowly using the hypothetical monopolist test (SSNIP test) in order to isolate products, whether goods or services, that can behave as substitutes for the product affected by the merger.
2. SIC assesses the competitive pressure caused by product substitutes and potential competition from other companies.
3. SIC calculates the participation levels of the merging companies in the relevant market and then applies concentration indexes like HHI (Herfindahl-Hirschman Index) and CR4 (four-firm concentration ratio) in order to establish the merger’s potential effect on the market.
4. In order to determine market contestability and the capacity of the market to absorb other competitors, SIC evaluates potential barriers to entering the market, such as import tariffs and duties, shipping costs, market saturation, the cost of building a local plant, etc.
5. SIC reviews potential conditions and discusses them with the parties. In some circumstances, SIC substantially modifies the parties’ proposed conditions. In general, the authority prefers structural over behavioral remedies. SIC often requires the merged entity to divest part of its business.
6. At this point, the particular circumstances that will trigger an objection or a conditioned approval are not clear. One can assume that SIC would reach such conclusions where a balance of the preceding elements weighs against the merger.
7. For instance, SIC would probably reject a merger that significantly increases market concentration, faces no perfect or even imperfect produce substitutes, does not have to cope with competition, enjoys high barriers to market entrance and limited contestability, and no possible structural remedies.
8. One should note, however, that SIC has prohibited less than one percent of informed mergers in its history.

As said before, SIC has been applying reasoning and analysis similar to those developed in the European Union and the United States for some

years now. There is much debate as to the use of economic tools, such as the concentration indexes that were prepared for developed economies, without adjustment to the size and specific characteristics of the Colombian economy. Most markets in a developing economy are small and already concentrated, but that does not mean that there is no competition or that it will become impossible for new competitors to enter the market.

From the lines of merger cases that SIC conditioned or objected to, it is possible to deduce that SIC has moved from the “market dominance” test it used initially to a more comprehensive “substantially lessening of competition” test. It is now clear that, under the 2009 law, SIC has the capacity to review vertical mergers. There is much debate regarding its potential authority to review conglomerate mergers.

Non-competition issues are not relevant in the merger review process and will not be considered or discussed by SIC.

As recent cases demonstrate, SIC has made significant strides in its ability to study and regulate mergers in the past few years. Despite this progress, substantial uncertainty remains as to what kind of analysis SIC will apply as it reviews mergers.

In compliance with the new 2009 law, SIC will have to issue its guidelines for assessing mergers, which will help to explain and illustrate its decision-making process for the benefit of the parties to the merger.

#### F. Remedies and Ancillary Restraints

Early in the review process, it is important for the merging companies to identify if the transaction should be subject to remedies, at least in a general way, so that the authority is aware of the intention or willingness of the parties to discuss them. In those cases, when SIC finds that the proposed transaction may pose undue restrictions to competition but believes there are options to correct such distortion, it will authorize the merger provided the parties undertake certain remedies.

Such conditions have ranged from elimination of exclusivity for distributors to the obligation of producing for a competitor at variable cost, allowing a competitor to use a percentage of installed capacity, and even the obligation to divest part of the business. SIC has shown a preference for structural remedies, such as divestments, over conduct or behavioral remedies.

SIC customarily requires that the parties comply with structural remedies within a certain time limit (generally, less than one year). Compliance with behavioral remedies is also required for a limited period of time (generally, no more than three years). Pursuant to article 11 of Law 1340, 2009, SIC must periodically review whether the parties have complied with the conditions and obligations imposed. Traditionally, SIC requires that an external auditor verifies the full compliance of the remedies and presents reports to the authority from time to time. Finally, SIC requests that the merging parties put in place a bank or insurance bond to guarantee full compliance with the remedies.

SIC has not made distinctions regarding the imposition of remedies in foreign-to-foreign mergers.

Even though SIC has not rendered an opinion on this issue, one could assume that the merger control authority would permit reasonable ancillary restrictions.

#### G. Involvement of Other Parties or Authorities

SIC has not admitted third parties to fully participate in the merger review process. The authority will not grant them access to information submitted by the merging parties, notify third parties of its determinations, or permit them to file a reconsideration plea. Though third parties are free to present documents or express their opinions to SIC, the authority is not required to consider them. At its discretion, SIC may seek third-party testimony or information that might assist the authority in the review process.

Pursuant to paragraph 3 of article 4 of Law 155, 1959, all the information the parties include in the antitrust filing is strictly confidential. Any public official who discloses any information regarding the procedure faces removal from office and criminal prosecution.

The Colombian economy is open to foreign investment. However, there are exchange, tax, labor, securities, and special-sector requirements that one must check about with local council before entering into a transaction.

#### H. Judicial Review

Decisions issued by SIC are not subject to appeal. Rather, a disgruntled party can seek a reconsideration plea before the same public official. The party must file the reconsideration plea within five working days after notification of the decision. The superintendent has to make a decision within the following two months, though the superintendent can extend this period if there is a need to gather additional evidence.

A party may challenge the final decision issued by SIC by means of a judicial action before the Administrative Jurisdiction. The party must file this action within the four months following the decision to object or prohibit the merger. However, this alternative is not very attractive to the parties because of the length of the procedure (six to ten years).

#### I. Penalties

SIC will impose penalties where the merging parties fail to disclose that a transaction meets the criteria as well as in cases of “jumping the gun.” The maximum fine that SIC may enforce amounts to \$20 million for the companies and \$450,000 for the administrators.

### Conclusions

As described in this document, the new Law 1340, 2009, introduced important changes to Merger Control Law.

- A new market participation threshold that divides the transactions that need previous authorization from SIC (authorization procedure) from those that only need to be reported to SIC without a waiting period (notification procedure).
- A new procedure in two stages that will allow SIC to authorize quickly those transactions that do not pose a threat to competition.
- The possibility for the participation of interested third parties.
- The possibility for the analysis of structural and behavioral conditions.
- The new definition of the efficiency exemption.

The modifications described will undoubtedly produce a very important effect in Colombian Merger Law.

There are many challenges ahead in the interpretation of the new law. That is why it is important that the Authority takes the opportunity to issue the merger control guidelines as requested by the law—to help the companies that have the obligation to report their merger operations to the State.