



# **COLOMBIA: ASSESSMENT OF COMPETITION LAW AND POLICY**

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## **FOREWORD**

This document consists of a background report prepared by the OECD Secretariat to support the review of Colombia undertaken by the OECD Competition Committee as part of the process for Colombia's accession to the OECD [see the Roadmap for the Accession of Colombia to the OECD Convention - C(2013)110/FINAL]. In accordance with paragraph 14 of Colombia's Accession Roadmap, the Competition Committee agreed to declassify the report in its current version and publish it under the authority of the Secretary General, in order to allow a wider audience to become acquainted with the issues raised in the report. Publication of this document and the analysis and recommendations contained therein do not prejudice in any way the results of the review of Colombia by the Competition Committee as part of its process of accession to the OECD.

The purpose of this report is to evaluate Colombia's plans to implement the substantive OECD legal instruments within the Competition Committee's competence, and to assess Colombia's policies and practices in comparison to OECD best policies and practices in the field of competition policy. The report, prepared by Jay C. Shaffer, consultant to the OECD, was finalised in the course of 2015.



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## EXECUTIVE SUMMARY

Colombia's competition law, based largely on the EU model, has all of the elements necessary for effective enforcement, including provisions for the imposition of heavy monetary sanctions sufficient to deter cartel formation. The Superintendencia de Industrio y Comercio (SIC) has notably increased its enforcement attention to bid rigging, which has also been established as a criminal offence. State owned enterprises, trade associations, and any persons or enterprises affecting market functions are fully subject to the competition law. Colombia's competition agency, the Superintendence of Industry and Commerce ("SIC"), is a well-respected enforcement agency that has a full arsenal of investigative and remedial powers, including authority to conduct dawn raids, and a leniency program that has recently emerged as an effective tool for exposing cartels. The attractiveness of the SIC's leniency program should be improved in several ways, by providing a broader range of options for use in calculating maximum fines for anticompetitive conduct, modifying the parallel leniency program for criminal bid rigging violations, and providing amnesty recipients with protection from excess damage awards in civil suits by cartel victims. With respect to public procurement, modifying the existing system to make procurements more competitive and to facilitate more effective interdiction of bid rigging would bring Colombia into closer conformity with OECD standards.

The merger law is substantively sound and sensibly enforced, but the pre-merger notification system departs from OECD and ICN recommendations by asserting control over mergers that have an inadequate local nexus with Colombia. Conglomerate mergers are not subject to any form of notification and are therefore uncontrolled because non-notifiable mergers cannot be attacked under the merger law. Colombia should address these deficiencies, as well as others relating to a merger notification option based on a subjective market share calculation, merger waiting periods, and the timeliness of judicial review for SIC merger decisions.

The SIC is headed by a Superintendent who, until recently, was appointed by the President for no fixed term and removable by the President at will. The consensus view in Colombia and sound policy dictate that the SIC should be constituted as an independent entity. A September 2015 Presidential Decree resolved this issue, providing that the Superintendent shall be appointed for a fixed term coincident with the President's four year term, and be subject to removal by the President only for cause. Certain procedural aspects of the SIC's operations, relating to separation of investigative and judicial functions, warrant modification to promote due process principles. At the staff level, the SIC has a high personnel turnover rate and suffers from chronic loss of staff expertise and institutional memory, conditions that the agency has plans to address.

The SIC is fully involved with international competition policy institutions, such as the OECD's Competition Committee and the ICN, and is committed to proactive co-operation with other competition authorities. The SIC notes that it has no authority to provide confidential information to another competition law enforcement agency, except when permitted by a waiver from the affected party or under a treaty between Colombia and the receiving country. The SIC does not consider this constraint to be a significant impediment to effective co-operation, observing that most of the information acquired in SIC investigations is public and that it rarely encounters a situation where exchanging confidential information is critical to effective co-operation or co-ordination.

Historically, the SIC played a minimal role as a competition advocate in government policy and regulatory development processes. A formal SIC function with respect to proposed agency regulations was established in 2009, but the system needs an overhaul to assure effective competition assessment. Colombia is engaged in implementing a government-wide program for regulatory impact analysis that includes competition assessment as an integral part. With respect to structural separation in sectoral regulatory regimes, Colombia has a sound record, but additional vertical segregation should be considered in certain markets. There should also be legislation modifying the allocation of merger control authority to sector regulators for financial institutions and airlines, and eliminating the unilateral authority of the Agriculture Ministry under Article 5 of Law 1340 to immunise agricultural stabilisation agreements from prosecution under the competition law.

The SIC has cordial relations with most other government agencies in Colombia, but is taking action to enhance its role as Colombia's prime competition law enforcement agency and chief competition advocate by developing closer and more regular contacts. The agency is also committed to a continuing program for developing transparent interpretations of the law and providing practical guidance to the private sector by issuing enforcement policies and guidelines.

A legislative proposal developed by the SIC and pending before Colombia's Congress contains a variety of provisions addressing many of the recommendations made in this report.



## COLOMBIA: ASSESSMENT OF COMPETITION LAW AND POLICY

### 1. Foundations and context

#### 1.1. Introduction

1. The Roadmap for the Accession of Colombia to the OECD Convention [C(2013)110/FINAL], adopted by Council on 19 September 2013, requested the Competition Committee to undertake an in-depth review of Colombia, with a view to providing (i) an evaluation of the willingness and ability of Colombia to implement the substantive OECD legal instruments within the Committee's competence, and (ii) an assessment of Colombia's policies and practices as compared to OECD best policies and practices in the field of competition policy.

2. The Roadmap sets out three core principles for the technical accession review of the Competition Committee, which synthesise elements in the OECD legal instruments on competition policy:

- Ensuring effective enforcement of competition laws through the establishment and operation of appropriate legal provisions, sanctions, procedures and institutions.
- Facilitating international co-operation in investigations and proceedings that involve application of competition laws.
- Actively identifying, assessing, and revising existing and proposed public policies whose objectives could be accomplished with less anti-competitive effect, and ensuring that persons or bodies with competition expertise are involved in the process of competition assessment.

3. This report describes the context and foundations of competition policy, substantive law and enforcement experience, institutions, special exclusions and sectoral regulatory regimes, and the treatment of competition issues in regulatory and legislative processes. The report examines Colombia's conformity with the OECD legal instruments, policies, and best practices that deal with competition law and policy issues. The assessment addresses, most prominently, the twelve Council Recommendations concerning competition policy,<sup>1</sup> but also considers the 2005 Statement of Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, and selected recommendations in the 2005 Guiding Principles for Regulatory Quality and Performance that have not been superseded by subsequent Council Recommendations.<sup>2</sup>

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<sup>1</sup> The twelve Recommendations currently in force are listed in Annex I to this report.

<sup>2</sup> The selected recommendations from the Guiding Principles include elements from sections 4.1, 4.3, 5.3 and 7.3 of the Principles.

### **1.1. The economic context<sup>3</sup>**

4. Colombia<sup>4</sup> is Latin America's fifth-largest economy (after Brazil, Mexico, Argentina and Venezuela), with a Gross Domestic Product (GDP) for 2014 estimated at USD 378 billion. The economy is resilient -- with the exception of 2009, GDP has grown by at least 2.6 % annually since 2003. Even in 2009, when the impact of the international financial crisis peaked in Colombia, growth was still positive at 1.7%.

5. Colombia's strong performance has rested partly on rising prices for its commodity exports, but also owes much to the government's prudent economic management and concerted efforts to promote growth. For 2014, central government expenditures were a modest 18.3% of GDP.<sup>5</sup> Robust growth has been accompanied by low inflation, which has fallen within or below the official target range of 3±1% since mid-2009 and in December 2014 stood at 3.66%. In 2011, all three bond rating agencies upgraded Colombia's government debt to investment grade.

6. Over the past 10 years, Colombia has implemented multiple institutional and regulatory reforms, most recently including a new fiscal framework and important tax and labour market modifications, all contributing to improvements in the economy. With respect to the prevailing business climate, the World Bank ranks Colombia 54<sup>th</sup> of 189 countries on its 2015 "Ease of Doing Business" indicator, while the Heritage Foundation's 2015 Index of Economic Freedom shows Colombia ranked 28<sup>th</sup> among 186 countries.<sup>6</sup>

7. According to OECD data, Colombia's 2013 per capita GDP (at purchasing power parity) was approximately USD 12,600. Although the World Bank classifies Colombia as an "upper middle-income economy," its 2013 per capita income is 66% below the OECD average. The unemployment rate has declined steadily since the early 2000s and employment creation has been vigorous since 2010. Nonetheless, the 2014 unemployment rate of 9.1% is well above the OECD average of 7.3% and is one of Latin America's highest. Low labour productivity, especially in the large informal sector, is a serious problem.

8. Total foreign trade in 2014 represented 31.5% of GDP. Colombia's principal trading partner is the United States, accounting for 26.4% of total exports from Colombia in 2014, followed by the European Union (17.2 %), China (10.5%), Panama (6.6%), and Spain (5.9%). Colombia's main exports, both traditionally and currently, are agricultural and extraction products, especially crude oil.<sup>7</sup> The United States was also the leading importer to Colombia in 2014, with 28.5% of the total, followed by China (18.4%), the European Union (13.7%), Mexico (8.2%), and Germany (4.0%).

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<sup>3</sup> The economic data in this section for which specific source citations are not provided are drawn from World Bank indicators, OECD data bases, the OECD Economic Survey of Colombia (2015) (available at [http://dx.doi.org/10.1787/eco\\_surveys-col-2015-en](http://dx.doi.org/10.1787/eco_surveys-col-2015-en)), and the SIC. Throughout this report, the May 14, 2015, currency exchange rate of 2377.87 Colombian pesos (COP) to 1 US dollar (USD) has been employed.

<sup>4</sup> Colombia, located in the north-western quadrant of South America, has a land area of 1.1 million km<sup>2</sup> (the fourth largest on the continent). Its population is estimated at 47.8 million in 2014, making Colombia the third most populous Latin American country after Brazil and Mexico. The population, 76% urban, has had a demographic growth rate averaging 1.02% over the previous five years.

<sup>5</sup> Central government expenditures as a percentage of GDP averaged 27.1% for OECD countries in 2012, the most recent year for which data are available.

<sup>6</sup> Colombia achieved its all-time highest score in the 2015 Economic Freedom Index.

<sup>7</sup> In 2014, petroleum and coal combined to account for 64% of exports.

Principal imports are industrial and transportation equipment, consumer goods, chemicals, paper products, fuel, and electricity. Although Colombia's tariffs have generally been declining over time, the average weighted tariff for all products was 4.5% in 2013, still well above the 2012 average of 1.7% for OECD countries.

9. Colombia's current account trade balance has been negative in recent years (USD -19.8 billion in 2014). Its positive capital account reflects strong foreign direct investment. FDI, notably in the oil and gas sectors, reached a record high \$16.2 billion in 2013, an increase of nearly 8% over 2012, before receding slightly to 16.05 billion in 2014.

10. Colombia has been a WTO member since 1995 and a member since 1969 of the Andean Community (CAN), a regional consortium whose other members are Bolivia, Ecuador and Peru.<sup>8</sup> It has signed free trade agreements with the United States (which entered into force in May 2012), the European Union, Chile, Venezuela, Mexico, Canada, Cuba, Nicaragua, El Salvador, Guatemala, and Honduras, and with three regional consortia: Mercosur (Common Market of the South)<sup>9</sup>, Caricom (Caribbean Community)<sup>10</sup>, and EFTA (European Free Trade Area)<sup>11</sup>. Colombia is seeking to expand the range of its trade agreements. As of September 2015, FTA's with South Korea, Costa Rica, Panama, Israel, and the Pacific Alliance<sup>12</sup> were awaiting ratification; negotiations were underway with Japan, Turkey, and the parties to the Trade in Services Agreement (TISA);<sup>13</sup> and negotiations are planned to commence with Singapore, Australia, New Zealand, China, and the Dominican Republic.

11. With respect to the structure of the economy, the services sector represented 55.1% of GDP (value added) in 2014, while the industrial and agricultural sectors accounted for 38.2% and 6.7% of GDP, respectively. Market concentration varies widely by sector. One of the most notably concentrated markets is mobile telephony. Colombia's competition agency, the Superintendence of Industry and Commerce, or "SIC," calculates that the Herfindahl-Hirschman Index (HHI) for the national market in that sector was 4653 in 2012, based on the share of users.<sup>14</sup> A recent OECD report

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<sup>8</sup> The Community's agreement entails expansive free trade commitments among its members.

<sup>9</sup> Mercosur's members are Brazil, Argentina, Paraguay and Uruguay, Venezuela, and Bolivia. Chile, Colombia, Ecuador, Guyana, Peru, and Suriname hold "associate member" status in Mercosur.

<sup>10</sup> Caricom's members are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Montserrat.

<sup>11</sup> EFTA's members are Switzerland, Liechtenstein, Norway, and Iceland.

<sup>12</sup> The initial (and current) members of the Pacific Alliance, created in 2011, include Mexico, Chile, Colombia, and Peru. Costa Rica and Panama are now in the process of accession to full membership. The FTA provisions awaiting ratification focus on expanding the trade provisions of the original Alliance agreement.

<sup>13</sup> The 24 parties participating in the TISA, representing 51 countries, are Canada, the United States, Mexico, Costa Rica, Panama, Colombia, Peru, Paraguay, Uruguay, Chile, the European Union (28 countries), Iceland, Norway, Switzerland, Liechtenstein, Turkey, Israel, Pakistan, South Korea, Japan, Hong Kong, Chinese Taipei, Australia, and New Zealand.

<sup>14</sup> The Herfindahl-Hirschman Index, a commonly accepted measure of market concentration, is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. Under the 2010 Horizontal Merger Guidelines issued by the US Department of Justice and Federal Trade Commission, a market with an HHI exceeding 2500 is characterised as "highly concentrated," while a market with an HHI less than 1500 is "unconcentrated."

See <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

notes that Colombia's telecom broadband market is also highly concentrated, with HHIs at the end of 2012 averaging 4267 in metropolitan-area markets for retail residential service and 4533 in retail corporate service markets.<sup>15</sup>

12. The SIC has analysed company operating revenues economy-wide to identify markets with HHI's exceeding 2500. The resulting list includes air transportation; collection, purification and distribution of water; research and development; production of coking coal, refined petroleum, and nuclear fuel; manufacture of radio, television, and communication equipment; provision of health and social services; tobacco manufacture; coal mining; and certain activities (including cement manufacture) related to the residential construction sector. By contrast, an SIC analysis of coffee export companies found that the HHI in that market fell below 1400. A recent OECD study of Colombia's banking sector concluded that, although the HHI in 2013 was below 1200, the market's contestability (and hence competitiveness) was nonetheless "subpar."<sup>16</sup>

13. In some markets, the dominant firm is a state owned enterprise (SOE). The most prominent example is in petroleum production, where SOE Ecopetrol holds a 63% market share. At present, the state has interests in 70 companies, and government ownership of the economy stands at approximately 30% of GDP, a share roughly in line with OECD countries. More than three-quarters of the government's holdings are in SOEs controlled by the national government, and include enterprises engaged in petroleum and gas production; mining; finance and insurance; electrical energy generation and distribution; pension plan administration; health care; defence industries; transportation; telecommunications; food services; and agriculture. The remaining firms, controlled by local governments, are primarily utility companies that provide water and sewerage services, electricity, trash collection, and landline telephone service.<sup>17</sup> One important SOE, electric energy company Isagen, which operates five hydroelectric plants and one thermal plant, was scheduled to be privatised on May 19, 2015. On May 14, 2015, however, an order issued by the Council of State in a judicial review proceeding challenging the transaction temporarily suspended the sale on the grounds that it posed a high risk to national public resources.<sup>18</sup> Under a provision in the Constitution (Art. 336), regional governments hold monopolies in hard liquor production and ticket-based lotteries. SOEs operate the liquor distilleries; the liquor produced faces competition at the retail level from imported products. Regional ticket-based lotteries are operated by concessionaires.<sup>19</sup>

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<sup>15</sup> OECD Review of Telecommunication Policy and Regulation in Colombia (2014) 76, available at <http://dx.doi.org/10.1787/9789264208131-en>. The average HHI figures are for metropolitan areas with more than 930,000 residents.

<sup>16</sup> Efficiency and Contestability in the Colombian Banking System (2015) 3, 12-13, 26-28, OECD Economics Department Working Papers, No. 1203, available at <http://dx.doi.org/10.1787/5js30twjgm6l-en>.

<sup>17</sup> The preceding information in this paragraph is drawn from OECD Corporate Governance Working Paper No. 12 (2013), *Colombian SOEs: A Review against the OECD Guidelines on Corporate Governance of State-owned Enterprises*, available at [http://www.oecd-ilibrary.org/governance/colombian-soes-a-review-against-the-oecd-guidelines-on-corporate-governance-of-state-owned-enterprises\\_5k3v1ts5s4f6-en?crawler=true](http://www.oecd-ilibrary.org/governance/colombian-soes-a-review-against-the-oecd-guidelines-on-corporate-governance-of-state-owned-enterprises_5k3v1ts5s4f6-en?crawler=true).

<sup>18</sup> The government privatised 63 enterprises between 1990 and 2012, mainly in the electric power, mining, hydrocarbons, and financial sectors. The most recent privatisation was of Transportadora de Gas Internacional, a natural gas pipeline, in 2009.

<sup>19</sup> Revenue from the monopolies is dedicated to public health and education services.

14. Colombia's score for the OECD's 2013 Product Market Regulation (PMR) indicator is 1.77, midway between the 1.5 OECD country average and the 2.0 non-OECD average.<sup>20</sup> The World Economic Forum's Global Competitiveness Report for 2014-2015 ranks Colombia at 56th and 101th of 148 countries, respectively, on its "intensity of local competition" and "extent of market dominance" indicators, and 58th with respect to "effectiveness of anti-monopoly policy."

15. In historical terms, the Colombian economy was administered during much of the 20th century to promote import substitution, protect domestic industries and markets, and encourage the formation of large conglomerates. GDP growth continued into the late 1970s before the limitations of this industrial policy model began to appear. By the 1980s, average annual GDP growth lagged at just over 1%.

16. As in many other countries, the modern era in Colombia's economy began in the early 1990s, when an ambitious policy of economic liberalisation was launched. A new Constitution, adopted in 1991, established a "right to free competition," and was followed by new laws that privatised many public enterprises; liberalised the import and foreign exchange markets; deregulated foreign investment; instituted reforms of financial, tax, labour, and pension systems; and restructured the health care sector. The result was a period of substantial economic growth that extended until nearly the end of the decade.

17. In 1998-99, Colombia's economy experienced its first recession in nearly 70 years. An acute economic and financial crisis, rooted in the sharp growth in domestic demand that began in 1992, was fed with heavy inflows of foreign private capital attracted by the economic deregulation programme. Interest rates increased, the peso – set free to float – was devalued, foreign financing suddenly constricted, and real GDP fell by 4.2%. By 2001, however, the economy had begun to revive and economic growth resumed, continuing until 2007 when GDP growth peaked at 6.9%.

18. In 2008, due to the international financial crisis, there was again a sharp slowdown, and GDP growth declined to 3.5%. Although the Colombian economy decelerated further in 2009, GDP growth avoided negative territory, ending the year with a 1.7% increase. Thereafter, the recovery gathered strength, achieving a real GDP growth rate of 4% and 5.9% in 2010 and 2011, respectively, before settling back to 4% in 2012. The growth spurt was sustained by the mining sector, while commodity exports and investment generally were boosted by the sharp rise in commodity prices from 2008 to mid-2011. The mining sector grew by more than 14% in real terms in 2011 alone. The non-tradable sectors were also buoyant, particularly transport, financial services, and construction. On the downside, the rising terms of trade and related capital inflows contributed to a sharp appreciation of the exchange rate, impairing the competitiveness of the manufacturing and agriculture sectors.

19. Since 2012, Colombia's economy has continued its noteworthy performance, with a GDP growth rate of 4.9% in 2013 and 4.6% in 2014. Strong growth has been driven by foreign direct investment in the commodity sector, broad-based investment across the entire economic spectrum, and until recently, by the boom in the oil and mining sector. Free trade agreements and unilateral measures have continued reducing investment barriers generally. A sound monetary, fiscal, and financial framework has reduced economic volatility, facilitating a rapid growth in GDP per capita relative to OECD economies. Nonetheless, productivity outside oil and mining remains subdued, income inequality and labour market informality remain among the highest in Latin America, and structural unemployment is consistently disproportionate by international comparison. Further, Colombia's

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<sup>20</sup> The PMR indicator measures the degree to which a country's policies promote or inhibit competition in areas of the product market where competition is viable. The indicator is plotted on a scale from 0 to 6 (least to most restrictive).

growth rate has been affected by the global drop in oil prices, with Colombia's Bank of the Republic recently projecting economic growth for 2015 at 2.8%, substantially below the 4.2% rate initially projected by the Ministry of Finance.

## **1.2 Development of competition policy**

20. Colombia's Constitution of 1886 banned monopolies, and an implementing law adopted in 1888 prohibited the formation of corporations exerting monopoly control over basic commodities. Competition law remained a moribund concept for more than sixty years, however, until the 1950's. The government's success in protecting domestic companies from import competition gradually led to the recognition that stronger laws were needed to constrain domestic monopolies and oligopolies. Additional impetus arose from the fact that new competition laws were being adopted by a number of Colombia's neighbours (Chile in 1959 and Brazil in 1962).

21. In 1959, the Colombian Congress approved Law 155, basing it on a provision in the 1886 Constitution that assigned to the State responsibility for the general conduct of the economy. Article 1 of the Law prohibited agreements that had "as their object" the restriction of competition and any other conduct "tending to limit free competition and to maintain or determine unfair prices." The 1959 Law also included a provision (in Article 4) establishing a system of prior review for mergers and acquisitions.

22. The 1959 law was amended in 1963, and supplementary regulations were issued in 1964. Those regulations, however, were insufficient to implement the law effectively, and it was seldom enforced for the purpose of preserving competition. Rather, the law was primarily used as the legal basis for imposing price controls. In 1976, the SIC, which had evolved from a predecessor agency created in 1958, was vested with roughly the same set of functions performed by today's agency, although with considerably less enforcement power.

23. By the early 1990s, economic liberalisation was underway. The new Constitution of 1991, besides establishing a right to free competition, provided in Article 333 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." Decree 2153, promulgated in 1992, was intended to implement the constitutional mandate and modernise the competition law regime. The Decree corrected a deficiency in Law 155, which covered agreements having an anticompetitive *purpose* but not those producing anticompetitive *effects*. The Decree, based largely on the competition law provisions in the European Union's Treaty of Rome, also included lists of agreements and unilateral acts deemed contrary to free competition; specified actions constituting abuse of a dominant position; and revised the merger notification provision. The SIC was granted enhanced powers to investigate anticompetitive behaviour at its own initiative or at the request of third parties, and to impose monetary fines.

24. The liberalisation programme of the early 90s also affected the application of competition policy to public utility services. New legislation created three regulatory commissions (in telecommunications, water and sanitation, and electricity and gas), vesting them with the usual regulatory powers (rate setting, tendering conditions, technical and commercial regulations) and a general mandate to strengthen competition and prevent monopolistic practices. A Superintendence of Public Services, complementary to the regulatory commissions, was also created, charged with responsibility for protecting consumers and supervising State enterprises, and empowered to sanction restrictive practices. The result was a decentralised institutional model for protecting and promoting competition, in which various economic authorities (the sector commissions, the sector

superintendents, and the SIC) all applied sanctions for restrictive practices and abuse of market dominance and exerted control over mergers and acquisitions.

25. By 2004, it had become apparent that this model resulted in administrative inefficiency, confusion regarding the scope of the powers granted to each authority, lack of legal predictability, and the absence of a unified jurisprudence interpreting the competition law. Colombia's National Development Plan for 2006-2010 called for overhauling the competition protection system to improve Colombia's business and investment climate and spur the development of internationally-competitive market sectors. Another round of reforms was formulated to implement the plan's recommendations.

26. The result was the enactment of Law 1340 of 2009, containing significant amendments to the competition law. The Law removed most authority for enforcing the competition law from the various sector agencies and consolidated it in the SIC, expanded the range of parties subject to the competition law, substantially increased civil penalties for violations, authorised a leniency programme, mandated a competition advocacy role for the SIC in evaluating proposed government regulations, and modified the merger control system.

27. Since 2009, three additional legislative actions affecting competition policy have been taken. Decree 4886 of 2011 implemented the 2009 amendments by updating certain structural and functional features of the SIC, while Decree 19 of 2012 modified certain due process aspects of the procedures employed in investigating competition law violations. Law 1474 of 2011, the third and most significant development, amended the anti-corruption chapter of the Colombian Penal Code to make bid rigging in public procurement proceedings a criminal offense, punishable by fines, imprisonment, and disqualification from future public procurements. The Law also includes leniency provisions designed to dovetail with the leniency programme applicable to civil penalties in SIC cases, so that parties who qualify for exemption from SIC civil penalties under the competition law will also qualify for certain reductions in criminal bid rigging penalties.

### **1.3 Objectives of competition law enforcement**

28. The SIC considers that the prime policy objective of Colombia's competition law is the advancement of consumer welfare. Article 333 of Colombia's 1991 Constitution establishes a right to free competition and imposes a duty on the State to enforce that right.<sup>21</sup> A separate constitutional provision in Article 88 defines the right to free competition as a "collective right," which is a right ascribed to society as a whole, rather than to particular individuals or enterprises.<sup>22</sup> The Constitution thus guarantees to society an economy based on market competition, and obliges the government to implement that guarantee by interdicting anti-competitive practices.

29. At the statutory level, Article 3 of Law 1340 of 2009 elaborated the State's constitutional role in protecting competition by directing the SIC, in making enforcement decisions, to focus on achieving three specified objectives: "free participation of businesses in the market, economic efficiency, and consumer welfare." This language was subsequently re-enacted, and now appears in Article 1.3 of Decree 4886 of 2011. The promotion of efficiency and consumer welfare are commonly

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<sup>21</sup> Article 333 provides that "Economic activity and private initiative are free, within the limits of the public good. . . . 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."

<sup>22</sup> The collective nature of the right is emphasised in a 1997 decision by the Constitutional Court, which notably interpreted Article 333 to protect only "the competitive process it, not competitors, whether large or small." Constitutional Court Judgment C-535 of 1997. Reporting Judge: Eduardo Cifuentes.

articulated objectives of competition law enforcement because they are among the principal benefits that competitive markets are expected to yield. In contrast, the reference in Article 1.3 to the promotion of “free participation by businesses in the market” does not describe a benefit of competition, but rather a condition necessary for the operation of competitive markets. Because Colombia’s competition regime does not protect individual competitors, the SIC interprets this language in Article 1.3 as a direction to prosecute only those forms of exclusionary conduct that impair maintenance of competitive processes.

30. Although Article 1.3 sets out guidance for the SIC’s exercise of prosecutorial discretion, it does not purport to articulate the full range of objectives that may properly be considered in enforcing the law. The SIC states that, in evaluating the market effects of conduct, it considers as pro-competitive any economic effect that advances a social benefit expected to arise from competition or that enhances the operation of competitive markets. In addition to consumer welfare and efficiency, examples of cognisable social benefits include increased innovation and growth (in the sense of output). Examples of enhancements to the operation of competitive markets include the reduction of entry barriers and the elimination of informational asymmetries.

31. As to the weights assigned to these various elements, in the event that there are trade-offs among them, the SIC notes that Article 1.3 identifies the advancement of consumer welfare, the promotion of economic efficiency, and the maintenance of competitive market structures by assuring free market participation for businesses as three objectives that the SIC is instructed to pursue with particular emphasis. The reference in Article 1.3 to “economic efficiency” as a goal does not specify what particular form of efficiency is meant. Another provision in the 2009 competition law amendments, however, casts light on that subject. Article 12 of Law 1340 amended the language of the efficiency defence applicable in merger review proceedings. The previous formulation required the merging parties to demonstrate that “significant efficiency improvements . . . will result in cost savings that cannot be achieved otherwise and that no reduction in supply to the market will result.” The amendment focuses directly on consumer welfare, requiring a demonstration that “the benefits to consumers from the transaction exceed the possible negative impact on competition and that such effects cannot be achieved by other means. In such a case, the parties shall submit a commitment providing that the benefits will be passed on to consumers.” The SIC therefore interprets Article 1.3’s reference to the advancement of “economic efficiency” to mean the advancement of efficiency gains that increase consumer welfare. Because the promotion of consumer welfare is the broadest objective specified in Article 1.3, and subsumes the other two objectives mentioned, the SIC regards consumer welfare as the overarching focus and objective of Colombia’s competition law regime.

## **2. Substantive issues: content and application of the competition law**

32. This section of the report discusses the content and application of the competition law to horizontal and vertical agreements, abuse of dominance, other unilateral acts, and mergers, and examines how unfair competition and consumer protection laws relate to the competition law regime.

33. The threshold provision in Colombia’s competition law (Article 46 of Decree 2153/92) prohibits “conduct affecting free competition” as specified in any of the laws constituting the competition regime. Those laws include provisions addressing agreements, abuse of dominance, other unilateral acts, and mergers, as well as Article 1 of the 1959 competition law (Law 155).<sup>23</sup> The 1959

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<sup>23</sup> Some competition law practitioners argue that Article 1 of Law 155 was effectively deleted by Article 2 of Law 1340/09, which amended Article 46 to define the competition law regime as comprised of those statutory provisions related to restrictive practices involving agreements, unilateral acts, abuse



provision covers both agreements and unilateral acts, prohibiting agreements "that have as their object the limitation of production, supply, distribution, or consumption" of goods and services, and "in general, all types of practices, procedures, or systems that tend to limit free competition and maintain or determine inequitable prices." The limitation of the prohibition in Article 1 to agreements that have an anticompetitive "object" was modified by Article 46 of the 1992 Decree, which provides that any conduct adversely affecting competition is "considered to have an unlawful purpose." Consequently, Article 1 covers both agreements and unilateral acts that have either an anticompetitive purpose or an anticompetitive effect.

34. The provisions that specifically address agreements, abuse of dominance, and other unilateral acts, all of which also appear in Decree 2153/92, provide lists of agreements or conduct that are deemed "contrary to free competition" (Articles 47 and 48) or, for dominant firms, "an abuse of a dominant position" (Article 50). The SIC considers that any conduct falling under Articles 47, 48, or 50 also falls under Article 1 of Law 155, but not vice versa, so that Article 1 serves as a catch-all for anti-competitive conduct not otherwise specified in the competition law regime.<sup>24</sup> The core merger provision, which appears in Law 1340/09, bars transactions that "tend to cause an undue restriction on free competition" (Art. 11).

## 2.1 *Agreements*

35. The competition law defines "agreement" as "every contract, covenant, meeting of the minds, agreed, or consciously parallel practice between two or more businesses" (Article 45.1, Decree 2153/92). A leading SIC decision interpreting the reference to "consciously parallel practice" affirms the application of a "plus factor" approach. The opinion concludes that parallel behaviour by competitors, even if coupled with proof that the firms involved are consciously adapting to their rivals' conduct, is insufficient to find an "agreement." The law's reference to "conscious" is held to require additional evidence sufficient to conclude that the parties are participants in a concerted anti-competitive agreement.<sup>25</sup>

36. An agreement is prohibited if its purpose or effect is adverse to free competition. The law makes no distinction between horizontal and vertical arrangements. Proof of either anticompetitive purpose or anticompetitive effect is sufficient, so that an agreement with an anticompetitive object may be sanctioned even if it has not been implemented.<sup>26</sup>

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of dominance, and mergers. The SIC rejects this view and considers Article 1 to constitute an operative legal prohibition.

<sup>24</sup> There have also been protestations that Article 1 is unconstitutionally vague. The SIC responds that the due process requirement for specificity is notably less rigorous for civil administrative law provisions like Article 1 than for criminal prohibitions, citing the Constitutional Court's Judgment C-713 of 2012, Reporting Judge: Mauricio González Cuervo.

<sup>25</sup> SIC Resolution 04946 of 2009: *Compañía Nacional de Chocolates S.A. and Casa Luker S.A.*

<sup>26</sup> This proposition was affirmed by the Superintendent in a November 18, 2013 bid rigging decision involving the provision of grocery supplies to government residential facilities operated by the District Institute for the Protection of Children and Youth (Instituto Distrital Para la Protección de la Niñez y la Juventud, "IDIPRON"). The Superintendent concluded in Resolution No. 66698 of November 18, 2013 (Héctor Alberto Hernández and Orlando Ramírez Gómez) that an agreement by two individuals acting as market participants to rig bids in a public procurement process was unlawful by object even though neither party won the contract. Hernández sought review of the Superintendent's decision in the Administrative Tribunal of Cundinamarca, which decided against the SIC on the grounds that Article 25 of Law 1340 could not be applied against individuals. The SIC appealed that decision to the

37. The SIC does not apply *per se* rules establishing non rebuttable presumptions that certain types of agreements are unlawful. In determining whether an agreement has an anticompetitive object, the agency considers whether it falls within the scope of Article 47 of Decree 2153, which provides that ten specified types of agreements “are considered contrary to free competition.” The SIC interprets Article 47 as creating a rebuttable presumption that the listed agreements have an anticompetitive purpose, in which case the burden shifts to the defendants to avoid a finding of illegality by demonstrating that the agreement will produce positive offsetting benefits.<sup>27</sup>

38. This methodology thus differs from that of the European Union, where a finding that an agreement has an anticompetitive object and is thus illegal under EU Article 101(1)<sup>28</sup> can occur without any opportunity for the defendants to show pro-competitive benefits. For an agreement found unlawful by object in the EU, defendants can assert offsetting benefits only in attempting to rehabilitate the agreement under EU Article 101(3). There is no counterpart provision to Article 101(3) in Colombia’s competition law.

39. The provisions in Article 47, which cover both horizontal and vertical arrangements, appear in the following box. The list is closely similar to the provisions in the EU’s Article 101, except that Article 47 expressly specifies bid rigging in item 9 and adds a separate clause in item 10 to cover agreements that obstruct access to markets by third parties.<sup>29</sup>

**Box 8. Article 47 - Agreements**

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

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

Council of State, where a decision is pending. Ramírez also sought review in the Cundinamarca Administrative Tribunal, but at a later date than Hernández. The Tribunal has not yet issued a decision in that case.

<sup>27</sup> The question of whether article 47 should be treated as a *per se* provision is also a disputed point in Colombia’s competition law community.

<sup>28</sup> Article 101(1) of the Treaty on the Functioning of the European Union.

<sup>29</sup> Item 10 was added by Article 16 of Law 590/00, which was legislation intended to promote SMEs.

40. Where the SIC determines that an agreement's purpose is unobjectionable, the analysis passes to whether the agreement will have anticompetitive effects. If the SIC concludes that it will, the burden shifts at that point, obliging the defendants to avoid a finding of illegality by demonstrating that the adverse effects will be offset by pro-competitive benefits.

41. In assessing competitive effects, the SIC considers whether the agreement falls within the scope of Article 49 of Decree 2153. Article 49 provides a non-exhaustive list of agreements that "are not contrary to free competition," listing specifically agreements that entail (1) a purpose "to co-operate in the research and development of new technologies," (2) "compliance with rules, standards and measures that have not been adopted as mandatory by a competent [government] entity, provided that they do not limit competitors' entry to the market," and (3) "procedures, methods, systems and ways of using common facilities." The SIC does not interpret Article 49 as creating a presumption of legality, but regards agreements falling within the Article's scope as likely to generate procompetitive efficiencies.

42. The SIC advises that, in examining research and development (R & D) ventures of the kind covered by Article 49.1, it is guided by the analysis described in the EU's R & D block exemption (Regulation No. 1217/2010). It has not, however, had occasion to consider a case arising under that portion of Article 49. As to standard-setting agreements referenced in Article 49.2, the SIC's analysis is guided by the relevant provisions in the EU's Guidelines on horizontal co-operation agreements (2011/C 11/01). In a 2010 case (*Ingenio del Cauca, S.A., et al*), the SIC encountered a claim that Article 49.2 protected an agreement among sugar mill enterprises setting a standard quality measure for sugar cane. The mills, when purchasing cane from growers, paid the prevailing market price per kilogram of sugar multiplied by the kilograms of sugar that the cane would yield. The "standard," established jointly by the mills, presumed that a ton of cane would yield 58 kilograms of sugar, which was about half of the actual yield. The SIC concluded that Article 49 offered no shelter for a "standard" concocted to cover a price-fixing conspiracy.

43. The only application of the common facility provision in Article 49.3 arose in a 2002 case involving a suspected price fix among airlines. The agreement at issue, developed by the International Colombian Airlines Association (ALAIICO), established a mechanism for specifying the daily exchange rate used to convert between Colombian pesos and US dollars in airline ticket sales. The SIC concluded that the agreement was lawful because it enabled the airlines to participate in the Global Distribution System (GDS), a worldwide system used by all airlines and travel agencies to execute international airline ticket sales. The SIC considered that the GDS was a common facility of the kind contemplated by Article 49.3.

44. For agreements that are found to be anticompetitive, the SIC can impose sanctions against both business entities and individuals. Natural persons acting as entrepreneurs are treated as business entities. The penalties for individuals are applied only to officers and agents of business entities that are also sanctioned. The available sanctions include monetary fines and orders requiring the modification or termination of conduct violating the law. For business entities, the maximum fine per offense charged is the greater of (i) 100,000 current legal minimum monthly wages (CLMMW), presently equal to about USD 27.1million,<sup>30</sup> or (ii) 150% of the profits derived from the anticompetitive conduct (Article 25 of Law 1340). Multiple sanctions can be assessed in the same case

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<sup>30</sup> The CLMMW is adjusted annually and the version applied is that in effect at the time the sanction is imposed. Throughout this report, the May 14, 2015, currency exchange rate of 2377.87 Colombian pesos (COP) to 1 US dollar (USD) has been employed. The 2015 CLMMW is COP 644,350, or USD 270, so that the 100,000 CLMMW maximum fine is equal to 64.435 billion pesos or about USD 27.1 million.

if there are multiple independent charges. An independent charge requires a separate and distinct form of unlawful conduct. Only one sanction can be imposed on a particular form of conduct, no matter how many legal prohibitions are infringed.

45. For individuals, the maximum fine per offense charged is 2,000 CLMMW, or the equivalent of about USD 541,955 (Article 26 of Law 1340). These maximum fine amounts for businesses and their officers prevail for all purposes and for all violations of the competition law in Colombia, and thus would apply, for example, to a defendant who violates a cease and desist order entered in a previous SIC case.<sup>31</sup>

46. There are two mechanisms by which a party vulnerable to SIC sanctions can avoid or ameliorate monetary penalties. First, a party may settle a case without incurring penalties, and without admitting a violation, by offering to the SIC satisfactory “guarantees.” If the guarantees are accepted, they become binding commitments, and a failure to comply with them can be sanctioned as if a SIC order has been violated (Article 52 of Decree 2153). Second, the SIC offers a leniency programme, under which a qualifying party who participates in conduct violating the competition law can obtain full or partial waiver of penalties by reporting the conduct and co-operating in the SIC’s investigation (Article 14 of Law 1340).<sup>32</sup>

#### *2.1.1 Horizontal restrictive arrangements*

47. Horizontal agreements are addressed, as described above, by first examining whether the agreement falls within the ambit of Article 47 (in which case, a rebuttable presumption of illegality attaches), and proceeding from that point to a determination of whether the agreement will have anticompetitive effects that are not offset by pro-competitive benefits. In February 2012, responding to numerous requests from competition law practitioners, the SIC issued for comment draft guidelines dealing with the application of the competition law to trade associations. The guidelines, which identified and discussed varieties of association behaviour that risk violation of the competition law, encountered criticism that they lacked sufficient specificity.

48. In March 2015, after publishing and discussing several draft revisions with the competition community, the SIC issued new Trade Association Guidelines, outlining the SIC’s approach in applying the competition laws to trade associations. The revised Guidelines discuss both the pro-competitive and potentially anti-competitive activities of trade associations, emphasising particularly the risk that information exchange within the association may lead to collusion between members, especially if certain structural features of the market are present, or if certain types of information are exchanged. Other areas addressed by the Guidelines include the risk of unlawful co-ordination associated with association recommendations relating to prices or other commercial terms, and of unlawful exclusion associated with discrimination in access to association membership.

49. There have also been many calls for guidelines concerning the treatment of horizontal collaboration agreements (joint ventures). Practitioners have two concerns on this front. First, they claim uncertainty about when joint ventures will be considered mergers and hence subject to the prior notification requirements under the merger law. Second, they note that ventures treated as mergers receive a binding SIC determination respecting their legality, and request a method by which non-

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<sup>31</sup> The fine maximums were increased by Law 1340 of 2009. The previous maximums were 2000 CLMMW for business entities and 300 CLMMW for individuals (equivalent respectively to USD 541,944 and USD 81,299 in today’s currency).

<sup>32</sup> The leniency program is discussed in further detail later in this report.

merger ventures can be submitted to the SIC in advance for a similarly binding determination of legality. The first issue will be examined in the portion of this report dealing with mergers. The second issue has been recently addressed by the SIC, as follows.

50. In February 2012, at the same time that the SIC released the draft trade association guidelines, it also issued draft guidelines on horizontal collaboration agreements. The Guidelines discussed the competition issues typically associated with joint ventures and included a description of how the SIC analyses joint conduct to determine its validity under the competition law. Like the trade association Guidelines, the horizontal collaboration Guidelines were criticised for lack of specificity.

51. In March 2015, the SIC published new Guidelines on collaboration agreements. According to these Guidelines, SIC's starting point when analysing a collaboration agreement is to determine if the agreement's provisions are likely to generate anticompetitive effects or if, on the contrary, their effects in the market will likely be neutral or positive. The SIC will not, however, undertake to analyse an agreement's expected pro-competitive effects unless the agreement raises a threshold risk of anticompetitive effects. Under the Guidelines, a joint venture in which the venture participants represent less than 20% of the relevant market is not expected to produce undue restrictions on competition.

52. Once an agreement's expected effects are determined, the evaluative question under the Guidelines is whether the agreement, in the aggregate, unduly restricts competition in the market. Where the collaboration agreement has already been implemented, the SIC's analysis of its anticompetitive and pro-competitive effects will take account not only of potential risks but also of the actual effects that the agreement has generated. The Guidelines also address the difference between a collaboration agreement and a merger, in accordance with the approach (similar to that employed by the European Union) previously developed by the SIC in case law and discussed later in the mergers section of this report.

53. The Guidelines are based in large part on the SIC's July 2013 opinion in the Almacenes Éxito case.<sup>33</sup> The SIC's analysis in that case states that joint ventures are not expected to produce undue restrictions on competition where the venture participants represent less than 20% of the relevant market.<sup>34</sup> For agreements falling outside that safe harbour, legality depends upon whether the SIC can conclude that: (i) the venture will produce efficiencies, whether in the production, acquisition, distribution, or commercialisation of the relevant product or service, (ii) the venture's competitive restrictions are indispensable to generating the expected efficiencies, and (iii) the efficiencies generated will produce benefits for consumers sufficient to offset the adverse effects of the competitive restrictions.

54. The SIC had previously stated that it would consider proposing a statutory amendment authorising the agency to issue binding advisory opinions on the legality of proposed joint ventures. The SIC's ultimate decision was not to include such authority in its proposed legislation, on the

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<sup>33</sup> SIC Resolution 42296 of 2013.

<sup>34</sup> In a case opinion issued earlier in 2013 (Roma-Axa, Resolution 4851), the SIC announced that the joint venture safe harbour applied where the venture participants held less than 15% of the relevant market. The subsequent increase to 20% was motivated by the fact that Colombia's merger law provides a safe harbour for transactions resulting in a post-merger entity that holds less than a 20% market share. The SIC's legislative proposal eliminates the 20% market share safe harbour, converting it to a category of transactions for which a short-form notification may be filed. Modification of the merger review system as contemplated in the legislative proposal is not expected to have any effect on the 20% market share safe harbour in the Horizontal Collaboration Guidelines.

grounds that issuing binding opinions would impose a significant administrative burden on the agency and divert resources from more important law enforcement programmes.

55. From 2008 to 2014, the SIC imposed sanctions totalling USD 24.47 million in 22 horizontal agreement cases, all of which involved one or more charges under Article 47 of Law 2153. The bulk of the cases, 18, were prosecutions of hard core cartels.<sup>35</sup> The cases entailed collusion by sellers in such markets as motor vehicle maintenance, retail gasoline sales, and health care services, and by buyers in the markets for sugar cane and cocoa beans. Eight of the 13 cartel cases involved bid rigging in public procurement, an area of law enforcement in which the SIC has been increasingly active.<sup>36</sup> Those cases involved procurement for road and public building construction, food supplies for public institutions, and a system for reporting students' grades in municipal schools. Two of the bid rigging cases, brought against the Nule business group, are described further below.

56. Significant horizontal cases during the seven year period through 2014 include a 2011 proceeding in which the SIC sanctioned 14 health care management companies and their trade association (ACEMI) for an anticompetitive agreement that affected subsidy payments by the government for health care services. The government pays a per capita premium to management companies to deliver basic health care services for low income people and also makes supplementary payments on a spot basis for services not covered by the basic plan. The defendants colluded on two fronts. First, they agreed to treat certain medical instruments as falling outside the scope of the mandatory plan, and to submit invoices to the government claiming supplementary payments for the use of such instruments. Second, they agreed to submit misleading data to the government office responsible for determining the per capita premium, in order to induce a payment increase. The SIC imposed fines totalling COP 17 billion (USD 7.14 million) on ACEMI, the companies, and 15 of their officers.

57. In 2010, the SIC sanctioned eight sugar mills (Ingenio del Cauca, S.A., et al) for price fixing and market allocation. The SIC found that, besides fabricating a quality standard to cover a price fixing conspiracy, the firms had also agreed to allocate the cane growers from which each sugar mill could purchase. The SIC imposed the maximum sanction per firm that could be imposed at the time, then equivalent to USD 600,000. The Administrative Tribunal of Cundinamarca recently overturned the sanctions on statute of limitations grounds, a decision that the SIC has appealed to the Council of State, where a decision is pending.

58. In September 2013, the SIC imposed a monetary fine of more than USD 12 million on enterprises and individuals belonging to the Nule Group, a business group that rigged bids to win public contracts for supplying food to community institutions housing persons under the state's care, and for providing food supplements for children. In one of the procurement proceedings, different enterprises under the Nule Group's control filed ostensibly independent bids strategically designed to affect the median bid amount, which was used by the contracting authorities to determine the winning bidder. The Group was sanctioned for infringing both Article 47.9 of Decree 1992 (bid rigging) and Article 1 of Law 155 (general clause). This was one of the first cases in which the SIC found that certain

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<sup>35</sup> The break-down of sanctions between the 18 hard core cases and the 4 non-hard core cases was USD 26.09 million for the former and USD 29.171 for the latter. Sanctions in the eight bid rigging cases, a sub-set of the hard core cases, totalled USD 3.4 million.

<sup>36</sup> The SIC takes the position that, if an enterprise bribes a procurement officer to award a contract to a particular firm, both parties have engaged in anticompetitive conduct falling within Article 1 of Law 155 of 1959. Both parties are therefore subject to sanctions by the SIC under the competition law. No case of this kind has been prosecuted.

officers of the defendant enterprises had also acted as independent market agents subject to sanction in accordance with the higher limits of Article 25.<sup>37</sup>

59. Only two horizontal agreement cases have been settled with guarantees over the past seven years, the most important of which was a case involving bank card interchange fees. The SIC charged 15 banks, two payment networks, and Asobancaria, the principal banking trade association, with fixing the fee charged by banks to commercial establishments for processing credit and debit card payments made by consumers. The 2012 settlement agreement, under which interchange fees are established through a voting mechanism, is described in the portion of this report discussing the banking sector. The other case involved Asociación Colombiana De Editoras De Música (Acodem), an association of music publishers that organised its members to fix licensing fees for music downloaded to mobile phones. The settlement, which was accepted in 2011, obliged the association's members to set prices independently and terminated the association's activities in collecting and disseminating license fee information. The SIC has not settled any cases by accepting guarantees since 2012.

60. Section IA 1(a) of the Council's 1998 Recommendation concerning Effective Action against Hard Core Cartels [C(98)35] urges Members to ensure that their competition laws provide sanctions effective to remedy and deter cartel operations.<sup>38</sup> The maximum fines available for imposition by the SIC were substantially increased in 2009 and an optional provision was added permitting fines equivalent to 150% of the profits derived from the anticompetitive conduct. Further, with respect to bid rigging offenses, the 2011 amendment to Colombia's Penal Code made bid rigging a criminal offense punishable by imprisonment (up to 12 years), fines (up to USD 524,000), and disqualification (up to 8 years) from future procurement proceedings. Coupled with the establishment of a leniency programme, the SIC considers that the available penalties ordinarily provide effective remediation and deterrence. For some cases, however, the SIC observes that the option permitting fines of up to 150% of the illicit profits is unavailable as a practical matter, because the profits cannot effectively be calculated. In such circumstances, where very large firms are involved, the maximum sanction of 27.1 million may not have sufficient deterrent effect.

61. In August 2015, Colombia's President submitted to Congress a legislative proposal developed initially by the SIC (hereafter, the "SIC's legislative proposal") that would provide a broader range of options for use in calculating maximum fines and permit the SIC to elect whichever option yields the highest maximum. The proposal authorises the SIC to assess fines of (i) up to the existing maxima of 100,000 current legal minimum monthly wages (about USD 27.1 million) for commercial enterprises, and 2,000 current legal minimum monthly wages (about USD 542,000) for corporate officers and agents; (ii) up to a percentage maximum (doubled under the proposal from 150% at present to 300%) of the illicit profits derived from the unlawful conduct; (iii) up to 10% of either the total turnover or the net worth of a company; (iv) up to 30% of company sales; or (v) in cases involving bid rigging in public procurement processes, up to 30% of the value of the contract affected.<sup>39</sup>

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<sup>37</sup> The parties have sought review of the SIC's decisions in the Administrative Tribunal of Cundinamarca, where the cases are presently pending. The Tribunal denied petitions from the parties to suspend the agency's decisions pending appeal.

<sup>38</sup> Discussions of Sections IA 1(b) and IB of the 1998 Recommendation, dealing with enforcement powers and co-operation with other competition authorities in cartel investigations respectively, are deferred to later portions of this report.

<sup>39</sup> The proposal also clarifies that the individuals can be treated as "market agents" subject to the higher fine limits in Article 25, and that the fines available under Article 26, which applies in the usual case to corporate officers, can also apply to enterprises (such as law or accounting firms) that assist or facilitate unlawful conduct by another enterprise.

The proposal includes an additional provision specifying that, in imposing sanctions for bid rigging in a government procurement proceeding, the SIC may bar the sanctioned bidder, whether a company or an individual, from contracting with any government agency for a period ranging from 2 months up to five years, the period to be determined based on the particular circumstances of the case and the affected market.

62. There are also elements in two older OECD recommendations that relate to enforcement policy against horizontal conduct. The Recommendation concerning Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements [C(89)32] urges that Members take into account the conclusions of the Competition Committee's 1989 Report on Competition Policy and Intellectual Property Rights [CLP(89)3] when applying competition analysis to patent and know-how licensing agreements. The 1989 Report notes that enforcement attention should focus on the licensing arrangements having the most serious anti-competitive effects, including particularly agreements between actual or potential competitors that entail more than a simple transfer of technology and thus can effectively promote cartelisation. The Recommendation concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences [C(78)40] makes essentially the same point (in subsection I(b)(i)) with respect to trademark licensing provisions that allocate exclusive territories among actual or potential competitors. The SIC states that its enforcement approach to licensing provisions is fully consistent with these recommendations.

#### 2.1.2 *Vertical restrictive arrangements*

63. The SIC's December 2014 decision in the CASYP case,<sup>40</sup> provides an updated articulation of the agency's analytical approach to vertical agreements. As initiated, the case charged an anti-competitive vertical agreement between CASYP, an airport operator, and Chevron, an airplane fuel distributor. The Superintendent's opinion, however, found that the case involved unlawful unilateral conduct under the "catch-all" general clause in Article 1 of Law 155. Taking the opportunity to distinguish the examination applied by the SIC to potentially pro-competitive vertical agreements from that applied to the coercive restraint at issue in the case, the Superintendent noted that the threshold inquiry for vertical agreements focuses on Article 47. Agreements falling under that Article, which refers to vertical arrangements that involve price fixing, price discrimination among downstream distributors, and certain tying requirements, are subject to a rebuttable presumption of illegality, and will be found unlawful unless the defendant demonstrates offsetting competitive benefits. If Article 47 does not apply, the analysis passes to whether the agreement will in fact have anticompetitive effects. If the SIC concludes that it will, the burden again shifts at that point, obliging the defendant to avoid a finding of illegality by demonstrating that the adverse effects will be outweighed by pro-competitive benefits. The analysis recognises that any form of vertical restraint, including those listed in Article 47, has the potential to facilitate inter-brand competition, and that therefore the adverse effects of a vertical agreement must always be balanced against its pro-competitive benefits.<sup>41</sup>

64. The law relating to vertical restraints is sparse, as there have been only two such cases brought since 2003.<sup>42</sup> In that year, the SIC sanctioned three road transport companies and a glass

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<sup>40</sup> Resolution No. 76724 of 2014 (December 16, 2014). ("CASYP" is the Spanish acronym for San Andres and Providencia Concession Airport, S.A.)

<sup>41</sup> This was not always the case, as the SIC traditionally treated vertical price-fixing agreements as anti-competitive by object and hence unlawful. See SIC Legal Opinions 99025015 of June 15 1999; 99050593 of September 27 1999; 01082559 of October 23 2001; and Resolution 21821 of 2004.

<sup>42</sup> Despite the paucity of cases, at least one practitioner recommends that the SIC issue enforcement guidelines for vertical agreements.



company (Cristalería Peldar, S.A.), together with their officers, for fixing the rates at which plain glass would be transported within the country. The agreement resulted in a 6.5% increase in the price for each route. The SIC imposed fines totalling approximately USD 40,500 (in the era before fines were increased by Law 1340 of 2009). The current SIC administration questions the vertical aspect of the case, since it is unclear how Cristalería would benefit from an increase in the cost of shipping its products. The scheme may actually have been targeted to Cristalería's competitors, with Cristalería sharing in the cartel's profits.

65. The second vertical case, resolved more recently in 2011, involved two interlocking vertical arrangements designed to exclude competitors by denying them a critical input. The inputs were television audience share statistics and data showing which advertisers ran commercials on what channels at what times. Both data sets were produced by IBOPE, the dominant firm in its field. The audience share statistics were used by television networks to price their advertising time for sale, and the broadcasting data for commercials were used by advertising agencies to strategize advertising time purchases for their clients. Colombia's two dominant privately-owned television networks -- RCN and CARACOL -- obtained exclusive rights to all of IBOPE's statistics, and then dramatically increased the price to their international broadcasting company competitors for access to the audience share data. RCN and CARACOL also partnered with UCEP, an association of Colombian advertising agencies, giving UCEP exclusive access to the commercial broadcasting data. This enabled UCEP to increase prices charged to its advertising agency rivals for data access, thus reducing competition from them. The SIC fined the four participating enterprises and seven of their officers a total of COP 3.95 billion (USD 1.7 million).

66. The two OECD recommendations dealing with intellectual property licensing, mentioned above, contain elements relating to enforcement against vertical conduct. The Competition Committee's 1989 Intellectual Property Report [CLP(89)3], associated with the Recommendation concerning Patent and Know-How Licensing Agreements, notes that vertical patent and know-how licensing agreements are problematic when they are employed as cartel implementation devices, but otherwise pose competition issues only in relatively rare circumstances. The Report adds that, even where such circumstances exist, vertical licensing agreements should be evaluated with maximum recognition of their pro-competitive benefits. The SIC states that this recommendation is fully consistent with the agency's enforcement approach to licensing provisions.

67. The most significant element relating to vertical agreements in the OECD Recommendation concerning Trademarks and Trademark Licences is the provision (in subsection I(a)) urging Members to consider eliminating restrictions on parallel (grey market) imports, where the purpose of such restrictions is to maintain artificially high prices or is otherwise anticompetitive. The SIC notes that Colombia does not bar grey markets imports in any circumstances.<sup>43</sup>

## **2.2 Abuse of Dominance**

68. The competition law provisions applicable to dominant firms include Article 50 of the 1992 Decree (2153/92) and the portion of Article 1 in 1959 Law (Law 155) that prohibits "in general, all types of practices, procedures, or systems tending to limit open competition to maintain or determine

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<sup>43</sup> The remaining elements of the Trademark Recommendation (subsections I(b)(ii) to (iv)) relate to the imposition on licensees of territorial restrictions, tying requirements, and resale price maintenance, and articulate outdated policies that have effectively been superseded by the more recent Patent and Know-how Recommendation. Colombia accepts these elements as modified by the Patent Recommendation.

inequitable prices.” Article 50, like Article 47 for agreements, adopts a “list” approach, in this case similar to that in the EU’s Article 102<sup>44</sup>, as shown in the box below.<sup>45</sup>

**Box 9. Article 50 - Abuse of Dominance**

Whenever a dominant position exists, the following conduct is an abuse of that position:

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 compared to 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.

69. Although the list is based on that in the EU’s Article 102, it is articulated differently. Where the EU’s provision refers to “unfair prices,” for example, Article 50 focuses on “predatory pricing” and provides a definition of that offence as well. Nonetheless, the SIC states that, as a practical matter, the EU and Colombian provisions are co-extensive.

70. Identifying an abuse of dominance necessarily requires a threshold determination of dominance, which is defined in Article 45.5 of Decree 2153 as “the capacity to determine, directly or indirectly, the conditions of a market.” The SIC explains that an enterprise is dominant when it can, without regard to the actions of its competitors, determine prices, output, quality, and other terms of trade. The law sets no market share threshold or other test for dominance, and the SIC must make a finding in each case based on an analysis that considers the standard array of factors relevant to such a determination, including market concentration, entry barriers, network effects, and the firm’s financial capacity.

71. Article 50, unlike its EU counterpart, does not refer expressly to joint dominance. On the other hand, neither Article 50 nor the definition of dominance in Article 45.5 employs language that precludes applicability of those provisions to joint dominance. The SIC observes that, even if Article 50 were construed to bar a joint dominance charge, the general prohibition in Article 1 of Law 155 of 1959 could be employed as a basis for prosecution. Thus far, however, the SIC has never pursued a joint dominance case.

<sup>44</sup> Article 102 of the Treaty on the Functioning of the European Union

<sup>45</sup> As with Item 10 in Article 47, Item 6 in Article 50 was added by Article 16 of Law 590/00 as part of legislation intended to promote SMEs.

72. Where the fact of dominance is established, the SIC's analysis proceeds in the usual way, with the provisions in Article 50 treated as creating a rebuttable presumption of illegality for the conduct they cover. The ultimate question, as for any other possible violation of the competition law, is whether the conduct has anticompetitive effects and, if so, whether the defendant has demonstrated that those effects will be offset by pro-competitive benefits.<sup>46</sup> The applicable sanctions for violations, including fines and conduct orders, are the same as those for unlawful agreements. The SIC notes that its authority to issue remedial conduct orders is limited to requiring modification or termination of the conduct that infringes the competition law (Art. 1.6, Decree 4886), and thus could not be employed to require asset divestiture in an abuse of dominance case. Nor does that authority empower the SIC to exercise ongoing regulatory authority over a defendant, such as by setting rates for network access.

73. From 2008 to 2014, the SIC imposed sanctions in five abuse of dominance cases, all of them involving one or more charges under Article 50.<sup>47</sup> In 2012, the SIC sanctioned Empresa de Acueducto y Alcantarillado de Bogotá (EAAB), a SOE and the dominant water supply utility in the Bogotá area, for dramatically increasing the price it charged for water delivered to two water supply companies serving contiguous areas. The objective of the price increase was to drive out the smaller companies and enable EAAB to enlarge its service area. The charges were 150% higher than the charges for other companies in contiguous areas that were not targeted for expansion. The SIC imposed a sanction of USD 150,000.

74. Also in 2012, the SIC imposed a USD 160,000 fine on the Federación Nacional De Ganaderos (Fedegan), the leading trade association for cattlemen in Colombia, for abuse of dominant position in the purchase of foot-and-mouth disease vaccine. Under government regulations designed to prevent spreading the disease, only cattlemen committees were permitted to purchase and oversee use of the vaccine. Because all of the principal committees were Fedegan members, Fedegan was essentially the sole purchaser of the vaccine. Three companies, two domestic and one foreign, sold the vaccine in Colombia, and each complied with government requirements for vaccine content. Fedegan, however, imposed an unjustified additional technical requirement that only the two domestic companies met and that foreclosed the foreign competitor. The SIC concluded that Fedegan's conduct violated the general prohibition in Article 1 of law 155 as well as sections 2 and 6 of Article 50 of Decree 2153, relating to discrimination and market access obstruction. Press accounts of the case suggest that Fedegan held an ownership interest in one of the domestic vaccine companies,<sup>48</sup> which may account for what otherwise appears to be an irrational act by Fedegan to reduce competition among its input suppliers.

75. The third abuse of dominance case resolved with sanctions during the five year period was brought against Ossa & Asociados, a firm that had exclusive rights to market tickets for soccer games in the qualifying rounds leading to the 2010 World Cup in South Africa. The SIC imposed a USD 106,000 fine on Ossa for violating Article 50.3 (tying) by requiring that purchasers of Colombia's game versus Brazil also purchase tickets to Colombia's other two games against Venezuela and Argentina. The current SIC administration is doubtful about the wisdom of pursuing this case, since Ossa dominated both the tying and the tied markets and could not extract any additional profit by imposing the tie.

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<sup>46</sup> As was the case with horizontal and vertical agreements, there are calls for the SIC to issue abuse of dominance enforcement guidelines.

<sup>47</sup> The most recent predatory pricing case by the SIC was resolved in 2005 with the imposition of maximum sanctions on a dominant chewing gum company (Chicles Adams) that was shown to have priced below average variable cost to exclude a new entrant.

<sup>48</sup> "Los gremios trampositos" ("Cheating Guilds"), La Silla Vacía, Mar. 25, 2013, available at <http://www.lasillavacia.com/historia/los-gremios-trampositos-42716>.

76. In a September 2013 action, the SIC fined Claro, Colombia's dominant mobile telephone service company, a record USD 39 million for two separate competition law violations relating to phone number portability. On the first count, an abuse of dominance violation under Article 50.6 of Decree 2153 (obstructing market access), Claro incurred a USD 30 million fine for (i) selling cell phones with locked frequency bands that prevented use of the phones on rival networks and (ii) refusing customers' requests to unlock their phones. Both actions violated rules of the Colombia Telecommunications Commission ("CRC") and interfered with phone number portability for customers who wished to migrate to a different network. On the second count, a charge based on the catch-all provision in Article 1 of Law 155 of 1959, Claro was fined USD 17 million for facilitating a practice by its dealers whereby the dealers purchased SIM cards from rival mobile phone networks and then immediately switched the associated phone numbers to Claro's network.<sup>49</sup> The resulting statistics, reported to and published by the CRC as part of a programme to provide consumers with more information about mobile phone networks, made it appear as if thousands of customers were dropping their existing networks and migrating to Claro. When the data were disseminated, Claro experienced an immediate and dramatic increase in actual customer migrations to its network.

77. Besides the record fine imposed, the Claro case is also notable because it is the first case in which the SIC imposed a sanction based solely on a charge under Article 1 of Law 155. Article 1 prohibits agreements "that have as their object the limitation of production, supply, distribution, or consumption" of goods and services, and "in general, all types of practices, procedures, or systems that tend to limit free competition and maintain or determine inequitable prices." The charge in Claro rested on the reference to "practices . . . that tend to limit free competition." Claro argued that the charge required not only a practice that limited competition, but also one that operated to "maintain or determine inequitable prices." The SIC's opinion concluded that Article 1 entails three separate and independent bases for a violation: (i) an agreement that limits output, or any conduct (joint or unilateral) that either (ii) tends to limit free competition, or (iii) tends to maintain or determine inequitable prices. Claro has appealed the SIC's decision to the Administrative Tribunal of Cundinamarca.

78. The fifth abuse of dominance case in which sanctions were imposed, involving monopolisation of the waste management market in the city of Bogotá, is described in the section of this report discussing the public utilities sector. An additional matter that did not involve a charge under Article 50, but that will be treated here because of its unilateral conduct feature, is the CAYPS case, discussed previously in the vertical agreements portion of the report (section 2.1.2). The sanctions imposed in CAYPS, like those in the second count of the Claro case, were based on a violation of the "catch-all" general provision in Article 1 of Law 155. The SIC concluded that the fees charged by the airport operator to an airplane fuel distributor for the exclusive right to supply the airlines operating at the airport constituted unlawful unilateral conduct that tended to maintain or determine inequitable prices under Article 1. Because the operator failed to demonstrate any pro-competitive effects to justify the conduct, the SIC imposed fines totalling USD 2.5 million on the firm and its chief executive officer.

79. Four additional dominance cases were settled during the past seven years with the acceptance of guarantees. A 2010 case involving Colombia Telecomunicaciones, E.S.P. (Coltel), the sole administrator of access to the terminal facility of a submarine telecommunications cable, is

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<sup>49</sup> Claro offered a bounty of about USD 2 for each customer of a rival network that a retailer switched to Claro. Retailers could purchase SIM cards from rival networks for well under USD 1 each, and then switch the phantom customers represented by those cards to Claro. No phone service time was ever purchased for the cards so switched, but the customer "migrations" to Claro counted towards the statistical data published by the CRC.

described in the portion of this report dealing with the telecommunications sector. In one of the other three cases, Cabot Colombiana, S.A., Colombia's monopoly supplier of carbon black, agreed to cease requiring exclusive contracts from distributors. The contracts, which had no efficiency justification, were designed to foreclose distribution of imported carbon black.

### 2.3 *Other Unilateral Acts*

80. Colombia's competition law specifies certain acts that are unlawful if undertaken by a single firm, without regard to whether that firm holds a dominant position. Article 48 of Decree 2153/92 declares that the following acts are deemed contrary to free competition:

- violating the rules on advertising contained in the Consumer Protection Law;
- influencing a firm to increase the prices of its goods or services or to desist from decreasing its prices; and
- refusing to sell or provide services to another firm or otherwise discriminating against it for purposes of retaliation against its pricing policies.

81. Conduct falling within the provisions of Article 48 is rebuttably presumed to be unlawful, but again, the ultimate question is whether the conduct has anticompetitive effects and, if so, whether the defendant has demonstrated that those effects will be offset by pro-competitive benefits. Deceptive advertising that harms consumers and violates the consumer protection law (Law 1480 of 2011) is actionable under Article 48 only if there is an adverse effect on market competition that warrants prosecution. A predicate finding by the SIC that the consumer protection law has been infringed is not required for prosecution. The provision prohibiting actions to influence another's prices covers every form of influence, from hints to threats, and does not require that the influence be effective. That provision is therefore available to prosecute unsuccessful invitations to collude. Sanctions for violation of Article 48 are the same as for other anticompetitive acts.

82. From 2008 to 2014, the SIC imposed sanctions in five Article 48 cases, all involving trade associations that violated the "improper influence" clause by encouraging their members to raise prices. A 2010 case against Procaña, the Association of Sugar Cane Producers and Suppliers, resulted in the imposition of fines totalling COP 13 million (USD 5,400), while a 2011 case against Fendipetroleo Nacional, the National Federation of Petroleum Derivatives Distributors, led to COP 1.1 billion (USD 463,000) in sanctions. The Fendipetroleo case, which is described in further detail in the portion of this report dealing with the hydrocarbons sector, also involved association members as defendants charged with engaging in an anticompetitive agreement under Article 47 of Decree 2153.<sup>50</sup> With respect to the Procaña case, the SIC notes that the fine imposed in that case was minimal for several reasons: the conduct occurred before fines were increased in 2009, the conduct had no effect in the market (partly because the participating growers represented only a 20% market share), and the growers were responding to collusion among sugar mills that suppressed the purchase price for sugar cane (the same collusive activity that the SIC attacked in the Ingenio del Cauca case described previously).

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<sup>50</sup> Because Fendipetroleo entailed Article 47 charges against association members in addition to the Article 48.1 charge, the SIC classifies it as a hard core cartel case. The other four Article 48 cases, in contrast, did not entail any charges against association members under Article 47, and are classified as non-hard core cartel cases.

83. In April 2015, the SIC imposed sanctions totalling COP 34 billion (USD 14.2 million) against Organización Roa Florhuila S.A. (a rice milling enterprise) and four of its officers for contravening Article 48.2 by influencing prices charged by other firms. The Superintendent found that the firms had granted discounts on the prices they charged to their retailers, but prohibited those discounts from being passed on to consumers and threatened retailers who violated the prohibition with a 90-day supply suspension.<sup>51</sup>

84. The SIC advises that it has rarely charged a defendant with violating the consumer protection law provision in Article 48 and that there are no cases since at least 2000 in which sanctions were imposed based on that charge. The agency notes the potential for prosecutorial complications in bringing such a case, including the necessity for proving a violation of both the competition and consumer protection laws. The SIC considers that Article 1 of Law 155 is a preferable basis for prosecuting anticompetitive conduct that entails consumer protection violations. For these reasons, the SIC's legislative proposal includes a provision repealing the consumer protection provision in Article 48 of Decree 2153/92.

## **2.4 Mergers**

### **2.4.1 Merger law applicability**

85. Mergers in Colombia are subject to a prior notification system (Article 9 of Law 1340/09<sup>52</sup>) and a determination of legality based on whether the transaction “tends to cause an undue restriction of free competition” (Article 11 of Law 1340/09). No provision in the competition law defines the term “merger,” and the SIC has devoted sustained efforts to clarifying the concept in guidelines and case opinions. The SIC's Merger Guidelines<sup>53</sup> define a merger as any mechanism employed to acquire “control” over one or several existing enterprises or to create a new enterprise for the purpose of carrying out joint activities.<sup>54</sup>

86. A definition of “control” appears in Article 45.4 of Decree 2153/92, providing that control is “the ability to influence directly or indirectly (i) the policies of the enterprise, (ii) the creation or termination of the enterprise, (iii) the alteration of the activities to which the enterprise is directed, or (iv) the disposition of the assets or rights essential for carrying out the activities of the enterprise.” This definition, however, is not expressly ascribed to or referenced in the competition law's merger provisions, and the SIC considers that it is insufficiently specific in any event. The SIC has therefore elaborated the concept of control in the Guidelines<sup>55</sup>, by specifying two relevant forms of control -- “corporate” control and “competitive” control.

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<sup>51</sup> In its defence to the SIC's charge, Roa Florhuila did not attempt to offer a pro-competitive justification for its conduct, focusing instead on alleged due process deficiencies in the SIC's investigation. The absence of any apparent economic rationale for the vertical price restraint raises the possibility that it reflects an enforcement strategy supporting price collusion among rice mills.

<sup>52</sup> Amending Article 4 of Act 155 of 1959.

<sup>53</sup> The SIC Merger Guidelines presently in effect were issued in October 2013, but revised Guidelines are presently undergoing review in the Superintendent's office and are expected to issue in the near future. For that reason, the citations to the Guidelines that appear in this Report are to the pending revised version.

<sup>54</sup> Guidelines Paragraph 23.

<sup>55</sup> Guidelines Paragraphs 35-69.

87. With respect to “corporate” control, the SIC evaluates stock acquisitions or the equivalent in light of Article 261 of the Commercial Code (Law 410 of 1971). Under that provision, there is an acquisition of control whenever, as a result of the transaction, one of the parties will acquire, either directly or indirectly (i) more than 50% of the capital (shares) of the target company, (ii) a majority of votes in the company’s board of directors, (iii) shareholder votes sufficient to elect a majority of the board, or (iv) shareholder votes that, as a result of a shareholders’ agreement, are sufficient to exert a dominant influence over the decisions of the company’s board .

88. These factors, focusing exclusively on the acquisition of shares, do not constitute an exhaustive exposition of qualifying transactions for purposes of “corporate” control. The Guidelines (paragraph 19) affirm that control can also arise from a “purchase of assets, merger, an enterprise spin-off, creation of an enterprise, alliances between enterprises, franchise contract, etc.” Under SIC case law, an acquisition of assets constitutes a merger when the acquiring company is thereby enabled to exploit a line of business that, absent the transaction, would not be within the acquirer’s capacity.<sup>56</sup> Such circumstances arise only where the acquirer obtains sufficient assets to participate in the market as an independent actor. Likewise, a transaction that involves only the transfer of intangible assets (such as when trademarks or patents are involved) is reportable if such assets are critical to compete in the line of business.<sup>57</sup> An acquisition of control can also occur in other situations, such as where a corporation is dissolved without being liquidated and then absorbed by another corporation; or where a contract for fabrication or distribution effectively transfers to one enterprise control of another firm’s line of business.<sup>58</sup> With respect to interlocking directorates, the SIC observes that there is no need to address them under the merger regime, because a separate law bars them outright.<sup>59</sup>

89. “Competitive” control, which can be acquired with only a minority share of votes, arises whenever one company has the ability to materially influence the way in which the target party competes in the market. This can occur, for example, when the acquisition of minority shareholdings grants special voting rights or veto rights in decisions that are critical to the way the enterprise develops in the market, such as decisions about how much to invest in research, or what geographical markets should be targets for expansion or withdrawal.<sup>60</sup> The SIC considers that while “competitive” control always arises when a party acquires “corporate” control, the reverse is not always true. The degree of material influence over the target entity is critical in determining whether a minority shareholder has obtained control, and must necessarily be evaluated on a case-by-case basis.

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<sup>56</sup> SIC Resolution 30238 of 2010, Colmena – Sideandes, p. 16.

<sup>57</sup> SIC Contribution to OECD Competition Committee Roundtable on the “Definition of Transaction for the Purpose of Merger Control Review,” (June 18, 2013), p. 3.

<sup>58</sup> *Id.*, p. 2.

<sup>59</sup> Article 5 of Law 155 of 1959 prohibits competing firms from having common directors. The SIC enforces this law but reports that there have been no cases in recent years.

<sup>60</sup> The concept of “competitive control” was developed by the SIC in deciding the Isagen case (Resolution 5545 of February 6, 2014). In that case, the Energy Company of Bogotá (EEB for its acronym in Spanish) sought to acquire Isagen S.A. ESP. In evaluating the merger, the SIC considered to what extent EEB already competed in Isagen’s markets, concluding that EEB did so not only directly, but also indirectly through exercising “competitive control” over two other energy companies, Codensa and Emgesa, that competed with Isagen. EEB held shares in those two companies, enabling it to elect members of their Boards of Directors, and also possessed special voting or veto rights that vested it with significant influence over strategic commercial decisions made at those companies’ shareholder meetings. Judicial review of the Superintendent’s decision in that case with respect to “competitive control” is pending before the Administrative Tribunal.

90. The SIC has addressed the question of when a joint venture constitutes a merger. The opinion in the 2013 Roma-Axa case<sup>61</sup> concludes that a joint venture is a reportable merger if (1) the operation is designed to be permanent and results in the elimination of a competitor, (2) the operation does not consist simply in the transference or joint performance of a particular function by the participating enterprises, but in the unification of competitive activities in a line of business or a market, and (3) the business resulting from the agreement conducts full functions in the market.

91. The notification requirements of Article 9 apply to acquisitions by “enterprises,” which Colombia’s commercial law defines as “any economic activity organised for the production, transformation, distribution, administration, or custody of goods, or for the provision of services.”<sup>62</sup> The SIC has stressed that the concept of enterprise “encompasses any type of organisation capable of establishing its conduct on the market,” and includes every type of business entity (including non-profit organisations engaged in commercial activity) as well as natural persons acting as entrepreneurs.

92. The notification regime, which applies only to enterprises the consolidation of which could have effects in the Colombian market, covers transactions involving (i) enterprises with a presence in Colombia that produce or sell a product or service originating in Colombia, (ii) enterprises with a presence in Colombia that sell an imported product, and (iii) foreign enterprises that export products to the Colombian market, even if the enterprise has no distributors or other presence in Colombia. No notification is required, however, if a foreign company that does not sell its products in Colombia acquires a Colombian company that produces or sells a competing product.

#### 2.4.2 *Merger notification*

93. The pre-merger notification system in Article 9 has two components, the first termed the “subjective” standard and the second termed the “objective” standard. Both must be met to trigger an obligation to notify. The subjective standard is satisfied whenever the merger transaction involves undertakings that are either (i) “engaged in the same economic activity” or (ii) “participate in the same value chain.” Enterprises are “engaged in the same economic activity” when they compete in the same relevant product or service market and thus stand in a horizontal relationship. Firms “participate in the same value chain” when they operate in a distribution or value-added production system in a particular product or service market and thus stand in a vertical relationship. In either case, whether the parties participate in the same geographic market is irrelevant. The structure of the subjective standard means that conglomerate mergers are not reportable under Article 9.

94. Section A1(1) of the Council’s 2005 Recommendation on Merger Review requires that merger review systems be “effective” in detecting and interdicting anti-competitive mergers. Colombia’s merger notification system excludes conglomerate mergers, which effectively shields them from effective control because the merger law applies only to transactions that must be notified. The SIC’s legislative proposal amends the law by bringing conglomerate transactions within the scope of the merger notification system, and thus permits the interdiction of anti-competitive mergers regardless of form, in accordance with the 2005 Recommendation.

95. The objective standard is met whenever the merging parties, either individually or in sum, had (i) operational income during the previous fiscal year that exceeded a certain amount (specified by the SIC) of minimum legal monthly wages, or (ii) total assets at the end of the previous fiscal year that exceeded a certain amount (also set by the SIC) of minimum legal monthly wages. The current

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<sup>61</sup> SIC Resolution 4851 of 2013, pp. 19-20.

<sup>62</sup> Article 25, Commercial Code.



thresholds for both income and assets are set by Resolution 82040 of December 26, 2014, at 100,000 CLMMW (about USD 27 million).<sup>63</sup>

96. The income and asset thresholds were previously set at 100,000 CLMMW for the years 2006 to 2009, increased to 150,000 for 2010 and 2011, and then reverted to 100,000 for 2012 and subsequent years. The SIC is required (Article 9, Paragraph 1 of Law 1340) to conduct an annual review of the income and assets thresholds. The SIC's review involves analysing the number of enterprises that would be covered by various threshold levels, evaluating the number of transactions reported during the previous year, and considering the general conditions of the economic environment. The review conducted in 2015, based on 2014 data, showed that the number of Colombian enterprises covered by the 100,000 CLMMW asset threshold was 1,649 (compared to 1,587 in 2013). Comparable numbers for the 100,000 CLMMW income threshold were 1,326 (compared to 1,288 in 2013). The general view among practitioners in Colombia is that the current 100,000 CLMMW threshold is reasonable. The SIC states that it is unaware of any past merger that fell outside the notification scheme but that would have been found substantially anticompetitive if examined under the competition law.

97. Under Resolution 12193 of 2013, which provided implementing regulations for the merger review system until it was replaced in March 2015 by Resolution 10930, both income and assets were to be calculated by referring to each merging entity's world-wide accounts, and by aggregating the income and assets of the merging entity with those of all other firms in the entity's control group (section 2.1.2).<sup>64</sup> The Secretariat's initial report concluded, based on these calculation rules and in conjunction with the provision in Article 9 requiring the assets or income of the merging parties to be considered "either individually or in sum," that Colombia's merger notification system diverged substantially from best practice standards. The merger notification rules did not comply with Section IA1(2.1) of the Council's 2005 Recommendation on Merger Review [C(2005)34], which urges that Members "assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction," nor with the more detailed recommendations on the same topic in Sections IB and IC of the Recommended Practices for Merger Notification Procedures issued by the International Competition Network ("ICN").<sup>65</sup> The specific deficiencies identified in the initial report were as follows.

- Local activity: Under ICN Section IB Comments 1 and 2, notification thresholds should focus on sales or assets within the reviewing jurisdiction, not those calculated on a world-wide basis. World-wide activities can properly be incorporated only in ancillary thresholds that do not themselves trigger a notification requirement.
- Control groups: Under ICN Section IB Comment 3, the calculation of local sales and assets should be limited to the local sales and assets of the business entities involved in the

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<sup>63</sup> The CLMMW is presently COP 644,350 or about USD 270.

<sup>64</sup> A "control group" is determined for this purpose by employing the definition of "control" in Article 45.4 of Decree 2153/92, as described above.

<sup>65</sup> International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup, Recommended Practices for Merger Notification Procedures (2005). The ICN is an organisation of government competition agencies from around the world that, in conjunction with non-governmental advisors (including representatives from business, consumer groups, academics, and the legal and economic professions), focuses on the development of solutions to practical antitrust enforcement and policy issues. The competition agencies of all OECD member nations participate in the ICN and the Competition Committee co-operates closely with it.

transaction. That is, particularly for the acquired entity, the sales and assets of the entity's entire "control group" should not be included in the calculation.

- Single party activity: Under ICN Section IC, Comments 1 and 2, requiring significant local activity by each of the merging parties to trigger notification is preferable to a reliance on the activity of a single party. If local activity by only one party is to be sufficient to trigger notification (as is the case when the assets and income of the merging parties are considered "either individually or in sum"), that sole party should be the acquired party.

98. In March 2015, the SIC issued a new merger resolution (Resolution 10930) and a proposed amendment to the merger law designed to address the deficiencies identified in the initial report. The Resolution provides that, in most cases, only revenues or assets located in Colombia will be counted in determining whether a merger must be notified.<sup>66</sup> Further, the revenues and assets of firms that are part of the control group of the companies involved in the transaction will be counted only to the extent that (i) those firms have a horizontal or vertical market relationship with the merging parties, and (ii) the revenues and assets of those firms are earned or located in Colombia. The legislative proposal includes an amendment to the merger law providing the SIC with authority to establish notification thresholds for revenues and assets that apply separately to each of the merging parties.

99. The net effect of these changes is as follows:

- Local activity: Colombia's notification thresholds now focus properly on sales and assets located within the reviewing jurisdiction. Sales or assets located elsewhere in the world are ordinarily excluded from the calculation.
- Control groups: The calculation of local sales and assets is not, as recommended, limited to the local sales and assets of the business entities involved in the transaction. Rather, the revenues and assets of firms that are part of the control group of the companies involved in the transaction are included to the extent that (i) those firms have a horizontal or vertical market relationship with the merging parties and (ii) the revenues and assets of those firms are earned or located in Colombia.

Best practice principles relevant to this point focus on excluding the sales and assets of the acquired entity's "control group" and reflect less concern about including revenues and assets from the acquiring party's control group. Indeed, there is an argument that the assets and revenues of the acquiring firm's control group should routinely be added to the calculation, to avoid an incentive for the acquirer to create a shell acquisition vehicle that has no significant assets or revenue and that would therefore avoid triggering notification requirements. The problematic aspect of Colombia's system is therefore that it involves calculating threshold amounts by including the assets and revenues attributable to firms in the acquired company's control group.

Also problematic is Colombia's attempt to reduce the portion of control group assets and revenues included in threshold calculations by limiting qualifying control group firms to those that have a horizontal or vertical market relationship with the merging parties. This feature of Colombia's system obliges the merging parties to define relevant markets in order to determine which firms in the associated control group should be included in the

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<sup>66</sup> The only instance in which a merging party's world-wide assets and revenue are taken into account arises when the company does not have any assets or revenue in Colombia because it participates in the market only through exports sold by independent distributors.

calculations determining whether notification is necessary. Requiring that merging parties define the relevant market in order to ascertain their notification obligations runs afoul of the provision in the 2005 Merger Recommendation urging the use of “clear and objective criteria” in determining whether and when a merger must be notified.

- Single party activity: Congressional enactment of the proposed merger law amendment would enable the SIC to issue notification thresholds requiring significant local activity by each of the merging parties. According to the SIC, however, even if the amendment were adopted, the SIC has no present intention to exercise the authority that would thus be made available. According to the statement:

*"At this point in time, we are not making any modification regarding [this] recommendation for the following reasons: (i) we have seen a couple of systematic acquisitions by large companies of several very small companies in the same relevant market, which are slowly concentrating some markets. Although we have not taken any action so far, there might come a time where we want to take a closer look at the future transactions; something we would not be able to do if we adjust the regime in accordance with the recommendation; (ii) apart from these systematic acquisitions in 2 or 3 markets, notifications to the SIC in which a large company acquires a very small company or vice versa are extremely rare. Accordingly, requiring such notifications does not really affect compliance with the local nexus principles."*

The SIC’s concern focuses on situations in which a large incumbent firm systematically acquires small competitors in transactions that would not require notification if the notification thresholds applied separately to the firms on both sides of the transaction. If the SIC maintains its position on this issue, Colombia’s merger notification system will continue to require notification of proposed transactions based primarily on the size of the larger of the two merging firms (which, in many cases, will be the acquiring firm). Thus, in Colombia, any acquisition by a firm whose own revenues or assets meet the threshold amounts will have to be reported regardless of how small the other party to the merger might be. Employment of notification thresholds keyed solely to the acquiring firm’s local activities, in order to cover exceptional cases, will impose unnecessary transaction costs on a much larger number of transactions that do not pose any appreciable risk of competitive harm.

100. Parties contemplating a merger can freely choose when to submit notification.<sup>67</sup> They must certify their “firm intention” to consummate the transaction, but need not have entered a binding

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<sup>67</sup> Article 9 exempts one class of transactions from notification. Under Paragraph 3, no prior notification is required for mergers involving the members of a “business group,” as defined in Article 28 of Act 222 of 1995. According to that Article, a business group is considered to be a set of enterprises characterized by “unity of purpose and direction” in that it exists and operates to achieve a commercial objective determined by the parent entity without regard to the interests of the group’s other members. The SIC’s legislative proposal includes a provision that amends Paragraph 3 of Article 9 by changing the citation to the definition of “business group” from “Article 28 of Act 222 of 1995” to “Articles 260 and 261 of the Commercial Code.” Article 260 focuses on the concept of “subordination and control,” defined to exist where a subsidiary is subject, directly or indirectly, to the will of the parent entity. Article 261 specifies situations in which “subordination and control” are legally presumed to exist. The SIC notes that, technically, this definitional language does not constitute an “exception” because the relationships covered do not involve a transfer of control and thus do not constitute a merger in any event.

contract.<sup>68</sup> The only timing constraint is that the transaction may not be consummated before the SIC authorises it or the time period specified in the notification system rules expires without SIC action. Currently, no filing fees are imposed at any stage of the merger notification process, but the SIC's legislative proposal includes a provision enabling the SIC to establish a filing fee, which may not exceed 0.1 % of the merging parties' total assets. Parties may meet with SIC staff in advance of filing to discuss whether the transaction must be notified and, if so, what information will be required. At that stage, the SIC will not address the substantive merits of the specific transaction, but will identify issues that are likely to arise when analysing a merger in the market sector involved.

101. The SIC does not offer binding advisory opinions with respect to contemplated mergers, but does issue non-binding advice based on hypotheticals. The Administrative Procedure Code (Article 13 of Law 1437/11) requires the SIC to respond to such hypothetical questions within 30 days. The SIC responds to such inquiries on a timely basis, but practitioners have criticised the opinions on the grounds that they tend to recite the applicable legal provisions without providing useful substantive analysis.<sup>69</sup> The SIC concedes the validity of this complaint and states that, as a matter of internal policy, its current practice is to respond with as complete an answer as possible, not only citing the applicable law but also explicating the doctrines that the SIC, by means of guidelines, opinions, or policy statements, has adopted on a particular issue.<sup>70</sup>

102. In circumstances where a transaction meets the notification standards but the merging parties jointly hold less than 20% of the relevant market, Article 9 currently provides that “the transaction shall be deemed as authorised” upon filing by the parties of an abbreviated notification form with the SIC.<sup>71</sup> Eligible transactions may be consummated immediately upon acknowledgment by the SIC that the filing is complete. Parties qualifying for the abbreviated process are not obliged to elect it, and may choose to file for approval of their transaction. Transactions that have been properly notified under the 20% share option cannot thereafter be prosecuted subsequently by the SIC under the merger law. If the SIC subsequently determines, however, that the parties in fact controlled more than 20% of the relevant market, the SIC may prosecute and sanction the parties for failure to file the proper form of notification and, where the merger is found to be anti-competitive, order the merger to be dissolved.

103. Section IA1 (2.2) of the Council's Merger Review Recommendation urges Members to use “clear and objective criteria to determine whether and when a merger must be notified.” The ICN, in section IIB of its Recommended Practices, similarly recommends that merger notification requirements should be based on “objectively quantifiable criteria,” explaining (in Comment 1 to

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<sup>68</sup> Competition law practitioners express a desire for formal SIC guidance about what interactions between the merging parties are proper during the due diligence phase of a merger transaction. The SIC states that it will soon be providing guidance on this issue.

<sup>69</sup> From 2009 through May 2015, the SIC issued 61 responses to hypothetical questions involving various merger-related issues, including whether the hypothetical transaction constituted a merger, was a reportable transaction, or would be anti-competitive if consummated.

<sup>70</sup> This issue is discussed further in the portion of this report dealing with transparency and predictability.

<sup>71</sup> The notification form requires that the merging parties identify themselves; describe the merger transaction; specify the relevant market, their market shares and the shares of their competitors; and note whether there are any legal provisions applicable in the sector that limit their market shares or restrict their market participation. The form must be supplemented with a description of the methodologies used to define the relevant market and calculate market shares, accompanied by supporting data and analyses.

Section IIB) that a market share test is “not appropriate for use in making the initial determination as to whether a transaction is notifiable.”

104. The 20% market share option does not conflict directly with the “objective criteria” provision in the OECD and ICN recommendations because it is not itself a notification criterion. Rather, it applies only in the case of transactions that already meet the notification thresholds, and its invocation relates to the content of the notification filed, not to the obligation to notify. Nonetheless, Colombia’s market share option is objectionable because a mistake by the parties in calculating market share does not result simply in an order to file more documentation. The option invites merging parties to avoid a delay in consummation by invoking it, but then exposes them to severe penalties and divestiture if (even inadvertently) they calculate market share incorrectly.<sup>72</sup> The SIC agrees with this analysis and has therefore included in its legislative proposal an amendment that deletes the 20% market share option from the merger law.

105. The SIC’s recently revised merger regulation (Resolution 10930) includes an unobjectionable form of the 20 % market share option. Under the regulation, merging parties may still notify the SIC that, by their calculation, the merged entity will hold less than 20% of the relevant market. The submission of such a notice will not, however, as was previously the case, entitle the parties to consummate the transaction immediately. Rather, the SIC will review each such notification and notify the parties if it has any doubts about the accuracy of the market share calculation, in which event the parties may not consummate immediately and will be obliged to submit a regular notification for approval of the transaction.

#### 2.4.3 *Merger Review Procedures*

106. The procedural elements of the merger review regime in Colombia are specified in Article 10 of Law 1340, as implemented by SIC Resolution 10930. For notifiable transactions that do not qualify for the short form notice under the revised 20% share option (or for which the 20% share option has not been elected), the parties file a “pre-assessment application,” which initiates Phase 1 of the merger review process.<sup>73</sup> Phase 1 is intended to provide a quick resolution for non-problematic transactions. The application must be accompanied by the information specified in Annex I to the Resolution.<sup>74</sup> The SIC does not accept requests from parties asserting undue burden as grounds for relief from specifications in Annex 1. In response to a recommendation in the Secretariat’s initial report, however, Annex 1 of Resolution 10930 no longer requires information about all investments

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<sup>72</sup> Competition law practitioners in Colombia agree that the 20% market share option is problematic because it leads merging parties to press intensely for fabrication of a market definition under which the merging parties’ share is less than 20%.

<sup>73</sup> In a hostile bid situation, the SIC will accept an application from the acquiring party only, and employ its compulsory investigative powers, if necessary, to obtain information from the target.

<sup>74</sup> The required information includes, among other items, (i) a description of the legal mechanism by which the parties are merging (i.e. acquisition of shares, acquisition of assets, takeover, etc.); (ii) the date schedule for the proposed merger; (iii) a statement noting whether there are specific sector regulations affecting the enterprises involved; (iv) a list of the competition agencies to which the merger has been notified; (v) information about the products or services offered by the merging companies (including descriptions of trademarks, uses, consumer habits, and market studies); (vi) the geographical area in which the companies operates; (vii) a list of certain investments held by or in the parties, and (viii) a list of the merging parties’ competitors, to the extent known. The parties may request the SIC to grant confidential treatment to sensitive material in the submission.

held by the merging parties, but only those in markets related horizontally or vertically to the market affected by the merger.<sup>75</sup>

107. Within three days after filing, the SIC will determine whether the application is complete and whether the proposed transaction must be notified. If notification is required, the SIC will publish a notice on its web page announcing the proposed merger and, depending on the circumstances, may also order the merging parties to publish a similar newspaper notice. The notices solicit information and views from the public about the competitive implications of the transaction (Art. 10.2).<sup>76</sup>

108. Submissions from third parties are accepted by the SIC for the ten day period following publication of the web site notice. Subsequent to the public comment period, the SIC may follow-up with parties who submitted information and may also contact other third parties to obtain information relevant to the proposed merger, using compulsory process if necessary. Third parties may request confidential treatment from the SIC for any sensitive material they provide. The end of the ten day public comment period is the earliest point at which the SIC may terminate its review and clear the merger, based on a finding that the transaction poses “no substantial risks to competition.” In any event, the SIC has thirty business days from the date the application was filed to determine if the case should progress to Phase 2.

109. The volume of 205 market share notifications and Phase 1 applications received, processed, and resolved for the years 2010 to 2014 is displayed in the following table.

**Table 1. Merger Notifications and Phase 1 Applications 2010 -- 2014**

<b>Year</b>	<b>Notifications received in period under 20% market share rule</b>	<b>Phase 1 applications pending at beginning of period</b>	<b>New Phase 1 applications received in period</b>	<b>Phase 1 applications resolved in period</b>	<b>Phase 1 applications pending at end of period</b>
2010	61	4	22	20	6
2011	78	6	21	23	4
2012	118	4	30	31	3
2013	102	3	41	39	5
2014	105	5	40	41	4
Total	464	N/A	154	154	N/A

110. For years prior to 2013, the SIC does not have data available to show the average duration of the Phase 1 review process from the time a pre-authorisation application is submitted until the Phase 1 period closes. For the years 2013 and 2014, the average Phase I duration was 44 days and 45 days, respectively. The proportion of pre-authorisations that advanced to Phase 2 for the years 2010 through 2014 was 46%, 36%, 21%, 34%, and 32%, respectively.

111. Phase 2 is initiated by service of a SIC notice to the parties, who then have 15 days to submit the additional information specified in Annex 2 to SIC Resolution 10930.<sup>77</sup> The parties may apply for

<sup>75</sup> Although this aspect of the modified regulation still requires the parties to define the relevant market, it does so in an acceptable manner that relates exclusively to the amount of information required from the parties, and not to a determination of whether the parties are required to notify their transaction to the SIC or at what point the transaction may be consummated.

<sup>76</sup> The parties may request, on “grounds of public order,” that the SIC waive any form of publication concerning their merger.

<sup>77</sup> The information requirements in Annex 2 include, among other items, (i) the parties’ price data for the 3 years preceding the merger; (ii) the parties’ cost structures; (iii) a list of any Colombian patents protecting the affected products; (iv) the parties’ total production capacity; (v) information about

relief from particular specifications in Annex 2 based on assertions of undue burden. In accordance with Article 8 of Law 1340, the SIC notifies the proposed merger to any government agencies that regulate or control the enterprises or the market sector(s) involved in the merger.<sup>78</sup> The notified agencies may, if they wish, submit a technical evaluation of the merger within 10 days after receipt of the SIC's notice.<sup>79</sup> Such agency opinions are not binding on the SIC, but the SIC's opinion resolving the case must "clearly state the legal and economic reasons" underlying its rejection of an agency's views. In any case, a notified agency may intervene at any time in the SIC's proceeding, either *ex officio* or at the SIC's request.<sup>80</sup>

112. As Phase 2 progresses, the SIC may request that the information submitted by the parties be clarified or supplemented and may request additional information. Article 10.5 provides that the SIC has three months to resolve the case, counting from the day that the merging parties satisfy the SIC's most recent information request. This means that the SIC can initiate a new three month period by requesting additional information. Practitioners report that the SIC occasionally requests additional information near the existing deadline as a means to obtain more time for analysing the case. The Secretariat's initial report recommended that the SIC modify its merger review procedures to permit, in certain circumstances and with the consent of the merging parties, an extension of the 90-day waiting period where additional time is needed to analyse particularly complex transactions or to finalise mutually acceptable conditions for authorisation. The SIC's legislative proposal amends Article 10.6 of Law 1340, modifying the system so that the SIC will certify the time at which the merging parties successfully complete the submission of required information, thus commencing the 90-day period. Thereafter, the SIC will be able to extend the Phase 2 waiting period once, for an additional three-month period, but only in the event that the merging parties and the SIC are engaged in negotiating the conditions to be imposed on the transaction in conjunction with SIC approval of the merger.<sup>81</sup>

113. During Phase 2, the SIC may conduct a field investigation and, if necessary, use compulsory process to obtain information from the merging parties or from third parties. The merging parties may access and dispute any information submitted by third parties,<sup>82</sup> and may request that the SIC use compulsory process to obtain evidence from other parties if necessary for that purpose (Art. 10.4). Throughout the process, the SIC's staff case team is available to meet with the merging parties for consultations about the competitive concerns that the agency may have. The merging parties may also consult with the Superintendent's case team, which also reviews the case.

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imported inputs for the affected products; (vi) the percentage of the parties' output that is exported; (vii) information about competing product imported into the relevant market; (viii) information about market entry conditions, including the history of entry and exit in the market; and (ix) a list of input providers for fabrication of the products involved.

<sup>78</sup> Article 6 of Law 1340 obliges other agencies to provide the SIC with any technical assistance needed in conducting the investigation.

<sup>79</sup> Such technical evaluations are rarely filed.

<sup>80</sup> No such interventions have occurred since 2009.

<sup>81</sup> The Secretariat's recommendation was intended to protect the merging parties' interest in expeditious review of their transaction, which is an interest advanced by the SIC's proposal. The Secretariat notes that the amendment would restrict the SIC's options for extending the waiting period even more than the recommendation contemplated, but that this reflects a choice that the SIC is entitled to make.

<sup>82</sup> Confidential portions of such information are presented to the parties in summary form.

114. The standard employed to evaluate the legality of mergers, which appears in Article 11 of Law 1340, provides that the SIC

*shall object to the transaction when it finds that it tends to cause an undue restriction on free competition. However, it may authorize the transaction subject to compliance with certain conditions or obligations when, in its view, there are sufficient elements to consider that such conditions are suitable to ensure the effective preservation of competition.*

115. Article 10 provides that, during the 15 day period within which the parties are required to file the information specified in Annex 2, they “may” propose to the SIC remedies designed to address the anticompetitive effects that the merger might create. The SIC treats this statutory clause as non-preclusive, so that parties may approach the SIC with proposed conditions at any time during the merger review process. Proposed conditions are considered by the SIC’s staff, which may offer counter-proposals.<sup>83</sup> If consensus is reached, and the Superintendent approves the proposal, an order will be issued imposing conditions with the agreement of the parties. Alternatively, the SIC may authorise the merger subject to conditions it has devised unilaterally, which the parties may either (i) accept in order to consummate the merger, or (ii) reject and thereby abandon the transaction. In the latter event, however, the parties can petition the SIC for reconsideration of the case and offer a different set of conditions for the SIC’s consideration. Settlement by agreement during a reconsideration proceeding is also an option for the parties where the SIC has rejected the merger outright.<sup>84</sup>

116. The SIC’s decision in a merger case is rendered by the Superintendent, based on memoranda submitted by the SIC staff and the merging parties. The Superintendent can authorise the merger without conditions, authorise the merger with conditions (either those developed in agreement with the parties or devised by the SIC unilaterally), or disapprove the merger.<sup>85</sup> If the merger is either authorised with conditions or is disapproved, the SIC will publish a decision containing a detailed statement of its analysis. The SIC also releases the staff analysis for mergers that are approved without conditions. In all cases, confidential information is redacted from the publically released documents.

117. Once the Superintendent has rendered a decision, the merging parties have ten business days to request that the Superintendent reconsider the decision (Art. 76 of the Administrative Procedure Code). The Superintendent has 60 calendar days to issue a decision ruling on the petition, at which point the decision becomes final and subject to judicial review. Of the thirteen merger case decisions issued by

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<sup>83</sup> The Secretariat’s initial report recommended that the SIC solicit the views of interested third parties when considering the acceptance of proposed structural or behavioural conditions to resolve a pending merger, in accordance with ICN XI(B), comment 2. The SIC’s newly issued merger regulation, Resolution 10930, provides (Art. 2.3.2.3) that the agency “may, when it is considered relevant, solicit the opinions of third parties in relation to the conditions proposed by the companies.” The SIC advises that it would issue an explanation if, in a particular case, it decides to omit the solicitation of third party comments.

<sup>84</sup> One practitioner opined that the SIC’s liberal approach to settlement negotiations is inefficient and unwise. In his view, the SIC’s policy encourages the parties to make a series of slightly improving offers in the hope of settlement, but to reserve their bottom line position until the reconsideration phase. The SIC states that it recognises the point but sees no net advantage in fixing a deadline for the submission of settlement offers.

<sup>85</sup> Practitioners recommended that the SIC issue a model hold-separate agreement for use in circumstances where a merger has been cleared in another jurisdiction (such as the United States) but is still pending before the SIC. The SIC included in Resolution 10930 a description of standards for use by merging parties in framing acceptable hold separate agreements for such circumstances.



the Superintendent from 2008 to 2014 in which the SIC rejected or imposed conditions on proposed mergers, four were reconsidered on petition by the parties. In three of those cases, the SIC initially rejected the merger, but on reconsideration authorised it subject to conditions negotiated with the parties. In the fourth cases, conditions imposed initially were modified on reconsideration.

118. The volume of Phase 2 matters initiated, processed, and resolved for the years 2010 to 2014 is displayed in the following table.

**Table 2. Phase 2 Merger Reviews 2010 -- 2014**

<b>Year</b>	<b>Phase 2 matters pending at beginning of period</b>	<b>New Phase 2 matters initiated in period</b>	<b>Phase 2 matters resolved in period</b>	<b>Phase 2 matters pending at end of period</b>
2010	7	19	19	7
2011	7	12	16	3
2012	3	8	9	2
2013	2	25	20	7
2014	7	13	19	1
Total	N/A	77	83	N/A

119. For years prior to 2013, the SIC does not have reliable data showing the average duration of Phase 2 merger review procedures from initiation of the Phase until resolution of the case. It does, however, have such data for the entire review process (Phase 1 and 2 combined) from submission of a pre-authorisation application until resolution of the case.<sup>86</sup> Average total duration fell from 117 days in 2010 to 106 days in 2011 and 57 days in 2012, principally reflecting the fact that only nine Phase 2 mergers were resolved in 2012. In 2013, average total duration rose again to 107 days, falling back to 91 in 2014. For the years 2013 and 2014, average duration of Phase 2 alone was 111 days and 99 days, respectively.

#### *2.4.4 Substantive analysis*

120. The analysis applied in evaluating mergers is described in the SIC's Merger Guidelines.<sup>87</sup> The Guidelines take a standard approach, examining market definition (using the SSNIP method, including isochrone analysis for local geographic markets), market concentration (using Leader, C2, C4, Herfindahl-Hirschman, Kwoka, and Stenbacka indices), entry barriers, and unilateral and co-ordinated effects.<sup>88</sup> In recent years, the analysis has expanded beyond reliance on concentration measures by employing econometric analysis and by considering cross-elasticities in determining demand substitutability.<sup>89</sup>

121. The SIC recognises a failing firm defence, but has accepted it only once, in a 2006 case involving the cement industry. To sustain the defence, the merging parties must demonstrate that the failing firm will exit the market absent the merger, that no other less anti-competitive alternative

<sup>86</sup> Data relating to Phase 2 processes do not include time expended for resolving petitions for reconsideration of the Superintendent's decision.

<sup>87</sup> Guidelines Paragraphs 83-197.

<sup>88</sup> A provision in Article 12 of Law 1340 provides that the SIC "may refrain from objecting to a merger, regardless of the merging companies' national market share, when the conditions of the international market guarantee free competition within the national territory."

<sup>89</sup> The SIC notes that the employment of more sophisticated analytical techniques has frequently led to the conclusion that an apparently problematic transaction was not anti-competitive.

exists, and that the effects of the merger will be no more harmful than the firm's departure from the market. The SIC may authorise a qualifying failing firm merger with or without conditions designed to ameliorate the merger's anti-competitive effects. In the cement case, the SIC focused on the geographic market where the merging firms overlapped, imposing conditions under which the prices charged by the merged entity in the overlap area could not exceed the prices it charged elsewhere.

122. An efficiency defence was introduced in the 1992 version of the competition law (Decree 2153, Article 51). It was applicable where (i) "significant improvements in efficiencies" will occur, resulting in "cost savings that cannot be achieved by any other means" and (ii) the merger "will not result in a constraint on supply in the market." The 2009 law (Law 1340, Article 12) amended this provision to focus on consumer welfare, permitting the defence only where the parties demonstrate, "based on studies founded on methodologies of recognised technical value, that the beneficial effects of the transaction for consumers outweigh its eventual negative impact for competition, and that such effects are not achievable by other means." The amendment also requires that the parties commit to transferring the beneficial effect of the transaction to consumers, and authorises the SIC to require a guarantee securing performance of that commitment.

123. The SIC has accepted an efficiency defence on one occasion. In a 2010 case, the SIC authorised the merger of six companies that supplied cargo services in the port of Buenaventura. The SIC concluded that the merged entity would be able to exercise market power in the market for transportation of containers within the port facility, but nevertheless approved the transaction given the efficiencies that the merger was expected to produce.

#### 2.4.5 *Conditional approval*<sup>90</sup>

124. In evaluating a merger, remedial conditions are considered for adoption by the SIC only where it has sufficient evidence to conclude that the merger threatens a material injury to competition. In horizontal cases, the default remedy is a structural condition requiring the divestiture of assets, although the order may also include ancillary behavioural conditions. Where divestiture is not possible due, for example, to the absence of any interested purchasers, the establishment of a firewall may be sufficient. In vertical cases, the default remedy is a behavioural condition prohibiting such conduct as refusals to deal or discrimination against competitors at certain levels of the value chain involved.

125. Conditions imposed in an order authorising a merger typically become effective upon consummation of the transaction. The SIC may, however, structure a condition precedent (such as a requirement to divest a trademark or other asset) that must be satisfied in advance of consummation. For any condition that applies subsequent to the merger, the SIC is obliged by Article 11 to monitor and assure compliance with the condition's terms. SIC orders in merger cases may therefore include compliance provisions requiring, for example, the appointment of a trustee to divest assets, and the maintenance by the parties of a bond in the SIC's favour that can be liquidated upon a finding of non-compliance. The parties subject to conditions in a merger case are also required by law (Article 22 of Law 1340) to make an annual payment covering the cost of the SIC's compliance monitoring activities. The SIC may employ its full set of investigative powers, as necessary, to monitor compliance with merger conditions.

126. An example of a bond liquidation in the SIC's favour occurred after two aluminum product manufacturers, Industrias Arfel S.A. and Aluminio Reynolds Santo Domingo S.A, allegedly did not complete a timely divestiture in their 2008 merger proceeding. The SIC had approved the proposed transaction subject to a requirement that, within nine months, the parties either divest certain

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<sup>90</sup> Guidelines Paragraphs 237-309.

production equipment and machinery to a third party or transfer the assets to a trust for later sale by the trustee. A subsequent SIC compliance inquiry determined that divestiture had not occurred until two months after the deadline. The parties' petition for reconsideration of this finding was rejected by the SIC (Resolution No. 34284 of June 24, 2011), triggering payment of COP 923 million (USD 388,000) under the terms of a guarantee that the parties had been required to post. The parties sought judicial review of the SIC's action before the Administrative Tribunal for Cundinamarca, where the matter is presently pending.

127. Under Colombia's Administrative Procedure Code (Article 34), a government agency may act, *ex officio* or upon petition of a party, to resolve any issue arising under the agency's jurisdiction. Consequently, a party subject to a condition imposed in a merger case may petition the SIC to terminate the condition or modify its terms. This process is implemented at the SIC by Part 5 of SIC Resolution 10930, which specifies the information to be submitted by the party in support of its application. The SIC has 30 days after receipt of a completed application to complete an investigation and, within 10 days of doing so, must present the collected evidence to the affected party and invite its analysis. The SIC's decision on the application is due thirty days after receipt of the party's response. In the 2006 "failing firm" case described earlier, the merged entity (Cementos Argos) applied in 2012 for relief from the applicable price discrimination prohibition, arguing that the maintenance of equal prices nationwide prevented it from meeting price competition in particular geographic markets. Argos also demonstrated that competition had increased since 2006 in the geographic market protected by the conditions, such that Argos had lost market share and had no power to increase prices in that market. The SIC agreed and terminated the condition.<sup>91</sup>

#### 2.4.6 Sanctions and enforcement

128. Parties involved in merger cases are subject to the same sanctions for violations of the law as are any other violators, and face the imposition of fines and conduct orders. The penalties in Articles 25 and 26 of Law 1340 can be assessed for (i) failing to file notice prior to consummation of a notifiable merger, (ii) consummating a notifiable merger after filing a notification improperly asserting that the merged entity would represent less than 20% of the relevant market, (iii) consummating a notifiable merger prematurely before completion of the merger review process, (iv) consummating an anticompetitive merger that was notifiable but not notified or notified improperly, (v) consummating a notified merger that the SIC rejected as anticompetitive, (vi) failing to comply with a merger condition imposed in an SIC order, and (vii) failing to comply with or obstructing investigative demands. In cases involving consummated anti-competitive mergers or failure to comply with merger approval conditions, the SIC can not only impose fines and orders, but can also invoke its authority under Article 13 of Law 1340, which expressly provides the SIC with authority to order that the merger be reversed. To date, however, the Article 13 authority has not been employed.

129. In two cases since 2008, the participants in consummated transactions have been fined for failing to file a pre-authorisation application.<sup>92</sup> In a 2009 case, the SIC sanctioned Telmex Colombia S.A. and Superview Telecomunicaciones S.A., two mobile telephony companies, for an unreported merger in the form of Superview's acquisition by Telmex. Fines totalling COP 1.7 billion (USD 715,000) were imposed on the firms and their officers<sup>93</sup>. In 2013, the SIC sanctioned an unreported

<sup>91</sup> Resolution 36130 of 2012.

<sup>92</sup> One convenient method by which the SIC detects unreported mergers arises from the presence of the Chambers of Commerce Group as a sub-unit in the Competition Protection Division. The Chambers Group monitors the business registries maintained by the various Chambers in Colombia, and can thereby flag registry amendments that signal a merger.

<sup>93</sup> Resolution 51320 of 2009.

vertical transaction in which the largest rice mills in Colombia (Molinos Roa S.A. and Molinos Florhuila S.A., two firms controlled by the same parent company) acquired a 52% interest in Alienergy S.A. Alienergy marketed rice husk to purchasers of biomass, who used it as an input for energy generation and for other purposes. Because rice husk is a rice milling by-product, Alienergy was in the same value chain as the acquirers. The SIC imposed fines on the companies and their executives totalling COP 500 million (approximately USD 210,200).<sup>94</sup>

130. Of the 464 merger cases resolved over the seven year period from 2008 to 2014, 451 proposed transactions were authorised without conditions. The thirteen remaining cases, all of which involved SIC decisions authorising the proposed mergers but subjecting them to conditions, are shown in the following table (acquiring firm listed first). There was no case during the period in which a proposed merger was abandoned by the parties in the face of SIC objections.

**Table 3. Merger Cases Resolved with Conditions 2008 - 2014<sup>95</sup>**

Year	Firms to be merged (Resolution No.)	Market Sector
2008	Industrias Arfel S.A. - Aluminio Reynolds Santo Domingo S.A. (Resolution No. 5886/2008)	Aluminum products
2008	Mexichem de Colombia Mexcol - Productos Derivados De La Sal Prodesal (Resolution No. 34452/2008)	Chemical products
2010	Compañía Colombiana de Tabaco S.A. - Coltabaco S.A. and Productora Tabacalera de Colombia Ltda. - Protatabaco Ltda. (Resolution No. 29937/2010)	Cigarettes and tobacco products
2010	Cafam – Éxito. (Resolution 38171/2010)	Retail grocery stores
2013	Essilor Óptica International Holding - Servioptica S.A.S. - Superlens S.A.S (Resolution 13466/ 2013)	Ophthalmic products
2013	Nestlé S.A. - Pfizer Inc. (Resolution 20968 / 2013)	Nutrition products
2013	Holcim (Colombia) S.A. - Concretera Tremix S.A.S. (Resolution 42497/2013)	Cement and concrete
2014	Grupo Argos, Celsia S.A. - Empresa de Energía del Pacífico (Resolution 525 / 2014)	Electrical energy
2014	Fresenius Kabi Colombia S.A.S. - Mix Supplier S.A. and Mix Supplier Bogotá S.A. (Resolution 4516 / 2014)	Pharmaceutical products and medical equipment
2014	Empresa de Energía de Bogotá - Isagen S.A. (Resolution 5545 / 2014)	Public utilities
2014	Une EPM Telecomunicaciones S.A. E.S.P - Colombia Móvil S.A. E.S.P (Resolution 24527 / 2014)	Telecommunications
2014	Yara Internacional - Abonos de Colombia Abocol (Resolution 54049/2014)	Agricultural products
2014	Almacenes Éxito S.A. - Comercializadora Giraldo Gómez & CIA S.A. (Resolution 54416 de 2014)	Retail grocery stores

131. Of the 13 conditioned mergers, ten involved horizontal combinations, one involved an exclusively vertical integration, and two involved mergers of competing enterprises that were vertically integrated in the same markets. The prime remedy in eight of the ten horizontal mergers was asset divestiture, involving, for example, retail grocery stores in the Cafam and Almacenes cases, tobacco product trademarks and related manufacturing assets in Coltabaco, an infant nutrition product line of business in Nestle, and 50 MHz of electromagnetic spectrum (returned to the government for re-allocation) in Une EPM.

132. The other two horizontal cases did not entail a significant effect on concentration in the affected markets or require any asset divestiture. They did, however, raise the SIC's concerns about

<sup>94</sup> Resolution 3703 of 2013.

<sup>95</sup> In three cases, Mexichem, Arfel and Coltabaco, the SIC initially rejected the merger, but subsequently authorised it subject to conditions when the parties applied to the SIC for reconsideration. In the remaining ten cases, the order conditioning the merger was entered at the close of the Phase 2 process, although, in the Fresenius Kabi case, the conditions were modified on reconsideration.

co-ordinated effects in the Holcim case and about maintaining equitable post-merger vertical distribution practices in Yara. In Holcim, the proposed merger involved Holcim's sale to Tremix of two pre-mixed concrete manufacturing plants and the subsequent incorporation of a new company in which Tremix would hold a 91% stake and Holcim the remaining 9%. The conditions imposed by the SIC prohibited Holcim from access to the price, sales, and client data and other sensitive information relating to Tremix and the new company. Also, all of the parties involved were barred from demanding that their downstream customers disclose any information about competing concrete suppliers. In Yara, a case involving agricultural fertilisers, the conditions prohibited the merged manufacturing enterprise from entering into exclusive or discriminatory contracts with any upstream or downstream firm, and required that product distribution in the national geographic market be continued absent a demonstrable economic, legal, or public interest justification for terminating supply.

133. In Fresenius Kabi, the only exclusively vertical integration case, an input supplier for the manufacture of nutritional drink mixtures acquired Mix Supplier S.A and Mix Supplier Bogotá S.A., two drink mixture manufacturers operating under common control. The SIC's conditions barred Fresenius from discrimination in supplying inputs to downstream drink manufacturers and required that the parties report to the SIC (i) price and quantity data for sales among themselves and (ii) quantity data for sales made to third parties.

134. The EEB-Isagen case involved a merger between two firms that were both vertically integrated in energy production and distribution. The SIC, noting that EEB operated a gas distribution subsidiary, required Isagen to divest its subsidiary gas generation plant in order to maintain vertical separation in the natural gas market, as mandated by the Commission of Electricity and Gas (CREG) in Resolution 071 of 1998. The SIC addressed the horizontal aspect of the case by requiring EEB to terminate some or all of its shareholdings in certain related companies competing in the same markets as did EEB and Isagen.<sup>96</sup> Essilor, the other case involving vertically integrated competitors, involved a merger combining two firms that were both vertically integrated in ophthalmic lens production and commercialisation. The SIC's order included provisions requiring the manufacturing arm of the merged firm to maintain existing supply contracts for three years and prohibiting it from discriminating among downstream retailers or demanding from them exclusive contracts or information about their dealings with competing suppliers.<sup>97</sup>

## 2.5 *Related regimes*

### 2.5.1 *Unfair competition*

135. Unfair competition in Colombia is regulated by Law 256 of 1996, which contains a general prohibition and a lengthy illustrative list of conduct deemed unfair (Arts. 8 to 19). Under the general provision in Article 7, "acts of unfair competition are prohibited" and "market participants must, in all

<sup>96</sup> The Isagen case is pending on judicial review before the Administrative Tribunal to assess the legitimacy of the Superintendent's findings with respect to "competitive control."

<sup>97</sup> Section IC of the Council's Recommendation on Merger Review urges Members to "be cognisant" that competition authorities need sufficient resources to "conduct efficient and effective merger reviews" and to "effectively co-operate and co-ordinate with other competition authorities in the review of transnational mergers." The SIC states that it has sufficient resources to perform these functions, although it considers that additional resources would better enable it discharge these (and all of its other functions) with a higher degree of quality, efficiency, and timeliness.

their actions, respect the principle of commercial good faith.” The language is based on the Paris Convention for the Protection of Industrial Property,<sup>98</sup> to which Colombia is a party.<sup>99</sup>

136. The list of unfair conduct in Law 256 deals with such activities as:

- exploiting another firm’s reputation (such as by imitating another firm’s product appearance or advertising materials) so as to cause confusion between the perpetrator’s products and those of the other firm;
- gaining an unlawful competitive advantage over another firm by misleading consumers (such as by disseminating false or incomplete information that injures the other firm’s reputation);
- interfering with the business operations of another firm (such as by improperly inducing the firm’s customers to terminate their contracts); and
- improperly acquiring or disclosing another firm’s commercial secrets.

137. Additional provisions prohibit exclusive contracts that have the purpose or effect of restraining market access or monopolising product distribution, and bar comparative advertising unless the comparison made is supported by reliable, objective, and relevant facts. A violation of Law 256 can also arise from the violation of a separate law, where the predicate violation results in a significant competitive advantage for the perpetrator.<sup>100</sup> The SIC’s legislative proposal elaborates this latter provision by adding language providing that it is “unfair to participate in the market without the licenses, permissions, legal authorizations, concessions, etc., required by legal provisions regulating market access.” The proposed amendment is intended to address the issues presented by disruptive market entrants.

138. A private party injured by conduct that violates Law 256 may file suit in the general or specialised commercial law courts, seeking injunctive relief and damages. Since 1998, the SIC has also had authority to adjudicate such claims under a law enacted to reduce court congestion (Law 446/98). At the SIC, this function is handled by the Division of Judicial Affairs, an office responsible for certain judicial functions assigned to the agency. If an unfair competition claim affects not only a private party, but might also prejudice the public interest, the claim will also be examined by the Competition Division to determine if there is a basis for commencing an enforcement investigation under Law 256. This is a consequence of Article 6 of Law 1340, which makes the SIC responsible for enforcing Law 256 in addition to the competition law.

139. SIC investigations under Law 256 follow the same procedures as for violations of the competition law, and the same sanctions apply. In determining whether to investigate an unfair competition complaint, the fact that the complaint alleges a clear violation of Law 256 is not dispositive. Article 1.3 of Decree 4886 of 2011 instructs the SIC to pursue only claims that are significant for maintaining competitive markets or promoting efficiency and consumer welfare. In

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<sup>98</sup> Article 10 *bis*, section (2) of the Paris Convention provides that “any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.”

<sup>99</sup> Law 178/94.

<sup>100</sup> The SIC can find a violation of Law 256 on this basis without the necessity of a separate law enforcement proceeding under the other law. In its Law 256 decision, however, the SIC must explain why the separate law was violated and why the violation granted the defendant a significant competitive advantage.

addition, an earlier 2001 ruling by the Constitutional Court had held that investigations of unfair competition allegations by the SIC were to be pursued in light of whether the violation affected the public interest.<sup>101</sup> Over the past seven years, the SIC has not imposed sanctions in any case based on a violation of Law 256, but in 2012 resolved two such cases based on guarantees.

### 2.5.2 *Consumer protection*

140. The 1991 Constitution (Art. 78) requires the government to protect consumers by monitoring consumer products and services, as well as the information disseminated by sellers marketing them, and by enforcing liability for products and marketing conduct that cause consumer injury. Colombia recently overhauled its consumer protection regime, replacing a law issued in 1982 with Law 1480 of 2011 (effective in April 2012). The new Law's substantive provisions comprehensively address (i) product safety and quality, (ii) warranties and product liability, (iii) advertising, information disclosure, and marketing practices (including tobacco advertising, promotional games, and E-commerce), and (iv) abusive contract provisions, among other subjects. Violators of the law are subject to prosecution and sanctions by the SIC, a function discharged by the agency's Consumer Protection Division.<sup>102</sup>

141. Consumers who suffer an injury or loss resulting from a violation may file a claim directly with the responsible enterprise, which is obliged by Law 1480 to provide "comprehensive, timely, and proper compensation" (Art. 30). Consumers may also pursue a claim for damages in court or before the SIC.<sup>103</sup> Similarly to the unfair competition regime, claims lodged with the SIC are adjudicated by the Division of Judicial Affairs when they involve a conflict of private interests, such as when the consumer is seeking the replacement of a defective product. The Division of Consumer Protection examines claims that may affect not only a particular party but also the public interest, to determine whether commencing a law enforcement investigation leading to sanctions is appropriate. Sanctions available for imposition by the SIC include fines;<sup>104</sup> orders prohibiting the sale of products; and directives requiring compliance with warranty obligations, publication of corrective advertising, and temporary or permanent closure of business enterprises.

142. The SIC also has a consumer protection function with respect to personal data, under a law enacted in 2012 (Law 1581). That Law imposes privacy protection responsibilities and security standards on certain entities that maintain data bases.<sup>105</sup> The SIC's Division for Personal Data Protection is in charge of monitoring compliance with Law 1581 and with maintaining the National Public Data Base Registry.

143. Another provision in Law 1480 (Art. 75) created the National Consumer Protection Network, which is composed of (i) the SIC, (ii) national and local consumer protection councils, (iii) national and municipal authorities with consumer protection duties, and (iv) consumer leagues and

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<sup>101</sup> Constitutional Court Ruling C-649/2001.

<sup>102</sup> Provisions in other laws also give the SIC authority to enforce the rights of consumers in their dealings with telecommunications and postal service providers.

<sup>103</sup> At the municipal level, such claims may be adjudicated by mayors.

<sup>104</sup> Maximum fines for business entities are set at 2000 CLMMW (COP 1.18 billion, USD 626,500) and for natural persons at 300 CLMMW (COP 176.8 million, USD 94,000). Company officers may also be barred from participating in business activities for up to five years.

<sup>105</sup> Data bases maintained by financial institutions and businesses subject to the jurisdiction of the Superintendence of Finance are regulated under a separate law.

associations.<sup>106</sup> The SIC acts as the Network's technical secretariat, enhancing the SIC's position as Colombia's primary consumer protection agency.

144. Competition policy and consumer protection policy in Colombia are complementary and serve similar objectives focused on advancing consumer welfare. The SIC's Competition Protection and Consumer Protection Divisions co-operate closely, consulting on common issues and exchanging information as appropriate. Subsection II(iv) of the OECD Council's 1971 Recommendation on Action against Inflation in the Field of Competition Policy, C(71)205, urges Members to "strengthen their policies respecting consumer protection, education, and information, where those policies can assist competition to function more effectively." The SIC states that Colombia's consumer protection regime is fully compliant with, and supportive of, the objectives underlying that Recommendation.<sup>107</sup>

### **3. Institutional aspects**

145. This section of the report describes the institutions engaged in competition law enforcement, the processes employed to investigate and prosecute violations, and other enforcement systems related to the competition law regime.

#### **3.1 The Superintendency of Industry and Commerce**

146. The Superintendencia de Industria y Comercio (SIC) is designated by law (Art. 6, Law 1340) as Colombia's "National Competition Authority."<sup>108</sup> It is a technical entity with its own legal personality, lodged in the Ministry of Commerce, Industry and Tourism. It has powers of inspection, supervision and control, as well as certain adjudicative authority. By law, it enjoys "administrative, financial and budgetary autonomy" (Art. 1, Decree 2153/92)<sup>109</sup>, and issues decisions without approval from any superior body. SIC resolutions can be challenged and reviewed only in the courts.

147. The SIC exercises three types of functions: (1) administrative functions (inspection, supervision and control); (2) registration functions; and (3) judicial functions. The exercise of administrative functions entails surveillance and enforcement of compliance with a particular legal regime in order to protect the public interest. The SIC exercises administrative functions in five areas: competition law, consumer protection, technical regulation and metrology, personal data protection, and surveillance of chambers of commerce. The SIC's registration functions, exercised in the area of industrial property, involve granting trademarks, patents, and denominations of origin. Finally, the SIC exercises judicial functions to resolve particular disputes in three areas: consumer protection,

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<sup>106</sup> Law 1480 confirms the right of consumers to form associations and encourages the establishment and operation of such organisations by providing technical support and financial assistance. The largest consumer organisation in Colombia is the Colombian Consumers Confederation, which has special status as an advisory body to the government and is a charter member of the Consumer Protection Network.

<sup>107</sup> The other elements in the 1971 Recommendation have either been superseded by later Council Recommendations or reflect outdated policies.

<sup>108</sup> The original predecessor of the SIC was the Superintendence of Economic Regulation, created in 1958 and renamed the Superintendence of Industry and Commerce in 1968. A set of functions roughly equivalent to that of today's SIC was consolidated in the agency in 1976, although the agency was vested with considerably less enforcement power. Significant additions to the SIC's authority were provided by Decree 2153 of 1992 and Law 1340 of 2009, and structural modifications were implemented by Decree 4886 of 2011.

<sup>109</sup> The degree of the SIC's financial and budgetary autonomy is discussed in Section 3.4 of this report.



industrial property, and unfair competition. In this latter capacity, the SIC acts as a judge and not as an administrative authority.

148. The SIC is headed by a Superintendent and is organised into six principal Divisions, each headed by a Deputy Superintendent. The Divisions are (1) Competition Protection, (2) Consumer Protection, (3) Personal Data Protection, (4) Intellectual Property (which resolves patent and trademark applications), (5) Technical Regulation and Metrology (which specifies standard weights and measures; enforces the conformity of domestic and imported products with applicable technical and certification standards; and enforces certain regulations relating to price controls, undue speculation, and hoarding), and (6) Judicial Affairs (which resolves private lawsuits involving unfair competition, industrial property, and consumer protection).<sup>110</sup>

149. The functions of the SIC with respect to the protection of competition are to investigate and sanction violations of the law, resolve applications for the approval of mergers and acquisitions, issue opinions on the competitive implications of proposed government regulations, and advise the government on competition policy generally. The Competition Protection Division,<sup>111</sup> which is responsible for those functions, is organised into four groups – (1) Bid Rigging, created in 2012, which focuses on collusion in government procurement proceedings<sup>112</sup>, (2) Competition Protection, created in 2009, which investigates conduct violations other than bid rigging, (3) Mergers, create in 2009, which assesses proposed mergers and acquisitions<sup>113</sup>, and (4) Competition Advocacy, created in 2014<sup>114</sup>, which is responsible for all of the SIC’s competition advocacy functions, including particularly the preparation of opinions on proposed government regulations.

150. Another organisational unit within the Competition Division is the Directorate for Chambers of Commerce, which is responsible for the SIC’s functions relating to such chambers. In Colombia, Chambers of Commerce have a quasi-governmental status and are responsible for maintaining certain official business registries, among other functions.<sup>115</sup> The SIC’s duties include supervising elections to the Chambers’ boards of directors, enforcing compliance with the laws controlling Chamber activities, monitoring the Chambers’ administration of business registries, resolving appeals from Chamber decisions that have legal effect, and imposing fines on unregistered business enterprises.

151. Other SIC entities warranting mention are (1) the Economic Studies Group (ESG), created in 2012 and attached to the Office of the Superintendent, which prepares market studies and economic analyses in support of the SIC’s functions, and (2) the Competition Advisory Council, a technical body established by law (Art. 25, Decree 4886/11), with which the Superintendent must consult for a non-binding opinion before making a final determination to impose fines for a violation of the

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<sup>110</sup> There SIC expects at some point in the near future to create a Deputy Superintendent for the Surveillance of Chambers of Commerce.

<sup>111</sup> The Competition Protection Division was created in 1992 under Decree 2153.

<sup>112</sup> The Bid Rigging Group was created by Resolution No. 22724.

<sup>113</sup> The Competition Protection Group and the Mergers Group were both created in 2009 under SIC Resolutions 56880 and 56878, respectively.

<sup>114</sup> The Competition Advocacy Group was created by Resolution 16424.

<sup>115</sup> Decree 1898 of 2002. Other functions of the chambers include offering training courses, arbitrating contract disputes, and organising trade fairs and conferences.

competition or unfair competition laws<sup>116</sup>. The Council is comprised of “five experts in business, economic, or legal matters,” appointed and removable by the President of the Republic.<sup>117</sup> There is no fixed term for the Council’s members, who receive an honorarium for their services unless they are employees of the government. The five current members include two officers from the Ministry of Commerce, Industry, and Trade; a former President of the Constitutional Court who is now a law professor and consultant; an economics professor; and a private sector consulting economist who was formerly the Vice-chair of Colombia’s National Planning Department. The SIC notes that there is no known instance of a matter in which the Superintendent acted against the advice of the Advisory Council. Before rendering an opinion in a case, the Council members are provided with both the Deputy Superintendent’s recommended decision and the parties’ response to that recommendation.

152. As of early 2015, the Superintendent was subject to appointment and removal at will by the President of the Republic and did not serve for a fixed term of office.<sup>118</sup> There is virtually unanimous agreement throughout the competition law community in Colombia that the SIC’s decision-making authority should be vested in an independent body and not in an officer subject to removal at will by the President. An independent body was proposed as part of the legislation that became Law 1340 of 2009, but that portion of the bill was eliminated due to intense political opposition, principally by agricultural interests.

153. Although none of the OECD Council’s Recommendations dealing with competition policy focus specifically on agency independence,<sup>119</sup> Section 7.3 of the 2012 Council Recommendation on Regulatory Policy and Governance,<sup>120</sup> developed by the OECD Regulatory Policy Committee, recommends that the establishment of “independent regulatory agencies” should be considered where the agency’s decisions “can have significant economic impacts on regulated parties and there is a need to protect the agency’s impartiality.” The Secretariat’s initial report, observing that “this principle . . . applies as well to an enforcement agency like the SIC, which issues decisions with at least as much economic impact as those of regulatory agencies,” recommended that Colombia establish an entity free from direct political control to enforce the competition laws. The OECD Regulatory Policy Committee, in conducting its accession review of Colombia, has concluded that institutional independence from political control by the Executive branch should be assured not only for Colombia’s multi-member sector regulatory agencies, but also for the single-head Superintendencies.<sup>121</sup>

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<sup>116</sup> The Superintendent may also, at his discretion, convene the Council on any other matter relating to competition. For example, the Superintendent’s standard practice is to convene the Council before issuing an injunction under Article 18 of Law 1340.

<sup>117</sup> The SIC’s legislative proposal expands the Advisory Council to include five regular and five “substitute” members, the latter available to serve as permanent or temporary replacements for absent regular members. The proposal also specifies that three Council members constitute a quorum for the conduct of business.

<sup>118</sup> Art. 10, Decree 775/05.

<sup>119</sup> Section XII C, comment 1, of the ICN’s Recommended Practices for Merger Notification Procedures states that “Enabling legislation and governmental policies and practices should ensure that competition agencies have sufficient independence to discharge their enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents.”

<sup>120</sup> Available at <http://www.oecd.org/gov/regulatory-policy/49990817.pdf>.

<sup>121</sup> Regulatory Policy Committee, Accession Review Report of Colombia 27-28 [GOV/RPC/ACS(2015)]. The same conclusion has been reached by other OECD Committees, in addition to the Competition Committee, that are involved in assessing Colombia.

154. Colombia's initial plan for addressing this issue was to adopt a Constitutional amendment applicable to all Superintendencies and regulators, rather than to amend separately each agency's organic law. While development of such a constitutional amendment is presently pending as a long-term project, Colombia's President on September 15, 2015, took a direct approach by issuing Decree 1817. The Decree, which took immediate effect, applies to the SIC, the Superintendent of Finance, and the Superintendent of Companies. It provides that the Superintendent is appointed for a fixed term coincident with the President's four year term, and is subject to removal by the President only for cause.<sup>122</sup>

155. The Deputy Superintendent for Competition (as is true for all SIC Deputies) is appointed and removable at will by the Superintendent and serves for no fixed term.<sup>123</sup> The Deputy's position is unaffected by Decree 1817.

### **3.2 Procedures**

#### **3.2.1 Preliminary Inquiries**

156. The procedures employed by the SIC in investigating restrictive trade practices (agreements, abuse of dominance, and other unilateral acts)<sup>124</sup> are prescribed primarily in Article 52 of Decree 2153/92, which was amended by both Law 1340 in 2009 and Decree 19 in 2012.<sup>125</sup> The SIC may begin a preliminary inquiry on its own initiative (*ex officio*) or as the result of a complaint submitted to the Competition Protection Division. The Division initiates investigations *ex officio* based on information derived from a variety of sources, including references in the news media, evidence developed in law enforcement investigations, market studies prepared by one of the SIC's components,<sup>126</sup> and alerts received from other government agencies.

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<sup>122</sup> The Decree further provides that the qualifications for the position of Superintendent are (1) a professional Degree and a post-graduate degree (at the masters or doctorate level) in subject areas related to the functions of the position, and (2) ten years of professional experience, acquired in private or public sectors, related to the functions of the position. Qualification requirements of this kind have legal status and are enforceable by the Public Prosecutor.

<sup>123</sup> The qualification requirements for the Deputy, as specified in Resolution 11753 of 2015 (SIC Organisation and Functions Manual) pp. 12-13, include a professional qualification in law, business or public administration, economics, industrial engineering or public accounting, industrial engineering, or economics; and either (i) a postgraduate specialization degree in areas related to the functions of the post, plus 60 months relevant professional experience, or (ii) 84 months relevant professional experience.

<sup>124</sup> The procedures applicable in SIC merger reviews were discussed previously in this report.

<sup>125</sup> The Codes of Administrative Procedure, Civil Procedure, and General Procedure (relating principally to rules of evidence) also apply in competition cases to the extent that Article 52 has no relevant provisions.

<sup>126</sup> The Economic Studies Group, the Mergers Group and the Competition Advocacy Group all conduct market studies that may reveal evidence of possible anticompetitive conduct.

### 3.2.2 *Recommendation of the Council on Fighting Bid Rigging in Public Procurement: detection elements*

#### **Box 10. The OECD Recommendation on Fighting Bid Rigging: Detection Elements**

Government offices that engage in procurement operations are a particularly promising source of information on collusive activity. In July 2012, the OECD Council adopted a Recommendation on Fighting Bid Rigging in Public Procurement, C(2012)115 and CORR1 ("BR Recommendation"). The Recommendation provides that Members should (1) encourage their competition agencies to form close relationships with government procurement offices for the purpose of facilitating the detection and reporting of bid rigging ("BR"), and (2) design and implement their procurement systems to "promote more effective competition and to reduce the risk of bid rigging while ensuring value for the money." The 2012 Recommendation refers to the Guidelines for Fighting Bid Rigging that were originally issued by the Competition Committee in 2009, and urges that Members encourage officials "at all levels of government" to follow the Guidelines, which are included in an annex to the Recommendation. The Guidelines include two detailed checklists. Checklist A focuses on methods for designing procurement processes to suppress BR, while Checklist B deals with methods for detecting BR when it occurs.

The SIC has been increasing its activities in the anti-bid rigging area since late 2010, when it began encouraging procurement offices to report suspected collusion and issued its own Bid Rigging Guidelines modelled on those of the Competition Committee. In 2011, the SIC was involved closely in the legislative process that amended Colombia's Penal Code to make bid rigging a criminal offense, punishable by fines, imprisonment, and disqualification from future public procurement proceedings (Law 1474). By 2012, the influx of bid rigging tips led the SIC to create a special unit dedicated to the investigation and prosecution of bid rigging cases.

In 2013, the SIC requested the OECD to prepare a report assessing the legal framework and practices relating to procurement in Colombia, and evaluating the initiatives that have been undertaken both to combat collusion in public procurement and to enhance competition in procurement procedures. The resulting *OECD Report on Fighting Bid Rigging in Colombia* (October 10, 2013) notes recent events in Colombia that relate to implementation of the OECD's BR Recommendation. Importantly, in 2011, Colombia established a National Public Procurement Agency (NPPA), whose mandate includes the promotion of best practices, efficiency, and competition in public procurement at all levels of government (Decree 4170).

The Report also describes other implementation activities by the SIC, including the preparation of a detailed internal review of Colombia's procurement laws and procedures to identify opportunities for design improvements, and the initiation of steps to establish a partnership with the NPPA. In late 2012, at the SIC's request, the OECD conducted BR training directed to procurement officials from the national government. Two training sessions, each lasting two days and involving a total of about 200 procurement officers, took place in December 2012 and February 2013. The sessions included discussions of the OECD's BR Guidelines and focused on ways to detect collusion in public procurement and to improve competition in procurement processes. Subsequently, the SIC has presented numerous additional training sessions to government procurement officers. The SIC has also adopted a practice of recommending corrective action to procurement offices when SIC bid rigging investigations identify features of the procurement process that facilitated the collusive activities at issue.

#### **Implementation of Sections II and III of the BR Recommendation**

This portion of the report discusses Colombia's implementation of sections II and III of the Council's BR Recommendation, dealing with detection of bid rigging activity. Sections I and IV, dealing with procurement procedure design and assessment of procurement procedures for adverse impact on competition, are treated in Box 7 of this report.

Recommendation II urges close collaboration between government procurement groups and competition authorities to ensure that procurement officers are aware of signs, suspicious behaviour, and unusual bidding patterns that may indicate collusion, and are encouraged to report their suspicions to the appropriate authorities. Implementation requires the development of training programmes, educational material, and procedures and incentives to facilitate reporting. The SIC has been advancing its relationship with the NPPA, an organisation that is pivotal in achieving compliance with the Recommendation. In March 2015, the SIC subscribed to a Memorandum of Understanding with the NPPA, expanding and expediting co-operative efforts to (i) detect and prosecute bid rigging in public procurement processes, (ii) devise procurement procedures and bid evaluation methods that encourage participation by more bidders and otherwise enhance competition, (iii) share information, analysis, and studies regarding competition indicators in procurement proceedings, and (iv) conduct joint training courses regarding the capacities and functions of both agencies.

On a related front, the SIC's Economic Studies Group has been participating since 2013 in a project to develop a procurement data tracking software program (known according to its Spanish acronym "ALCO"). The program is designed to help identify patterns of conduct by bidders that suggest collusive behaviour. The SIC recently completed a series of successful pilot tests using ALCO and, with the support and assistance of the Secretary of Transparency in the President's office, is currently undertaking a co-ordinated project to integrate ALCO into the procurement processes of designated government agencies, beginning with the Colombian Institute of Family Welfare (Instituto Colombiano de Bienestar Familiar or "ICBF").

Recommendation II also urges the inclusion in procurement officials' job descriptions of a performance element dealing with the prevention and detection of bid rigging, and the institution of a programme for paying monetary rewards to officers who successfully detect anti-competitive practices. Several Colombian government procurement offices have adopted the performance element recommendation, but the SIC is not aware that any office has established a reward programme.

As to Recommendation III, which urges that members encourage procurement officials to use the OECD's BR Guidelines, the SIC has distributed those Guidelines at training sessions for procurement officers and developed its own version of the guidelines for distribution throughout the government.

157. If the SIC receives a complaint from a private party, the Deputy Superintendent reviews it and determines whether to open a preliminary inquiry or to dismiss the complaint.<sup>127</sup> In making this decision, the Deputy is guided by Article 1.3 of Decree 4886 of 2011, which instructs the SIC to pursue only those claims that are "significant" for the purposes of maintaining competitive markets or promoting efficiency and consumer welfare.<sup>128</sup> This authority is important because it relieves the SIC of an obligation to investigate every complaint it receives, and enables it to focus on violations that warrant the expenditure of investigative resources. There is no precise legal standard that applies in determining whether or not a claim is significant; the SIC evaluates "significance" on a case-by-case basis.<sup>129</sup>

158. The following table shows the disposition of public complaints over the past five years. The SIC ascribes the rapid increase in complaints received since 2010 to the SIC's greater visibility in the public eye, arising from such factors as the increase in sanctions for competition law violations, the enactment of the new consumer protection law that took effect in 2012, and a more vigorous law enforcement posture by the agency generally. It ascribes the recent reduction in preliminary investigations to the adoption of a more demanding standard under which investigations are commenced only in circumstances where the existence of anticompetitive conduct is highly probable.

**Table 4. Public complaints received and resolved 2008-2014, by outcome**

	2008	2009	2010	2011	2012	2013	2014	Total
Complaints pending at beginning of period	89	92	49	33	70	75	212	N/A
New complaints received during period	113	122	86	328	635	469	594	2,347
Complaints resolved by dismissal	56	90	64	206	514	290	368	1588
Complaints resolved by opening a preliminary inquiry	40	59	24	43	42	42	10	260
Complaints pending at end of period	92	49	33	70	75	212	428 <sup>130</sup>	N/A

<sup>127</sup> The Deputy Superintendent has delegated authority to exercise this power.

<sup>128</sup> In a case where these three objectives are in conflict, the SIC considers that consumer welfare trumps the other two.

<sup>129</sup> Colombia's competition law contains no "de minimis" provision exempting firms below a certain size or market share from exposure to liability.

<sup>130</sup> This number, because it includes complaints that have not yet been evaluated to determine whether they duplicate other pending complaints, overstates the true number of distinct investigative leads. The SIC estimates that approximately 350 distinct leads were awaiting assessment at the end of 2012.

159. A preliminary inquiry, whether commenced *ex officio* or in response to a third party complaint, is conducted by the Competition Protection Division. There is no public announcement or notice to the suspected parties. During this phase, the Division can employ the SIC's full array of investigative methods to determine whether there is sufficient evidence to open a formal investigation.<sup>131</sup> Those methods include, most dramatically, the power to conduct "unannounced administrative visits" ("dawn raids") at the premises of the alleged offenders or others. No court order is required for such a raid, but the SIC does not have police powers to force entry, and can search the premises only with the consent of the occupant or proprietor. Obstruction of an SIC investigative process is, however, a separate violation of the competition law, leading to an investigation and imposition of a fine bearing the same high maximum as other fines under the competition law. The SIC is, therefore, almost invariably granted access to the targeted premises. Besides seizing digital media, documents, and other evidence during a raid, the SIC can also take depositions at the scene. The number of dawn raids conducted annually in past years was 77 for 2008, 118 for 2009, 92 for 2010, 144 for 2011, and a remarkable 288 for 2012, reflecting a 100% increase over the previous year.<sup>132</sup> In subsequent years, the number fell, to 161 in 2013 and then to 60 in 2014, the lowest number of raids in the seven year period. This reduction is concomitant with the SIC's recent efforts to target its investigative resources more effectively.

160. Nothing in the law provides a standard for the SIC's application in determining whether a raid is warranted. The SIC's policy, however, is to consider (i) the probability, based on the available information, that the competition law has been violated; (ii) the recent performance of the market affected; (iii) the type of business and market sector involved; (iv) whether the business has been investigated previously; and (v) the prospect of obtaining more or different information than would likely be produced in response to an investigative demand. Once a dawn raid commences, the SIC permits the target company's attorneys to observe the process and to note, on the minute prepared by the SIC at the end of the raid, any objections to the procedures used. The company is also provided with a certified copy of all materials seized during the raid.

161. As an investigation progresses, additional dawn raids may be conducted, and both the suspects and third parties can be ordered to appear for depositions, respond to questions, and produce information and physical evidence.<sup>133</sup> Any person providing evidence to the SIC, whether voluntarily or under compulsion, may request confidential treatment for specified information and will receive a responsive determination from the Deputy Superintendent. The preliminary investigation phase ends when the Deputy concludes that there is sufficient information in the record to determine whether a formal investigation should be opened or the case should be closed. The disposition of preliminary investigations over the past five years appears below. The recent reductions in the number of preliminary investigations resolved and formal investigations opened also reflects the SIC's emphasis on careful examination to assure that cases pursued represent worthwhile resource expenditures.

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<sup>131</sup> The SIC's investigative powers are set out in Article 1 of Decree 4886/11.

<sup>132</sup> It should be noted, however, that for statistical purposes a "dawn raid" includes any unannounced inspection visit by the SIC, which may simply entail a mid-day interview of a potential witness.

<sup>133</sup> The SIC has no criminal law enforcement authority of its own and thus cannot employ wiretaps, which are reserved by law for use in investigating criminal conduct.

**Table 5. Preliminary investigations commenced and resolved 2008-2014, by outcome**

	2008	2009	2010	2011	2012	2013	2014	Total
Preliminary inquiries pending at beginning of period	31	19	56	36	45	48	65	N/A
New preliminary inquiries opened during period	41	60	25	54	48	53	17	298
Preliminary inquiries resolved by dismissal	45	14	30	22	27	22	10	170
Preliminary inquiries resolved by opening a formal investigation	8	9	15	23	18	14	4	91
Preliminary inquiries pending at end of period	19	56	36	45	48	65	68	N/A

### 3.2.3 Formal investigations

162. A formal investigation is opened by resolution, which must be personally notified to the parties under investigation. The SIC also publishes the opening resolution on its web site and orders the defendant to publish notice in a widely circulating regional or national newspaper. In accordance with Article 8 of Law 1340, the SIC also notifies the investigation, within ten days of its commencement, to any government agencies that regulate or control the enterprises or the market sector(s) involved in the case. The notified agencies may, if they wish, submit a technical evaluation of the case within 10 days after receipt of the SIC's notice. Such agency opinions are not binding on the SIC, but the SIC's opinion resolving the case must "clearly state the legal and economic reasons" underlying its rejection of an agency's views. In any event, a notified agency may intervene at any time in the SIC's proceeding, either *ex officio* or at the SIC's request.<sup>134</sup>

163. During 20 working days after having been notified of the investigation, the defendants may inspect the evidence in the SIC's file collected during the preliminary investigation and submit evidence they consider relevant to their defence. They may also request the SIC to use compulsory process, if necessary, to obtain evidence from other parties necessary for the defendants to support their arguments. During the 15 working day period after the web site publication, third parties with a direct interest in the case may intervene and submit evidence that they consider relevant to the investigation. Any such third party information, redacted to protect confidential data, will be provided to the defendants, who may respond with rebuttal evidence by the deadline established by the Deputy.

### 3.2.4 Interim injunctions

164. The Superintendent may, at any time during the investigative process, issue an order enjoining anticompetitive conduct, provided that the requirements of Article 18 of Law 1340 are met.<sup>135</sup> Under that Article, the SIC must have sufficient evidence to conclude that a violation is probably occurring and that failure to enjoin its continuation would "jeopardise the effectiveness of an eventual decision imposing penalties." Under Colombian law, any administrative authority that is considering the issuance of an interim injunction must make determinations in accordance with two jurisprudential principles: (i) "Fumus boni juris," an assessment of whether there is a sufficient legal and factual basis to conclude that the interests to be protected by the injunction are likely to be vindicated in the underlying case, and (ii) "Periculum in mora," an assessment of whether there is a sufficient legal and factual basis to conclude that the interests to be protected by the injunction are likely to suffer imminent and irreparable harm absent the injunction. The SIC considers that, to issue an Article 18 injunction, it must possess evidence of a probable violation and make a reasoned

<sup>134</sup> Article 6 of Law 1340 obliges other agencies to provide the SIC with any technical assistance it may need in conducting the investigation.

<sup>135</sup> Although not required to do so, the Superintendent routinely convenes the Advisory Council to hear its non-binding opinion before issuing an injunction.

determination that the damage caused by the unlawful conduct is so manifest and substantial that immediate action is needed to avoid further injury that cannot be adequately compensated. No court order is required.

165. Violation of an injunction bears the same sanctions as do other competition law violations. To date, the SIC has issued only one injunction, in a 2013 case involving the principal water supply company in Bogotá. The company had reduced the volume of water it provided to water suppliers in adjacent services areas, in an effort to supplant them as the supplier in their markets. The SIC ordered immediate resumption of the previously-supplied volume.

166. The SIC's legislative proposal includes provisions that increase in several ways the Superintendent's authority to issue injunctions, which may be exercised at any time before rendering the decision in a pending case. First, the proposal expands the existing language of Article 18 to permit an order requiring the immediate suspension of unlawful anticompetitive conduct for reasons beyond merely securing the effectiveness of a decision imposing penalties. Specifically, the added language covers instances in which the Superintendent considers that an injunction is "reasonable to protect competition, prevent infractions or avoid their consequences, [or] prevent damages from occurring." Second, if the Superintendent finds during an investigation that the investigated parties are undertaking to evade payment of the fine that could be imposed at the conclusion of the case, he may impose a security mechanism designed to assure payment. Under the legislative proposal, the investigated parties may, if they wish, offer an alternate assurance mechanism, which the Superintendent is obliged to accept if the parties' offer provides an equivalent guarantee of payment. To exercise this authority in accordance with the applicable principles, the Superintendent would have to have an adequate legal and factual basis for finding that that parties (i) had likely violated the law and were therefore likely to be sanctioned with a fine, and (ii) were taking action (such as liquidating assets, depleting bank accounts, or transferring funds overseas) that, if unrestrained, would foreclose the possibility of collecting the fine.

167. Third, if the Superintendent finds during an investigation that the investigated parties are engaged in bid rigging in an ongoing procurement process, he may order that the parties be disqualified from participating in the procurement. To exercise this authority, the applicable principles would require the Superintendent to have an adequate legal and factual basis for finding that (i) the parties were likely violating the law, and (ii) there was a risk of imminent and irreparable damage to the public procurement process in which the parties were participating. It is possible that the SIC could invoke the existing injunctive order authority in Article 14 to disqualify a bidder from an ongoing procurement on the grounds that a fine cannot compensate for manipulating a procurement process to secure a public contract at a supra-competitive price. The SIC considers, however, that it is preferable to have express language in the law authorising the disqualification of conspiratorial bidders from an ongoing procurement.<sup>136</sup>

### 3.2.5 *Settlement*

168. The 20 day period available for the defendant to submit or request evidence is also the period during which the defendant may offer to settle the investigation without admitting a violation or suffering sanctions. Under Article 52, as amended, the Superintendent may order an investigation to be closed "when, in his opinion, the alleged offender provides reasonable guarantees that it will suspend or modify the conduct for which it is being investigated." The settlement process commences

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<sup>136</sup> The SIC's legislative proposal also includes a provision that enables parties subject to an injunction order to petition the Superintendent for reconsideration of an injunction or of its particular terms. The injunction remains in effect during the reconsideration procedure.



when the defendant submits proposed “guarantees,” which are lodged with the Superintendent rather than with the Deputy. The offer is notified to interested third parties, who may comment on the proposal. The Superintendent may request clarifications and additional commitments, and otherwise negotiate an agreement with the defendant. If consensus is reached, the Superintendent issues an order accepting the commitments, closing the case, and specifying the method by which the defendant’s compliance with the conditions will be monitored and assured<sup>137</sup>. As in merger cases that involve conditions, the defendant is required by law (Article 22 of Law 1340) to make an annual payment covering the cost of the SIC’s compliance monitoring activities.

169. The requirement that a defendant offer settlement conditions before expiration of the 20 day period for submission of evidence was added in 2009 with the enactment of Law 1340. Before that time, a defendant could make a settlement offer at any point. The effect of the amendment is to limit settlement proposals to the beginning of the formal investigation stage, before the SIC has expended substantial resources to prove a violation. In those circumstances, accepting a settlement that terminates the suspected anticompetitive conduct is a quick and low cost way to improve competition. The disadvantage is that the settlement entails no fines, which means that the deterrent value of the case is minimal. Considerable criticism was directed to the SIC in the past for resolving serious cartel cases by settlement. The SIC states that its current policy on this issue is to reject settlement offers in cases involving conduct (such as hard core collusion) that it is important to deter. No SIC cases have been resolved by guarantees in recent years.

170. A related issue that arises with respect to Article 52 settlements is whether the Superintendent is compelled, as a matter of law, to accept undesirable conditions that he nonetheless concedes “will suspend or modify the conduct for which [the defendant] is being investigated.” The SIC’s position is that, under Article 52, the Superintendent “may” accept such an offer, but may also decline to do so on enforcement policy grounds (such as to impose fines that will deter similar conduct by other enterprises). Some practitioners complain that the SIC has in the past rejected settlement offers without explaining its reasons for doing so. The current administration’s policy is to explain the reasons for rejecting settlement proposals.

171. In cases commenced as a result of a third party complaint, once the 20 day period for submissions or requests by the defendant has elapsed, the SIC will schedule a “conciliation hearing,” as required by Article 33 of Law 640 of 2001. The hearing involves the defendant (whose attendance is required) and interested parties who claim injury caused by the alleged restrictive competition practices under investigation. A conciliation hearing is also required in proceedings under the unfair competition law, both in SIC law enforcement cases and in damage claim actions filed with the SIC by private parties. The SIC’s legislative proposal eliminates the conciliation hearing requirement in SIC law enforcement proceedings under both the competition law and the unfair competition law, on the grounds that such cases are resolved solely by fines and conduct orders, and entail nothing to “conciliate” because no outcome of the case results in redress to victims. The proposal retains the conciliation hearing requirement for application in private damage actions filed with the SIC. An attempt to conciliate between the defendant and third party claimants is appropriate in such cases because damages can be awarded.

172. The next step in the investigative process occurs when the Deputy Superintendent issues an order specifying what additional information must be submitted or acquired to clarify the record. Once evidence satisfying that order is provided, the Deputy issues a one-time order summoning the party under investigation and any recognised third parties to a hearing, at which they may present arguments

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<sup>137</sup> Settlement conditions normally have a duration of three years.

regarding the merits of the case.<sup>138</sup> Subsequently, the Deputy submits a reasoned report to the Superintendent, providing an analysis of the evidence in the record and assessing the justification (or lack thereof) for the conduct under investigation. The report includes an analysis of the relevant market, the parties' market power, the conduct involved, the duration of the conduct under scrutiny, and the conduct's legality or illegality, and concludes with a discussion of what decision the Deputy recommends.

### 3.2.6 Decision

173. The Deputy's reasoned report is sent to the defendants and recognised third parties, who have 20 days to submit their comments regarding it. The Superintendent, assisted by a team comprised of lawyers and economists who have not participated in the investigation, undertakes a *de novo* analysis of the Deputy's report, the record, and the submissions of the defendants and third parties, and may either accept the recommended decision or reach a different result. If the Superintendent finds an offense, either in accord with or contrary to the Deputy's recommendation, the Superintendent's ruling will include an opinion detailing the facts and analysis supporting the conclusion. Under Colombian law, the standard of proof in a SIC law enforcement proceeding to impose sanctions is the same as that applied in a criminal prosecution. The defendant is presumed innocent and no decision finding liability can be taken in the face of reasonable doubt<sup>139</sup>

174. The ruling may impose a fine<sup>140</sup> and order the unlawful conduct to be terminated or modified,<sup>141</sup> but the Superintendent must hear the Advisory Council's non-binding opinion before imposing a monetary sanction. If the Superintendent agrees with the Deputy that no violation occurred, the Superintendent issues a Resolution fully explaining why there has been no violation. The Superintendent may also simply adopt the Deputy's report by a "briefly supported" reference, an option that is reserved for simple cases and has not been employed thus far. If the Superintendent closes the case despite the Deputy's recommendation for sanctions, the Resolution closing the case fully explains the case, including the facts, the law, the alleged harm, and the arguments presented in the reasoned report, and describes why there has been no violation.

175. Under the SIC's legislative proposal, the Superintendent need not convene the Advisory Council before imposing any type of monetary fine, but only fines in cases targeting "core" violations involving anticompetitive conduct and agreements. Thus, the requirement for a Council opinion would no longer apply to fines for obstructing investigations, or for failing to comply with orders, instructions, information requests, pre-merger notification requirements, merger approval conditions, or settlement guarantee provisions. The legislative proposal also provides that, in cases where a Council opinion is mandatory, the Council may, at its discretion, convene a non-public hearing at which the investigated parties and recognized third parties are invited to present their arguments to the Council orally. Failure of an investigated party to attend such a hearing may not be considered evidence of liability.

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<sup>138</sup> The defendant is not required to attend this hearing, and Article 52 specifies that failure to appear shall not be considered evidence of liability.

<sup>139</sup> The standard of proof is one of the few features of SIC procedure adopted from criminal law.

<sup>140</sup> Under the statute of limitations in Article 27 of Law 1340, an order imposing sanctions must be issued not later than five years after the occurrence of the unlawful act (or the occurrence of the last in a series of unlawful acts).

<sup>141</sup> The SIC imposes conduct orders on the basis of Articles 1.6 and 1.61 of Decree 4886.

176. Whether or not a hearing for the investigated parties is convened, the Advisory Council must subsequently convene a separate non-public hearing at which the Deputy Superintendent and the Superintendent present their arguments. Once the presentations are complete, the Deputy withdraws, and the Council advises the Superintendent of its non-binding opinion. If the Superintendent departs from the Council's opinion, he must explain the reasons of such departure in his decision.

177. Once the Superintendent has rendered a decision, the parties (including third parties) have ten business days to request that the Superintendent reconsider the decision (Art. 76 of the Administrative Procedure Code).<sup>142</sup> The Superintendent has 60 calendar days to issue a decision ruling on a reconsideration petition, at which point the decision becomes final and subject to judicial review. Of the 85 non-merger case decisions issued by the Superintendent from 2008 to 2014, 62 were reconsidered on petition by the parties. In 49 of the reconsidered cases, the decision was confirmed without change. In the remaining 13 cases, the SIC took such actions as reducing the amount of fines imposed or removing from the case defendants who could not be sanctioned due to the statute of limitations.

178. The disposition of formal investigations over the past five years is shown below.

**Table 6. Non-merger competition cases resolved 2008-2014, by outcome**<sup>143</sup>

	2008	2009	2010	2011	2012	2013	2014	Total
Formal investigations pending at beginning of period	31	24	20	24	29	32	27	N/A
New formal investigations opened during period	8	9	15	23	18	14	4	36
Formal investigations resolved by dismissal	4	5	5	7	6	10	2	39
Formal investigations resolved by orders/sanctions	15	8	9	15	10	7	21	85
Formal investigations resolved by settlement	1	0	2	1	3	0	0	7
Formal investigations pending at end of period	24	20	24	29	32	27	21	N/A

179. For the years 2008 through 2014, average elapsed time for the various phases of conduct investigations were as shown in the following table. The preliminary investigation phase runs from receipt of a complaint or initiation of an *ex officio* investigation to the termination of the preliminary investigation. The formal investigation phase runs from the initiation of a formal investigation until the submission of the Deputy Superintendent's reasoned report. The decision phase runs from the filing of the Deputy's report to the release of the Superintendent's decision (excluding time for reconsideration).

<sup>142</sup> Procedural decisions made by the Deputy Superintendent during the course of the case are not ordinarily subject to a petition for reconsideration by the Deputy, and assertions of procedural error by the Deputy that the Deputy has declined to correct may therefore be raised only at the time that the Deputy's reasoned decision is filed with the Superintendent (Art. 21, Law 1340). There is an exception for decisions by the Deputy rejecting evidence proffered by a party – such decisions are subject to an immediate reconsideration petition. (Art. 20, Law 1340). If, on reconsideration, the Deputy confirms his initial decision, the party must then wait to raise the issue until the case is submitted to the Superintendent. Any claim of procedural error arising after the Deputy's reasoned decision is submitted to the Superintendent may be asserted in a petition seeking reconsideration of the Superintendent's decision (Art. 21, Law 1340).

<sup>143</sup> "Non-merger cases" means all SIC law enforcement cases other than decisions on the merits of proposed mergers, and thus includes, for example, cases sanctioning failure to notify merger transactions.

**Table 7. Average Case Processing Times 2008 – 2014 (months elapsed)**

<b>Year cases commenced</b>	<b>Preliminary Investigation phase</b>	<b>Formal Investigation phase</b>	<b>Decision phase</b>	<b>Total Time elapsed</b>
2008	21.7	12.5	4.8	39.0
2009	9.7	21.2	4.2	35.1
2010	14.3	6.3	6.8	27.4
2011	3.9	10.5	6.4	20.8
2012	14.0	18.8	4.8	37.5
2013	14.4	11.6	8.2	34.2
2014	11.5	20.25	7.25	39.0

180. In general, practitioners believe that cases take too long to process. The SIC’s internal policy is that preliminary investigations should be completed within six months and formal investigations within two years. The preceding table shows that these standards are met infrequently for preliminary investigations but met routinely for formal investigations.<sup>144</sup> The SIC considers that the duration of formal investigations is more significant than that of preliminary investigations in terms of impact on the investigated parties, and regards two years as a reasonable period in which to complete a formal investigation in a contested matter. In this respect, the agency notes that the statute of limitations for competition law violations is five years, running from the date of the last unlawful act to the date on which notification of the Superintendent’s decision imposing sanctions is served. This means that the clock continues to run while the case is being investigated and litigated. If the SIC fails to prosecute a case with sufficient expedition, the statute of limitations will ultimately render the case moot in the defendant’s favour, as the time limit will expire before a decision is reached and a sanction imposed.

181. Parties subject to conduct orders and settlement conditions may petition the SIC for their modification or termination, following the procedures described previously with respect to orders and conditions imposed in merger cases. Violations of conduct orders, or failure to comply with guarantees accepted by the SIC in settlement of a case or with orders to produce evidence, are investigated as violations of the competition laws, in accordance with the same procedures under Article 52 of Decree 2153 and subject to the same sanctions and orders.

182. The SIC’s legislative proposal would change this regimen, providing that Article 52’s procedures would apply only to investigations of “core” violations involving anticompetitive conduct and agreements, while other investigations would be conducted and resolved in accordance with the provisions of Articles 47 to 52 of the Administrative Procedural and Contentious Administrative Code. Thus, the latter procedures would apply to investigations that focus on conduct obstructing SIC investigations; failing to comply with SIC orders, instructions, information requests, pre-merger notification requirements, merger approval conditions, or settlement guarantees; and involving violation by a business entity or its affiliates of the prohibition against insuring or paying for the fines assessed against an individual facilitator under Article 26 of Law 1340. The principal differences between the Article 52 Decree 2153 procedures and the Article 51 Code procedures are summarized as follows:

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The SIC attributes the noticeable 2014 increase in the duration of formal investigations to two factors: (1) the large overhang of pending matters at the beginning of 2014 compared to 2013 (the sum of pending complaints, preliminary investigations, and formal investigations was 155 for 2013 and 304 for 2014), and (2) the increased degree of scrutiny applied by the agency in determining whether to advance a matter to the next phase. The increase in work hours devoted to resolving the large number of complaints and preliminary investigations reduced the number of hours available for allocation to formal investigations. The latter, although resolved more slowly than in previous years, were still completed, on average, within the time specified by the agency’s internal policy standard.

**Table 8. Comparison of Procedural Element between Decree 2153 and Code Article 53**

Procedural Element	Decree 2153 Article 52	Code Article 53
Time period after formal investigation opens for submitting or requesting evidence	20 days	15 days
Maximum time period for evidentiary phase of proceeding	None specified	30 days; may be expanded to 60 days if the case involves 3 or more parties or entails practice in a foreign jurisdiction
Time period after close of evidentiary phase for presentation of arguments; type of argumentation permitted	20 days; oral and written argument	10 days; written argument only
Statute of limitations applicable to underlying offense	5 years	3 years

### 3.2.7 *Sanctions*

183. For business entities, the maximum fine under current law is the greater of 150% of the profits derived from the anticompetitive conduct or 100,000 CLMMW, equivalent to COP 61.7 billion or about USD 27.1 million (Article 25 of Law 1340).<sup>145</sup> Article 25 specifies the criteria to be taken into account by the SIC when determining a fine, as follows: (i) the conduct's impact on the market, (ii) the size of the affected market, (iii) the illicit benefits obtained by the defendant, (iv) the degree of the defendant's participation, (v) the defendant's conduct during the investigation, (vi) the defendant's market share and portion of business involved in the violation, and (vii) the defendant's equity position. Aggravating circumstances include (i) persistence in the violation, (ii) recidivism, (iii) failure to comply with commitments given to or directions issued by the SIC, and (iv) activity as the instigator or leader of the unlawful conduct. Mitigating circumstances include assisting the SIC to expose the illegal conduct and co-operating in the investigation.<sup>146</sup>

184. For individuals, the maximum fine is 2,000 CLMMW, the equivalent of COP 1.28 billion or about USD 541,900 (Article 26 of Law 1340). A fine can be imposed on any person "who collaborates with, facilitates, authorises, performs or tolerates" a violation of the law. Article 26 therefore covers not only corporate officers but also other persons in a position to "facilitate" a violation, such as

<sup>145</sup> As described previously, the SIC's legislative proposal would authorise the SIC to assess fines of up to (i) 10% of either the total turnover or the net worth of a company, or 30% of company sales, whichever is greater, or (ii) in cases involving bid rigging in public procurement processes, 30% of the value of the contract affected. The proposal also retains the existing option to assess a fine based on a percentage of the illicit profits, but doubles the percentage maximum from 150% to 300%. The SIC may elect whichever option yields the highest fine.

<sup>146</sup> The SIC's legislative proposal amends the existing list of fine determination criteria in Article 25 by (i) deleting the existing references to (a) the size of the affected market, (b) the illicit benefits obtained by the defendant, and the defendant's equity position; (ii) adding new references to (a) the nature of the goods or services involved, and (b) the period of time in which the conduct has been perpetrated; and (iii) modifying the reference to "the defendant's conduct during the investigation" to "the conduct of the defendant during the process in order to obstruct or delay the investigation" and convert that criterion to a new aggravating factor. The aggravating factors, which are otherwise left unchanged, are expressly stated to entail a 10% fine amount increase for each factor applicable in a particular case. The two present mitigating factors, "assisting the SIC to expose the illegal conduct and co-operating in the investigation," are replaced with a single factor: "acceptance of the charges by the defendant, if has not been subject to a benefit in a leniency program."

attorneys and accountants. Liability depends solely on unlawful conduct; an unlawful intention is not required. As noted previously, however, penalties for individuals are applied only where the corporate violation that was facilitated has itself been sanctioned by the SIC. Article 26 specifies the criteria to be taken into account by the SIC when determining an individual's fine, as follows: (i) persistence in the violation, (ii) the conduct's impact on the market, (iii) recidivism (as a facilitator), (iv) the individual's conduct during the investigation, and (v) the degree of the individual's participation.<sup>147</sup> Fines assessed against an individual may not be insured or paid, directly or indirectly, either by the business entity that employed the individual or by a company affiliated in any way with the employer.<sup>148</sup>

185. The imposition of fines by the SIC in individual conduct cases is described in section 2 of this report, and data showing aggregate fines imposed, by year, for each type of conduct violation are shown in section 3.5. The record of the SIC with respect to fines in cartel cases receives special treatment in the following paragraphs, because Colombia's leniency programme is discussed here, and the size of the fines assessed against cartels plays a fundamental role in determining the success of any leniency programme.

### 3.2.8 *Leniency*

186. Article 14 of Law 1340 of 2009 established a leniency programme as part of Colombia's competition law regime. The programme contemplates both complete and partial amnesty from fines for business enterprises and individuals who participate in an anticompetitive agreement and who provide timely and effective assistance to the SIC in exposing and prosecuting the conduct involved. Although leniency benefits are available even if the SIC is already aware of the agreement and has commenced an investigation, an application must be submitted no later than twenty business days after the initiation of the formal investigation to which the application relates.

187. At present, Article 14 is implemented by Decree 1523 of 2015, issued in July 2015. Under the Decree, complete amnesty is reserved for the first party to apply to the Deputy Superintendent and who meets the following conditions: (i) is not the instigator, (ii) terminates participation in the conduct, and (iii) preserves evidence and provides complete information relating to the identities of the other participants; the nature, duration, objectives, and operation of the agreement involved; and the geographic and product or service markets affected. If the Deputy determines, after examination, that the evidence provided by the applicant is not sufficient to warrant total exemption of the fine, the applicant

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<sup>147</sup> The SIC's legislative proposal also amends the existing list of fine determination criteria in Article 26 by (i) deleting the existing reference to the conduct's impact on the market; (ii) expanding the existing reference to recidivism (as a facilitator) to include failure as a facilitator to comply with commitments given to or directions issued by the SIC; (iii) adding a new reference to the net worth of the facilitator; (iv) modifying the existing references to "persistence in the violation" and "the individual's conduct during the investigation" to "continuing to facilitate the violation" and "the conduct of the facilitator during the process in order to obstruct or delay the investigation," respectively, and converting both of those criteria to aggravating factors; and (v) adding a further aggravating factor to cover recidivism (as a market agent rather than as a facilitator), including failure as a market agent to comply with commitments given to or directions issued by the SIC. The aggravating factors, no version of which appears in Article 26 at present, are expressly stated to entail a 10% fine amount increase for each factor applicable in a particular case. The proposal also adds a mitigating factor covering "acceptance of the charges by the defendant, if has not been subject to a benefit in a leniency program."

<sup>148</sup> Practitioners complain that they cannot discern how the SIC determines whether to impose fines on company officers in a given case. The SIC states that current policy is always to impose fines on officers if there is sufficient evidence of personal culpability.

may withdraw the application and the evidence submitted, or may request the Deputy to consider the application as a petition for a reduced fine. If the evidence provided by the applicant is sufficient but the applicant thereafter fails to continue co-operating with the investigation, the applicant will be demoted to a lower position on the applicant roster.

188. Subsequent applicants apply in the same manner, must meet the same conditions for qualification, and are assigned roster positions in order of application. The Deputy determines recommended fine reductions for subsequent applicants by evaluating the quality of their co-operation and applying the following reduction schedule: between 30 and 50% for the second applicant and up to 25% each for any others. An additional 15% reduction is available for disclosing the existence of a different cartel (a feature commonly known as “Amnesty Plus”). The benefits earned by a business entity will extend to the entity’s officers, but not vice versa, although the employer of an individual applicant may still qualify for lesser benefits by co-operating with the investigation. The Superintendent’s order resolving the case will award the benefits earned. Any leniency applicant who risks retaliation as a consequence of disclosure may request the Deputy to maintain his or her identity in confidence.

189. Although Law 1340 was enacted in 2009 and the initial regulation implementing the leniency programme (Decree 2896) was issued in August 2010, no leniency applications had been granted at the time of the Secretariat’s initial report. The 2009 OECD-IDB Latin American Competition Forum Report (“2009 LACF Report”),<sup>149</sup> noting that Law 1340 of 2009 had both substantially increased maximum fines and authorised the SIC to establish a leniency programme, observed (¶ 145) that such a programme “cannot be effective unless the SIC also establishes a reputation for imposing large, punitive fines on cartel operators.” The SIC’s current administration, in full agreement with that Report’s observation, determined in 2013 to incentivise applications by conspicuously increasing the fines imposed on cartel participants. As described previously, in September 2013 the SIC imposed a monetary fine of more than USD 11 million on enterprises and individuals belonging to the Nule Group, a business consortium that had rigged bids to win two public procurement contracts. The average fines imposed on business enterprises and company officers in the 20 cartel cases sanctioned by the SIC for the years 2008 to 2014 are shown in the following table.

**Table 9. Fines Assessed Against Cartel Participants 2008 - 2014**

<b>Year</b>	<b>Per Business Entity (Average amount)</b>	<b>Per Individual Officer (Average amount)</b>
2008	COP 923 million (USD 388,162)	COP 44 million (USD 18,503)
2009	COP 498 million (USD 209,431)	COP 38 million (USD 15,980)
2010	COP 947 million (USD 398,255)	COP 11 million (USD 4,625)
2011	COP 736 million (USD 309,520)	COP 51 million (USD 21,447)
2012	COP 506 million (USD 21,795)	COP 52 million (USD 21,868)
2013	COP 1.8 billion (USD 756,979)	COP 1.02 billion (USD 428,955)
2014	COP 1.48 billion (USD 622,405)	COP 29.7 billion (USD 12,490)

190. Since the beginning of 2014, the SIC has received leniency applications that led to the opening of three investigations involving markets for baby diapers, school notebooks, and household paper products. The SIC is presently reviewing leniency applications relating to other markets and anticipates opening investigations in certain of those matters as well.

<sup>149</sup> “Colombia – Peer Review of Competition Law and Policy,” available at <http://www.oecd.org/daf/competition/44110853.pdf>.

191. The Secretariat's initial report noted that, with respect to the sub-class of cartels that involve bid rigging agreements, one factor that could deter applicants from applying for leniency is the fact that complete amnesty is available under the SIC's programme, whereas the leniency programme applicable in criminal bid rigging cases entails maximum reductions of one-third of the imprisonment term, 40% of the fine, and three years of the eight year disqualification period for participation in public procurement proceedings. Further, leniency in criminal cases is available only to defendants that have earned complete leniency in the associated SIC proceeding; with the consequence that only one defendant per case can qualify. Practitioners note that it might be possible for a SIC leniency applicant to negotiate in advance with the Attorney General's office (which prosecutes criminal cases) and obtain a waiver of any criminal prosecution for bid rigging and other possible charges, such as wire fraud or conspiracy to defraud. Clients are, however, averse to making such an approach to the Attorney General. The SIC's legislative proposal partially addresses this issue by modifying Article 410A of Law 599 of 2009 (the Anti-corruption provision of Colombia's Criminal Code) so that a leniency applicant who obtains complete amnesty in the SIC's case would also obtain total amnesty from criminal sanctions.

192. Another possible problem applicable in cartel cases generally is that SIC leniency does not apply to protect parties co-operating with the SIC from civil liability for damages arising from participation in anticompetitive collusion. Under Colombian law, each participant in a conspiracy is jointly and severally liable for all the damages attributable to the conspiracy. An action by victims for damages caused by collusion can be filed in Colombian courts, although it does not appear that any such cases have been brought. Nonetheless, it is a risk that attorneys must explain to their clients. The SIC's legislative proposal also addresses this issue, employing the approach adopted by the United States and the European Union. Under the proposal, a conspirator who receives total amnesty from the SIC will be liable only for its own share of the damages, and not (as is now the case) jointly and severally liable for all damages.

193. The SIC's legislative proposal also includes a number of other provisions designed to improve the attractiveness or operation of the leniency programme. As noted above, the SIC's legislative proposal would provide a broader range of options for use in calculating maximum fines and permit the SIC to elect whichever option yields the highest maximum. The proposal also includes language amending Article 14 of Law 1340 to:

- Delete the statutory requirement that a leniency recipient not have been "the instigator or promoter" of the conspiracy. The SIC has concluded that this restriction is problematic on several grounds. (i) It discourages leniency applications relating to cartels that have existed for many years and in which the conspirators have taken turns as ringleader, and from enterprises that were initially the instigator but are now under new managers who have terminated involvement in the conspiracy and would prefer to seek leniency from the SIC. (ii) It reduces uncertainty among the conspirators about which enterprise might apply for leniency. (iii) It is difficult for the SIC to administer because, among other reasons, it creates disputes among leniency applicants seeking to improve their place on the application roster by asserting that an earlier applicant is an ineligible instigator.<sup>150</sup>

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Pending adoption of the proposed legislation, the SIC addressed this problem by including in its modified leniency program regulation (Decree 1523 of 2015) a provision defining the term "instigator" narrowly as "a person whose actions in coercing or inducing by serious threat another person or persons to participate in an anticompetitive agreement are a continuing and decisive factor in maintaining the agreement."



- Extend leniency benefits to individuals who reveal that they facilitated anticompetitive unilateral conduct by an associated enterprise. The enterprise itself is not eligible for leniency with respect to such unilateral conduct, since there are no co-conspirators and hence no other defendants that the enterprise can assist in prosecuting.
- Accord permanent statutory protection against disclosure to adverse third parties of the identities of leniency applicants and the evidence submitted by them during the course of the investigation. This protection is without prejudice to the rights of other cartel members to access such leniency application evidence as is necessary on due process grounds to prepare their defence.
- Provide that the SIC may not charge an individual as the facilitator of a competition law violation with respect to which the individual is the first leniency applicant.

194. As noted above, the SIC on July 16, 2015, issued a revised leniency programme regulation. The Decree was developed in conjunction with the SIC's legislative proposals for enhancing the operation of the leniency programme. The provisions of the Decree include improvements that:

- Revise the current leniency benefit schedule to increase the incentive to be "first in." The previous schedule offered full amnesty to the first applicant and maximum fine amount reductions of 70% to the second applicant, 50% to the third, and 30% each to any others. The revised schedule offers a reduction of between 30 and 50% for the second applicant and up to 25% for any others.
- Enable leniency applicants who are not "first in" with respect to a particular cartel to earn an additional 15% reduction in their fine by disclosing the existence of a different cartel.
- Simplify the procedure by which a leniency applicant obtains a "marker" to reserve its place on the application roster. The previous procedure required an in-person meeting with the Deputy Superintendent, who was not always immediately available when an applicant wished to file. The revised regulation provides that, in addition to an in-person meeting, an applicant may also obtain a marker by means of a telephonic or written communication.

### 3.2.9 *Collections*

195. The imposition of fines will not exert the expected deterrent effect if other prospective violators perceive that such fines are not actually paid. The SIC is legally empowered to pursue coercive proceedings in order to obtain payment of fines imposed. This function is the responsibility of the Coercive Collection Working Group, part of the SIC's Legal Unit attached to the Superintendent's office. If a fine remains unpaid after its due date, normally 15 days after the completion of the case (excluding any time expended for reconsideration), and if payment of the fine has not been suspended during a judicial review proceeding, the SIC will send the debtor a notice to pay, followed thereafter (if the debtor remains in default) by an SIC collection order for execution. The SIC can then proceed to seize financial assets in bank or brokerage accounts, as well as to auction the debtor's tangible assets, such real estate holdings, jewellery, and automobiles. Over the five years from 2008 to 2014, the SIC imposed due and payable fines totalling COP 297.83 billion (1.252 billion USD), of which 48% was collected (COP 146.41 billion, 615.71 Million USD). The SIC states that a considerable portion of the outstanding fines has been suspended pending judicial review proceedings in which the defendants have posted a bond assuring payment if the SIC's decision is sustained. To address this cause of delay in collections, the SIC's legislative proposal includes a provision repealing Article 101 of Law 1437 of 2011 (the Administrative Procedural and Contentious Administrative

Code), which provides the courts with legal authority to suspend a collection proceeding during judicial review of the underlying agency order imposing sanctions.

196. Section IA1(b) of the OECD Council's 1998 Recommendation on Effective Action against Hard Core Cartels [C/MIN(98)24] urges Members to ensure that their competition laws provide for "enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance" with orders to produce relevant information. The SIC considers that, in Colombia, the competition law institution, and its investigative powers, enforcement procedures, and authority to impose penalties for non-compliance fully satisfy this element of the Recommendation., although the SIC notes that is currently proposing legislative amendments to the leniency programme designed to make it even more effective.

### *3.2.10 Due process and related issues*

197. With respect to the application of due process principles in SIC law enforcement proceedings, practitioners have cited a number of concerns, including complaints that:

1. Defendants have faced undue practical difficulties in accessing the full record of the case (including all documentary and digital information) during the 20 day period after the formal investigation is initiated. The 20 day period is the time available to the defendants to submit evidence, request the SIC to require additional evidence from third parties, and formulate settlement offers, and the parties therefore consider it imperative to have unimpeded access to the investigative file.

The SIC states that, if practical constraints prevent access to the file, defendants will be granted an appropriate extension of the 20-day period.

2. The SIC, in cases where a specific charge was asserted in the notice initiating the formal investigation, has subsequently changed the charge without granting the defendant a new 20 day period to submit rebuttal evidence.

The SIC states that there is no case in which where the SIC has materially altered the charge subsequent to the notice initiating the formal investigation. No court has ever overturned a SIC decision based on such a claim.

3. The Superintendent has issued final decisions relying on record evidence that differs from the evidence relied upon by the Deputy in his reasoned opinion, and that the defendant did not have reason to address in its responsive brief.

The SIC states that the Superintendent's decisions ordinarily rely on evidence cited in the Deputy's reasoned report. If a decision relies on non-record evidence or on record evidence that the defendant had no reason to rebut, the defendant can raise that point on petition for reconsideration or on judicial review.

4. There is no legal prohibition on communications between the Superintendent and the Deputy Superintendent during the pendency of a formal investigation.

The SIC states that although there is no legal prohibition, the Superintendent maintains, as a matter of policy, a strict "Chinese wall" barring communications between the Superintendent and the Deputy with respect to a pending investigation, beginning with the initiation of the

preliminary investigation. Once Congress acts on the SIC's legislative proposals, the agency will issue revised procedural regulations and will include provisions making the functional separation between the Superintendent and the Deputy a legal mandate rather than, as is now the case, a matter of agency policy.

5. The Deputy Superintendent, who acts as prosecutor, prepares the Superintendent's opinion resolving the case.

Under Article 9.7 of Decree 4886, the Superintendent may direct the Deputy Superintendent to prepare the Superintendent's final opinion. This authority has not, however, been invoked since late 2011 and, in the current administration, is barred under the "Chinese wall" policy described above. The regulation establishing a formal functional separation between the Superintendent and Deputy, above, will address this issue as well.

6. There is no opportunity to cross-examine hostile witnesses;

The SIC states that parties may always cross examine hostile witnesses, whether called by the SIC or by the parties themselves. Under present Colombian procedural law applicable in all administrative and judicial proceedings, however, parties on the same side of a case are treated as sharing common interests and are not permitted to call one another as hostile witnesses. Consequently, cartel participants cannot question one another in a SIC law enforcement proceeding, although their interests in that context are plainly adverse. The SIC's legislative proposal includes a provision that would permit cross-examination among defendants in a SIC case.

7. There is no rule prohibiting participation by a government officer in a case wherein he or she has a personal interest, financial or otherwise.

The SIC states that Article 11 of the Administrative Procedure Code expressly prohibits public officers from participating in a case where they have a direct or indirect interest of any kind. Defendants may petition for removal of a conflicted officer.

198. In addition to due process, other related aspects of the SIC's operations that warrant examination include (1) the transparency of its decisions and policies, including the predictability and consistency of its decisions, and (2) its treatment of confidential information. Practitioners agree that the SIC has recently made great strides in transparency, particularly by elaborating its web site and making its public output available there.<sup>151</sup> In November 2012, the SIC adopted a policy focused on producing clear rulings, doctrines, and precedents in every competition case that the agency decides. The result has been the development of rulings on essential facilities, refusals to deal, differences between mergers and collaboration agreements, and anticompetitive conduct by object, among others. The SIC has also launched a programme to publish on its website all the decisions issued by the Superintendent since 2000, compiled in a format that permits the cases to be searched by year, name and type of conduct at issue.<sup>152</sup> The online collection includes economic studies of mergers that are approved without conditions, and excerpts from case decisions containing the passages with the most

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<sup>151</sup> The site is not perfect. Practitioners note that some items are hard to find. Also, the SIC does not place any English language materials on its web site other than its Merger Guidelines, although ICN VIII C, comment 5, urges the translation of the full array of laws, regulations, and interpretive notices relevant to a country's merger control system.

<sup>152</sup> This project is presently complete for decisions issued since 2006.

significant rulings in each matter. These improvements, among others, enabled the SIC to win the 2013 prize for the best government agency webpage in Colombia.

199. With respect to predictability, the SIC states that, in addition to articulating doctrine in its case opinions, it has also issued Merger Guidelines and Guidelines for trade associations and collaboration agreements.<sup>153</sup> As the system matures and generates sufficient doctrine and case law, the SIC will move towards the EU model of issuing guidelines on all substantive competition law issues, including abuse of dominance, anticompetitive agreements, and case settlements (guarantees), among others. Also, in accordance with Article 13 of the Administrative Procedure Code (Law 1437/11), the SIC is required to respond to requests for advisory opinions relating to compliance with the competition law, although the questions must be framed as hypotheticals and the SIC's response is not binding. Under the law, the SIC must (and does) respond to such requests within 30 days. As in the case of opinions about hypothetical mergers, mentioned previously, critics assert (and the SIC concedes) that opinions on non-merger topics tend to recite the applicable legal provisions without providing useful substantive analysis. For this reason, the SIC has adopted an agency policy modifying the approach to answering such requests. SIC responses are now framed to provide not only the applicable legal rule, but also to cite the applicable case opinions, guidelines, policy statements, or other guidance applicable to the issues presented.

200. Article 24 of Law 1340 provides that the SIC "shall compile and periodically update the final decisions it adopts during competition protection proceedings. Three unvarying final decisions in connection with the same matter shall constitute probable doctrine." This provision reflects an attempt to establish a precedential effect when three sequential SIC decisions resolve a particular analytic issue in the same way. The effect attaches automatically, and the SIC can thereafter depart from the precedent only by developing a compelling justification that would meet the same standard applicable when judicial authorities decide to overturn a judicial precedent. The SIC has not triggered the application of Article 24 since the enactment of Law 1340 in 2009, and does not consider the provision to be a useful mechanism for enhancing the consistency or predictability of SIC decisions. The SIC states that, in any event, its policy is to explain in each case the theories applied, and to justify fully any divergence from a previously articulated theory. The SIC's treatment of confidential material is regulated by the Administrative Procedure Code (Art. 24, Law 1437/11), which accords confidential treatment to (i) sensitive business data and industrial secrets, (ii) professional secrets, (iii) personal privacy information, such as medical records and pension files (iv) data relating to public credit and treasury transactions, and (iv) national security and defence information.<sup>154</sup> Any person providing information to the SIC, whether voluntarily or under compulsion, may request confidential treatment for specified information, citing the constitutional or legal basis for confidentiality, and will receive a responsive determination. The requesting party must provide a non-confidential summary of the information, unless a summary cannot be developed without directly or indirectly disclosing confidential material. For each investigation that the SIC conducts, the SIC's staff creates two dockets: (1) a public docket that contains public information and non-confidential summaries of confidential material, and (2) a docket in which the confidential material appears and which the parties may review, but only with respect to information upon which the SIC has relied to open the investigation or

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<sup>153</sup> The practitioner community calls for guidelines or other forms of guidance to cover virtually every topic about which the SIC makes decisions, including on such subjects as vertical agreements, abuse of dominance, imposition of fines on individuals, acceptance of guarantees in conduct cases, model hold-separate agreements, and acceptable forms of interaction between prospective merger partners during due diligence inquiries.

<sup>154</sup> Agency employees are subject to disciplinary action and criminal prosecution for improper disclosure of confidential materials.

impose a sanction. Under no circumstances is the reproduction of confidential information or its use for a different purpose allowed, nor is any third party permitted to access the confidential docket in a case.<sup>155</sup>

201. With respect to privileged material, ICN Recommendation VI F, comment 1, provides that “In responding to information requests, parties should not be required to disclose material and information that is subject to applicable legal privileges and related confidentiality doctrines (such as the attorney work-product doctrine) in the requesting jurisdiction.” The SIC states that it complies with this recommendation insofar as it does not disclose privileged information or employ it in agency investigations. The SIC notes, however, that if a corporate employee asserts during a dawn raid that a particular document is privileged, the SIC will analyse the document to verify that the assertion is justified. If so, the SIC will not retain the document or use any of the information that it contained. The SIC also observes that it considers the work of in-house counsel to be protected by the attorney-client or work product privilege only if it is clearly demonstrated that the attorney was giving legal advice to the company and not simply performing administrative duties.

202. Practitioners recognise that the SIC has adopted appropriate confidentiality policies, but state that there have been circumstances in which personal privacy information was mistakenly retained in a public file and where attorney work product was improperly collected. They also note that the summaries of confidential information redacted from the submissions of recognised third parties are sometimes insufficiently detailed to permit the defendants to formulate a rebuttal. The SIC states that it is prepared to address complaints of this kind on a case-by-case basis.

### **3.3 Judicial review**

203. In a SIC case, any party (including recognised third parties) who is adversely affected by a SIC action can pursue judicial relief along two avenues.<sup>156</sup> First, as a matter of administrative law, Article 138 of the Administrative Procedure Code (“APC”) provides that a party may file a petition for a “Declaration of Nullity and Restoration of Rights” to obtain review of a final agency action. Second, as a matter of constitutional law, a party (or any other affected person) may immediately seek a judicial writ (Acción de Tutela, or “tutela”) against an agency act or omission that violates or threatens to violate the petitioner’s fundamental constitutional rights, if effective protection of the right would be prejudiced by awaiting resolution of the underlying case.<sup>157</sup>

#### **3.3.1 Nullity Actions**

204. The APC (Art. 75) provides that a nullity petition may not be filed against any “procedural” act taken by an agency during the course of a proceeding. Initiation of judicial review must therefore ordinarily await a final agency decision on the merits of a case. At the SIC, final agency actions that qualify for judicial review include resolutions imposing a conduct order or fine, rejecting a merger

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<sup>155</sup> A third docket is created in merger cases in which third parties have submitted confidential information. That docket, which contains the confidential third party information, is available for review by the third parties only with respect to the material that each has submitted and by the merging parties only with respect to information that the SIC relies upon to reject or condition the merger. The SIC notes that a third docket is not created in conduct investigations because, as a practical matter, third parties do not submit confidential information in such proceedings.

<sup>156</sup> Attorneys from the SIC’s Legal Unit, attached to the Superintendent’s office, represent the agency in court.

<sup>157</sup> A tutela is similar to an amparo in Mexican jurisprudence.

authorisation or imposing merger conditions over the parties' objections, or (with respect to a recognised third party) closing a formal investigation that arose from the third party's complaint. Once a final decision is issued, the affected party can pursue judicial review without seeking reconsideration by the agency, but may not file a judicial annulment petition if internal agency review has been sought and is still pending.

205. In SIC cases, most of the interim or procedural determinations made by the SIC during an investigation, such as to conduct a dawn raid, reject a complaint or a request for confidential treatment, reject evidence, deny a leniency application, or issue an injunction under Article 18 of Law 1340, are not subject to judicial review under the APC. The only method for obtaining immediate judicial relief from such SIC actions is by means of a tutela, which requires the assertion of a cognisable constitutional claim.

206. Nullity actions against the SIC decisions are filed with either an Administrative Judge of the Circuit of Bogotá or the Administrative Tribunal for Cundinamarca (the geographic department in which Bogotá is located), depending on the amount at issue. At present, the threshold for Tribunal jurisdiction is 300 CLMMW (COP 193.3 million or about USD 81,000). Cases in the Bogotá Circuit court are heard by a single judge, while Tribunal cases are heard by a three judge panel.<sup>158</sup> Judgments issued by an Administrative Judge may be appealed to the Tribunal, but no further since, under Colombian law, SIC decisions are subject to only two instances of judicial review. Nullity petitions heard in the first instance by the Tribunal are appealable to the Council of State, which is Colombia's highest court of administrative law. All SIC cases decided by the Tribunal and appealed to the Council of State are heard by a designated Council section consisting of four judges. Once an annulment petition is filed before a court, all forms of alleged error (evidentiary, substantive, and procedural) are subject to de novo review. The same standard of review, requiring substantial evidence on the record, is applied by all of the courts (including the Council of State) engaged in reviewing SIC decisions.

207. The frequency with which parties challenge final SIC competition protection decisions that are susceptible to judicial review in a nullity proceeding is shown in the following table. Decision listed in the "Decisions challenged" row may have been rendered in a year prior to the year in which they were challenged.

**Table 10. Judicial Review of SIC Final Actions: Frequency of Review 2008 - 2014**

Year	2008	2009	2010	2011	2012	2013	2014	Total
Decisions subject to judicial review	13	9	14	17	11	25	41	130
Decisions challenged	13	4	25	28	30	28	12	140

208. The volume of SIC nullity proceedings filed (either initially or on appeal) and resolved over the past seven years appears below.<sup>159</sup> Cases in the "Directly filed" columns are listed under the

<sup>158</sup> The court hearing a judicial annulment petition has power to enter provisional orders suspending enforcement of the sanction or conduct order by the SIC, but strict standards apply to such orders and none has ever been issued in a SIC case. As is true for any injunction issued by a judicial or administrative authority, the court must follow two general principles in determining whether to suspend a SIC order: "Fumus boni juris" (likelihood of success/ sufficient legal basis) and "Periculum in mora" (risk of imminent and irreparable damage). Accordingly, a party seeking to enjoin application of a fine or order imposed by the SIC must demonstrate that the agency's act likely violates a specific legal provision and that the party will suffer irreparable harm absent injunctive relief.

<sup>159</sup> The Table shows that six cases were initiated in the Council of State during the period. Ordinarily, nullity petitions cannot be initiated in the Council, which is exclusively an appellate court. However,

“Resolved” heading only if the initial decision was not appealed.<sup>160</sup> Cases listed as “Resolved” in a particular year were typically filed prior to the year of their resolution. The SIC states that the time required for a judicial body to process a case, whether pending before an administrative judge, the Tribunal, or the State Council, ranges from two to four years from start to finish. Of the 222 review proceedings commenced during the period, 140 involved initial review petitions while 82 involved appeals of lower court decisions.

**Table 11. Judicial Review of SIC Final Actions: Proceedings Filed and Resolved 2008 - 2014**

Year	Administrative Judges (Filed directly)		Administrative Tribunal		State Council		Total	
	Filed	Resolved	On appeal	Filed directly	On appeal	Filed directly	On appeal	Filed
	Filed	Resolved	Filed	Resolved	Filed	Resolved	On appeal	Directly
2008	3	0	3	2	8	0	7	0
2009	4	0	1	1	0	0	0	0
2010	4	0	4	0	20	0	18	1
2011	9	0	8	1	17	0	5	0
2012	9	0	8	0	21	0	12	0
2013	9	0	5	4	18	0	11	3
2014	3	0	0	1	9	0	0	0
Total	41	0	29	9	93	0	53	4

209. Of the 13 nullity cases resolved by the administrative Judges, Tribunal, and the State Council in the period shown, four involved decisions adverse to the SIC: one 2013 decision in the State Council and three Tribunal cases, also in 2013. The State Council decision (Induga) involved abuse of dominance in the market for ice cream cones.<sup>161</sup> The SIC found that the defendant had abused its dominant position by selling its products at artificially low prices in an attempt to drive competitors out of the market. The Council concluded that the SIC had erred in defining the relevant market, since the definition included neither key substitutes for the product at issue nor the defendant’s closest competitor. In addition, the Council found that the SIC had not proven that the defendant sold its products at artificially low prices.

210. One of the adverse 2013 Tribunal cases (Procables) affirmed a decision by an administrative judge holding that the SIC could not impose sanctions against parties for resisting the agency’s access during a dawn raid unless the SIC had provided notice to the parties before the raid commenced.<sup>162</sup> The other two adverse Tribunal decisions (Arisitzábal and Suárez) arose from a single cartel case in which the SIC had fined two individuals as “market agents” under Article 25 of Law 1340 rather than as “facilitators” under Article 26.<sup>163</sup> The court decided that Article 26 could be applied only to

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the Council accepted direct nullity petitions during certain periods when the Administrative judges and the Tribunal were not functioning due to a work stoppage as part of a “judicial strike.”

<sup>160</sup> The Table shows that none of the cases filed directly with the Administrative Judges or the Tribunal were “resolved” during the period. This is because all the decisions rendered in such cases were appealed to a higher court.

<sup>161</sup> State Council, Judgment of May 23, 2013.

<sup>162</sup> Administrative Tribunal of Cundinamarca, Judgment of March 22, 2013.

<sup>163</sup> Administrative Tribunal of Cundinamarca, Judgments of February 13, 2013 (Arisitzábal) and June 28, 2013 (Suárez).

business organizations and not to persons. The SIC could not further appeal any of these Tribunal decisions since they were rendered on appeal from decisions by an administrative judge. The SIC notes that most of the nullity cases in which it has suffered an adverse decision turned on debatable legal issues and that very few SIC decisions (such as the ice cream cone case) have been overturned on the grounds that the agency's decision was not adequately supported by evidence or reasoning.

211. Of the nine nullity cases resolved in the SIC's favour during the period, three were rendered by the State Council (one in 2010 and two in 2013) and six by the Administrative Tribunal (two in 2008 and one each in 2009, 2011, 2013, and 2014). The 2010 State Council decision in the Andevip case held that the SIC did not have to prove that the parties in a cartel case had an anticompetitive intent.<sup>164</sup> The first 2013 State Council case (Londoño) affirmed an Administrative Tribunal decision holding that the SIC had adequately demonstrated a price fixing agreement involving gasoline stations, while the second (Villa del Río) agreed with the SIC with respect to the five-year statute of limitations applicable to a competition law offense under Article 27 of Law 1340.<sup>165</sup> The most significant of the favourable Administrative Tribunal cases (the 2014 decision in Moreno) likewise involved a statute of limitations issue, as well as a dispute about whether the SIC had adequately proved an agreement among the defendant health care providers.<sup>166</sup>

212. The Tribunal and Council judges interviewed for this report stated that the SIC was well represented in court, and that the judges responsible for reviewing SIC cases appreciated both the importance of competition and the necessity for applying economic concepts in resolving appeals. In this respect, they welcome the opportunity to attend seminars designed to train judges in the application of economic analysis to competition issues, provided that such seminars are not taught by the SIC or any entity likely to be a party in a SIC judicial review case. The Judicial Administration Council, a part of the judicial branch that handles administrative issues relating to the judiciary, is responsible for organising training seminars for judges. The course instructors for programmes offered by the Administration Council are, however, normally members of the Colombian judiciary, which is not a practicable option for courses relating to competition law. Two recent programmes arranged partly by the SIC, in December 2013 and June 2014, offered competition law and economics training classes to Colombian judges under the auspices of Competition and Consumer Protection Policies for Latin America (COMPAL), a technical assistance programme offered by the United Nations Conference on Trade and Development (UNCTAD). Instructors were judges and experts from other countries, such as Peru, Spain and the United Kingdom.

213. The Colombian judges noted that, as a practical matter, there are only a few judges in Colombia who routinely deal with SIC cases (6 judges from the Tribunal and four from the Council). In their view, which is shared by the SIC, there is no need to create a specialised court in Colombia to resolve competition law cases, since the existing structure effectively yields the same result.

214. A related topic raised by the judges relates to the ability of Colombian courts to retain expert consultants for assistance in dealing with technical issues. The Judicial Administration Council establishes an approved list of experts available for service as court consultants and specifies a fee schedule for their compensation. The judges observed that well qualified economic advisors were not sufficiently attracted by the fee schedule to seek positions on the list. The SIC states that, under recent modifications to the APC (Arts. 218 and 222), judges in complex cases are now permitted to retain

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<sup>164</sup> State Council, Judgment of January 28, 2010.

<sup>165</sup> State Council, Judgments of February 13, 2013 (Londoño), and November 13, 2013 (Villa del Río).

<sup>166</sup> Administrative Tribunal of Cundinamarca, Judgment of June 12, 2014.



consultants who do not appear on the approved list and to compensate them at rates higher than those on the official fee schedule.

215. Section IA3 of the Council's Recommendation on Merger Review [C(2005)34] urges Members to ensure that merger parties have "the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger," and to receive a decision resolving their appeal "within reasonable time periods." ICN VII E, comment 1 repeats this recommendation, emphasising that such review should be resolved "within a time frame during which the merger remains viable." The ICN recommends further that competition agencies should take appropriate steps to facilitate timely judicial review, such as by "co-operating in available procedures for expedited review or expedited evidence gathering."

216. Colombia's judicial review scheme comports with the recommendation to make review available from a separate adjudicative body. Timely resolution of judicial review proceedings is problematic -- Administrative Tribunal cases take approximately two years and Council of State cases another two years.<sup>167</sup> The SIC, which recognises that a proposed merger is unlikely to remain viable for that length of time, has included in its legislative proposal a provision specifying that judicial review of SIC merger review decisions, as well as of SIC decisions resolving law enforcement investigations of anticompetitive conduct, will no longer commence with a petition to the Administrative Tribunal (which is normally the reviewing court of first instance). Rather, such cases will proceed directly to the Council of State (which is normally the reviewing court of second and final instance) for a single determination of the petition. The SIC anticipates that, by eliminating one layer of judicial review, the expected duration of judicial proceedings will be considerably reduced.

### 3.3.2 *Tutelas*

217. While nullity actions in SIC cases are processed exclusively in the administrative court system, tutelas can be handled by any court, including both administrative courts and courts of ordinary jurisdiction. In the courts of ordinary jurisdiction, a case can be commenced by a petition to a Circuit judge, a Superior Tribunal, or the Supreme Court of Justice (the highest court of ordinary jurisdiction). A Circuit judge determination may be appealed to the appropriate Superior Tribunal. If a tutela petition is filed initially with a Superior Tribunal, the Tribunal's determination is appealable to the Supreme Court of Justice. A tutela initiated in the Supreme Court cannot be appealed further.

218. Because practitioners in competition law are familiar with bringing actions against the SIC in the administrative courts, some SIC-related tutelas are filed in those courts. As in the courts of ordinary jurisdiction, a petitioning party in the administrative court system may initiate a tutela at any level -- before an Administrative judge, an Administrative Tribunal, or the Council of State. In both judicial systems, a tutela petition (whether filed in the first instance or filed on appeal) takes immediate precedence over any other cases on the court's docket and, by rule, must be resolved no later than ten days after filing. . During the resolution of a tutela, the agency's proceeding is not automatically suspended, although the court can order suspension if necessary to protect the constitutional right at issue. In addition, Colombia's Constitutional Court has, *ex officio*, discretionary authority to take jurisdiction and review any final determination rendered in a tutela proceeding.

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<sup>167</sup> Only one SIC decision on the merits of a proposed merger has been subject to a nullity petition in the last ten years. As noted previously, the Isagen case is presently pending before the Administrative Tribunal to assess the legitimacy of the Superintendent's findings with respect to "competitive control." The infrequency of such nullity actions may reflect a belief that judicial review is an impractical method of obtaining timely relief from an adverse agency decision in a SIC merger case.

219. Reliable statistics on the SIC's tutela cases are not available, but the SIC estimates that approximately 50 tutela petitions were initiated in the first instance over the two year period from 2013 to 2014. The claims most commonly asserted are alleged violations of procedural due process and personal privacy rights. Decisions rendered in cases initiated before judges or in Tribunals are typically appealed to the next higher court.

220. In the courts of ordinary jurisdiction, different panels of the Superior Tribunal of Bogotá issued conflicting decisions in 2013 regarding two tutelas filed by the Water Utility Company of Bogotá (EAAB) on behalf of its employees. In both cases, the company asserted that the SIC's actions in demanding e-mails from company employees during dawn raids violated the employees' constitutional rights to due process and privacy of personal correspondence. In the first case, the Tribunal concluded that the asserted rights had been violated because the SIC's inspection was conducted without a judicial order.<sup>168</sup>

221. Two weeks later, EAAB filed a second tutela raising the same issues, but in a separate investigation. This time, a different panel of the Tribunal held that the SIC could obtain e-mails during inspections when access is granted by the person whose email is being examined. The panel reasoned that the SIC's inspection procedures do not breach rights of due process and privacy because the Constitution itself allows all investigative agencies to demand, without a court order, any private document necessary to clarify relevant facts. The inspection conducted by the SIC was properly focused on determining whether EAAB was engaged in anti-competitive conduct affecting the supply of potable water.<sup>169</sup>

222. In another 2013 decision, the Superior Tribunal of Bogotá reversed a Circuit judge's decision dismissing the petitioner (Rojas) from an SIC cartel case based on a statute of limitations claim.<sup>170</sup> The Tribunal ruled that a tutela is appropriate only if effective protection of the constitutional right at issue would be prejudiced by awaiting final resolution of the underlying case. If the SIC had ultimately ruled against Rojas, there would have been an effective opportunity to raise the statute of limitations defence in a nullity proceeding. Similarly, in a 2014 tutela case (Silva), the Supreme Court (the highest court of ordinary jurisdiction) rejected a petition raising issues relating to due process and the privilege against self-incrimination on the grounds that those claims could be adequately addressed in a nullity proceeding.<sup>171</sup>

223. In the administrative courts, the State Council in a 2014 case (Gisaico) and the Administrative Tribunal of Cundinamarca in a 2013 case (Andcom) likewise relied on the availability of effective relief in a nullity proceeding to reject tutela petitions raising claims relating to due process, the rejection of proffered evidence, and self-incrimination.<sup>172</sup> In 2013, the Administrative Tribunal of

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<sup>168</sup> Superior Tribunal of Bogotá, Judgment of April 15, 2013. The SIC subsequently sought clarification from the Tribunal about whether it was required to return the seized e-mails. The Tribunal replied that the SIC was not so obligated. The SIC did not subsequently employ the e-mails as evidence in its own proceeding, concluding that evidence from other sources provided sufficient proof.

<sup>169</sup> Superior Tribunal of Bogotá, Judgment of April 30, 2013. A judge of the Tribunal filed a petition before the Constitutional Court seeking review of the Tribunal's ruling, but the Court refused the petition.

<sup>170</sup> Superior Tribunal of Bogotá, Judgment of March 20, 2013.

<sup>171</sup> Supreme Court of Justice, Judgment of August 14, 2014.

<sup>172</sup> State Council, Judgment of May 29, 2014 (Gisaico), and Administrative Tribunal of Cundinamarca, Judgment of May 9, 2013 (Andcom).

Valle rejected a tutela petition by Servicio Occidental de Salud (SOS) asserting that there was inadequate proof to sustain sanctions imposed on SOS for failure to comply with a previous SIC order. The Court concluded that, because the tutela petition had not been filed until months after the SIC had imposed the sanctions, the circumstances presented did not constitute an emergency warranting a tutela intervention<sup>173</sup>. In a 2013 State Council case, the petitioner (Central Tumaco) claimed that it had been denied the opportunity to copy confidential documents in the SIC's investigative files that were necessary for the petitioner's defence. The Council, noting that Central Tumaco had been permitted to review the documents, held that due process did not mandate a right to make copies.<sup>174</sup>

### 3.4 Agency resources

#### 3.4.1 Personnel

224. The SIC's Competition Protection Division presently has a staff of 119, 42 per cent of whom are contractors. Since 2008, the Division has increased dramatically in size by 258%, as the following table shows. Particularly notable growth in total employment (up 58%) occurred in 2010, reflecting the enactment of Law 1340 in the previous year. Law 1340 entailed a substantial expansion of the SIC's jurisdiction and functions, and a concomitant commitment by the Colombian government to increased resources for competition law enforcement. Another surge in personnel (up 48%) occurred over the last two years, associated with additional increases in both the SIC's workload and its budget.

**Table 12. Competition Protection Division Personnel 2008 – 2015**

Year	2009	2010	2011	2012	2013	2014	2015
Contractors	39	32	27	3	5	18	49
Employees	7	41	45	73	75	74	70
Total	46	73	72	76	80	92	119

225. The percentage of personnel represented by contractors has fluctuated substantially over the past seven years, falling from 58% in 2009 to a low of 4% in 2012, and then rebounding to 20% in 2014 and 41% in 2015. The variance is driven by the employee cap applicable to the SIC. The cap reflects the SIC's current structural legislation, which is periodically revised. Immediately after a restructuring that increases the cap, as in 2009, the SIC is able to convert contractors to employee status. Subsequently, as the SIC's personnel needs increase in the face of a fixed cap, the number of contractors increases until the next re-structuring. The SIC anticipates that it will be restructured with a higher employee cap at some point in 2015.

226. A table showing the allocation of SIC personnel (employees and contractors) to the Division's structural groups, and the professional fields that the personnel represent, is shown below.

<sup>173</sup> Administrative Tribunal of Valle, Judgment of May 30, 2013.

<sup>174</sup> State Council, Judgment of July 3, 2013.

**Table 13. Allocation of Permanent Staff to Competition Protection Division Groups, by profession 2015<sup>175</sup>**

Division Group	Personnel				Total
	Lawyers	Economists	Other professionals	Support staff	
Deputy's office	5	1	5	4	15
Competition Protection group	21	10	1	10	42
Mergers group	1	6	1	1	9
Bid rigging group	6	5	3	2	16
Competition Advocacy Group	2	4	1	1	8
Chambers of Commerce group	18	0	6	5	29
Total	53	26	17	23	119

227. Some adjustments to these data should be made to develop a more accurate portrayal of personnel assigned to the competition mission. First, although the Chambers of Commerce group is lodged within the Division, its resources are not directly employed in the Division's competition protection mission. Restating the Division's resources to exclude the Chambers group produces a new staff total of 90. Second, the Superintendent's Office has a team of six lawyers, one economist, one public policy expert, and three support staff who advise and support the Superintendent regarding competition matters arising from the Competition Protection Division. These resources are devoted exclusively to the competition mission and increase the headcount to 101. Finally, the Economic Studies Group, created in 2012 as a unit attached to the Superintendent's office, has a complement of four economists who devote a substantial portion of their efforts in support of the competition mission. This Group effectively adds another four persons to the mission's total workforce, for a total of 105, including 41 lawyers and 30 economists.

228. There is common agreement in the competition law community that SIC personnel are dedicated, diligent, and honest in their work, and professional in their dealings with outside parties. More than a few observers, however, including several former Superintendents, suggested that the development of human capital is the single most pressing challenge facing the SIC. Staff turnover at the SIC is disturbingly high. At present, 82% of the Competition Division's lawyers and economists have been employed at the SIC for less than 5 years, and 94% for less than 10.<sup>176</sup> Further, there are no SIC employees holding a doctoral degree in industrial organisation or in other fields of economics. Representatives from several regulatory agencies and regulated sectors remarked that the SIC had not developed, or had not been successful in retaining, enough personnel with sufficient experience or expertise to undertake sophisticated analyses of technical markets. While this kind of complaint about competition agencies is not uncommon to hear from regulated sectors, academic economists in Colombia also characterise the SIC's output as uneven in quality.

229. The SIC states that the agency's high turnover is due to two main causes.

- First, although salaries for junior employees and senior officials are competitive with the private sector, salaries for middle-level officials are not. This problem is not unique to the SIC; all Colombian government agencies have similar difficulties in retaining middle-level officials. In fact, when compared with other government agencies, the SIC may be considered as a high-compensation agency.

<sup>175</sup> Data are accurate to May 2015.

<sup>176</sup> The high turnover has a severely adverse effect on institutional knowledge and memory, which, among other things, impaired the preparation of this report.

- Second, many employees who leave the agency do so to study abroad for a master's degree or a PhD. Upon their return to Colombia, private sector firms consider such persons highly desirable candidates for employment because of their public sector experience. In addition, it is noteworthy that there are few PhD graduates in Colombia, especially in industrial economics. The practice of antitrust and its associated economics are relatively new, so only now are students beginning to undertake its study.

230. Considering these issues, the SIC is preparing a plan to re-structure itself in 2015. A prime objective of the reform, among others, is to close the gap for middle-level officials in terms of salaries. If the re-structuring plan is approved, the SIC will create five new posts for high-level advisors reporting to the Deputy Superintendent for Competition. These positions will be designed for candidates holding PhDs in economics, preferably in industrial organisation. The plan would also create three new posts for high-level advisors reporting to the Superintendent. One of these posts would be designed for a PhD economist. The SIC is presently engaged in negotiations with the Ministry of Finance to request inclusion in the 2016 budget of the necessary resources for additional personnel. Once the budget is adopted and the SIC's legislative proposal is enacted, a Presidential decree will be issued to restructure the SIC.

#### 3.4.2 Budget

231. The increase in staff devoted to the competition mission over the past several years has been accompanied by an increase in the agency's budget, as called for in the Government's National Development Plan for 2010-2014.<sup>177</sup> The National Plan's recommendation was based in large part on the 2009 LACF Report (§ 158), which urged additional resources for the SIC so that it could undertake the additional functions assigned by Law 1340 of 2009. As required by Law 1340, the SIC was re-structured in 2011 and its budget (expressed as an "expenditure cap") was increased from USD 24.5 million in 2011 to USD 36.7 million in 2012. The budget continued increasing in subsequent years, as described below.

232. The SIC's budget for a given year is determined by an expenditure cap negotiated initially between the SIC and the Ministry of Finance, subsequently reviewed and approved by the Department of National Planning, and ultimately adopted as part of the budget legislation enacted annually by the Congress.<sup>178</sup> The expenditure cap must be set at an amount no greater than the total amount of funds available for allocation to the SIC, which amount includes both government funds and revenues generated by the SIC. The portion of funds provided by the government is relatively small, with the bulk of the available funds coming from the SIC's own sources.

233. The following table displays the amounts and sources of funds available for allocation to the SIC for the years 2009 to 2015. The table shows five types of funds generated from SIC sources:

- "Fees" arise from charges assessed by the SIC for services rendered to users in conjunction with its intellectual property, metrology, and accreditation functions.
- "Fines" arise from monetary sanctions imposed by the SIC in any of its various law enforcement proceedings.

<sup>177</sup> *Towards the Democratic Prosperity: Vision 2010-2014*, Department of National Planning (2010) p. 81.

<sup>178</sup> Although the SIC is, in organisational terms, lodged in the Ministry of Commerce, Industry and Tourism, the Ministry plays no part in the SIC's budget process.

- “Yields” are monetary returns from the investment of SIC budget surpluses in earlier years.<sup>179</sup>
- “Contributions” arise from fees assessed by the SIC to finance its surveillance activities, such as monitoring the administration of business registries by chambers of commerce and compliance with guarantees accepted by defendants in competition cases.
- “Other” includes (i) revenues from the sale of assets by the SIC, and (ii) contributions by other government agencies to the SIC in compensation for its activities enforcing price controls in the agricultural sector and consumer protection regulations relating to telecommunications services.

**Table 14. SIC Funds Available for Allocation: Amounts and Sources 2009 - 2014**

Year	SIC Total Funds Available for Allocation		Funds from National Budget (% of total funds available)	Funds from SIC Sources (% of total funds available)				
	COP	USD		Fees	Fines	Yields	Contributions	Other
2009	49.2 billion	20.6 million	0%	58%	33%	2%	7%	0%
2010	54.2 billion	22.7 million	6%	65%	18%	3%	7%	1%
2011	74.7 billion	31.4 million	6%	57%	19%	5%	5%	8%
2012	99.8 billion	50 million	14%	44%	22%	5%	4%	10%
2013	207.4 billion	87.2 million	7%	20%	54%	3%	2%	14%
2014	138.9 billion	58.4 million	2%	56%	20%	9%	4%	9%

234. The fact that “fines” assessed by the SIC constitute one source of funds available for allocation to the agency raises the question of whether the SIC has an incentive to assess high fines to finance its own functions. In practical terms, it does not. Although Articles 25 and 26 of Law 1340 of 2009 provide that fines for anti-competitive practices shall be imposed “in favour of the Superintendency of Industry and Commerce,” disbursement of such funds is controlled by the Ministry of Finance and not the SIC.<sup>180</sup>

235. It bears emphasising that the foregoing table shows funds *available* for allocation to the SIC, not funds actually allocated or expended. In practice, the expenditure cap established for the SIC in a given year is always less than the total amount of available funds. The cap effectively determines the SIC’s budget for the year, and the agency is therefore able to formulate its expenditure plans in advance. The following table shows the SIC’s expenditures cap and total actual expenditures per year over the past six years, along with the Competition Protection Division’s share of those expenditures.

<sup>179</sup> The Ministry of Finance manages the investment of surplus funds.

<sup>180</sup> Under Law 1480 of 2011, 50% of the fines collected by the SIC for violations of the data protection and consumer protection laws must be allotted to the SIC. (The remaining 50% is allotted to finance the national consumer protection network.) The effect of this provision is that the Ministry of Finance cannot propose to set the SIC’s expenditure cap at an amount less than 50% of such fines.

**Table 15. SIC Expenditure Cap, Total Expenditures, and Competition  
Protection Division's Share 2010 - 2014<sup>181</sup>**

Year	SIC Expenditures Cap		SIC Total Expenditures		Competition Division Total Expenditures		% Share of SIC Expenditures
	COP	USD	COP	USD	COP	USD	
2010			42.4 billion	17.8 million	7.4 billion	3.1million	17.5%
2011	47.5 billion	20 million	45.3 billion	19 million	8.3 billion	3.4 million	18.4%
2012	64.6 billion	27.2 million	66.8 billion	28 million	12.2 billion	5.1million	18.2%
2013	99.6 billion	41.9 million	97.1 billion	40.83 million	17.3 billion	7.2 million	18.2%
2014	152 billion	64.3 million	105.7 billion	44.4 million	18.7 billion	7.8 million	18.2%

236. Increases in SIC's budget since 2010 have been devoted not only to the payment of better salaries and the creation of higher-paying positions, but also to employee training; software; file digitalisation; web page development and maintenance; infrastructure such as hearing rooms; and consumer education campaigns and communications strategies (including travel by SIC representatives to local communities and the development and broadcast of competition-related television commercials). Notwithstanding the substantial budget increases for the SIC since 2010, the agency considers that additional funds should be allocated so that salaries for mid-level employees can be increased.

237. Article 1 of Decree 2152 of 1992 vests the SIC with "administrative, financial and budgetary autonomy." The SIC controls how the funds allocated to it for expenditure are distributed among the agency's various organisational units and functions. The SIC does not, however, control its own expenditure cap nor determine independently how to expend the various fees it collects. Both the Ministry of Finance and the National Planning Department are agencies subject to the President's control, and their involvement in setting the SIC's expenditure cap means that the agency could be punished (or threatened with punishment) by the reduction or elimination of critical funding in retaliation for making politically unpopular decisions. The SIC notes that it has some protection from such retaliation because its budget allocation is reviewed and approved by Congress, a circumstance which provides the agency with an opportunity to appeal for relief from punitive budget cuts. In fact, of course, there has been no need for appeals to Congress, since the SIC's budget has been markedly increased in recent years.

### **3.5 Agency planning, priorities, and outcome assessment**

238. The SIC does not engage in advance planning, as such, to identify particular markets for enforcement attention or otherwise target its enforcement resources. It has, however, established a Bid Rigging group to specialise in the detection and prosecution of bid rigging in government procurement proceedings, which reflects the SIC's reaction to an increased flow of tips and leads relating to cases of that kind. The Economic Studies Group, among other functions, conducts market studies that may result in the identification of market areas or practices warranting investigative attention.

239. The table below displays the SIC's law enforcement activities over the past five years. The "Other conduct" column covers the following four types of activity: (i) unilateral anticompetitive acts violating Article 48; (ii) failures to comply with a settlement guarantee adopted in a conduct case; (iii) failures to comply with a condition adopted in a merger review proceeding, and (iv) failures to comply with any other SIC order or instruction, such as a compulsory process order. Of the 20 "Other conduct"

<sup>181</sup> Expenditures cap data for 2010 are unavailable.

cases in which sanctions were imposed, 2 involved Article 48 violations, as described in Part 2.3 of this report. Of the remaining 18 cases, 1 involved failure to comply with settlement guarantees, 3 involved merger conditions, and 14 dealt with other orders or instructions.

**Table 16. Competition Law Enforcement Cases by Violation Type and Outcome 2010-2014**

Year	Formal Investigations	Horizontal agreements	Vertical agreements	Case Types Abuse of dominance	Unreported mergers	Other conduct	Total
2014	Opened	3	0	0	0	1	4
	Dismissed	0	0	1	1	0	2
	Settled	0	0	0	0	0	0
	Orders/sanctions	1	0	0	4	3	8
	Total monetary sanctions imposed	COP 5.9 billion USD 2.48 million	0	0	COP 1 billion USD 0.42 million	COP 89.4 billion USD 37.5 million	COP 96.3 billion USD 40.4 million
2013	Opened	8	0	2	4	0	14
	Dismissed	0	0	0	0	0	0
	Settled	0	0	0	0	0	0
	Orders/sanctions	4	0	4	0	1	9
	Total monetary sanctions imposed	COP 31.1 billion USD 13million	0	COP 98.6 billion USD 41.4million	0	COP 6.2 million USD 2,523	COP 129.7 billion USD 54.5 million
2012	Opened	7	0	7	3	3	20
	Dismissed	2	0	1	2	2	7
	Settled	1	0	1	0	2	4
	Orders/sanctions	4	0	2	0	3	9
	Total monetary sanctions imposed	COP 9.2 billion USD 3.8 million	0	COP 641 million USD 269,568	0	COP 13.7 billion USD 5.7 million	COP 23.6 billion USD 9.9 million
2011	Opened	12	0	2	6	5	25
	Dismissed	2	0	4	2	2	10
	Settled	1	0	0	0	0	1
	Orders/sanctions	7	1	0	0	10	18
	Total monetary sanctions imposed	COP 24.1 billion USD 10 million	COP 3.9 billion USD 1.6million	0	0	COP 3.1 billion USD 1.3 million	COP 31.2 billion USD 13.1million
2010	Opened	11	1	0	2	2	16
	Dismissed	1	0	2	1	1	5
	Settled	0	0	2	0	0	2
	Orders/sanctions	2	0	1	1	3	7
	Total monetary sanctions imposed	COP 13.4 billion USD 5.6million	0	COP 220 million USD 92,520	COP 273 million USD 114,800	COP 129 million USD 54,250	COP 14.0 billion USD 5.8 million

240. Although the table shows a predominance of horizontal cases with a recent uptick in abuse of dominance investigations, the SIC states that, in its view, the data do not reflect any particular priority or systemic trends regarding the focus of competition law enforcement. In large part, this is because the SIC initiates law enforcement investigations in response to complaints, tips, and other information received from external sources. The SIC observe that, starting in 2010 (after maximum fines were



increased by the 2009 legislation), total monetary sanctions increased substantially compared to previous years. The SIC adds that fines imposed in 2013 totalled USD 67 million, exceeding by more than 70% the total for the previous four years combined. With respect to *ex post* outcome assessment, the SIC states that it has not attempted to evaluate the effect or efficacy of particular law enforcement or competition advocacy actions that it has taken.

### **3.6 Other enforcement methods**

#### **3.6.1 Criminal prosecution**

241. Article 6 of Law 1340 of 2009 designated the SIC as Colombia's "National Competition Authority," charged with responsibility for civil enforcement of the competition law economy-wide (excepting only certain transactions among financial institutions and airlines). No sub-national government agency is vested with competition law enforcement authority and, until 2011, civil enforcement by the SIC was the only available law enforcement mechanism.

242. As noted previously, Article 27 of Law 1474 amended the anti-corruption chapter of the Colombian Penal Code in 2011 to impose criminal liability for bid rigging and other acts impairing public procurement proceedings. Penalties include fines ranging from 200 to 1000 CLMMW (COP 129 million to 644.3 million, equivalent to USD 54,250 to 271,000), imprisonment for six to twelve years, and disqualification for eight years from future public procurements. Law 1474 also includes a leniency provision under which an applicant who has qualified for complete exemption from penalties in an SIC case will qualify for a reduction of (but not full amnesty from) criminal bid rigging penalties. The reductions available are one-third of the imprisonment term, 40% of the fine, and three years of the eight year disqualification from participation in procurement proceedings. When Law 1474 was under consideration in the legislature, the SIC unsuccessfully urged adoption of more generous leniency benefits. As described in section 3.2.8 of this report, the SIC's current legislative proposal provides that a leniency applicant who obtains complete amnesty in a SIC bid rigging case would also obtain total amnesty from criminal sanctions.

243. Colombia's Attorney General is responsible for enforcing criminal laws such as Article 27. Although no criminal bid rigging complaints have been filed in court thus far, the SIC advises that it is currently co-operating with the Attorney General's office in conducting bid rigging investigations involving private security services, infrastructure, public parking services, maintenance and operating services in the aeronautical sector, and food supply services. Senior officers of the SIC and the Attorney General's office maintain regular communication and exchange information about specific cases, subject to appropriate confidentiality commitments. The objective is to facilitate independent but co-ordinated investigations as the circumstances require. As recommended in the Secretariat's initial report, the two agencies are presently engaged in developing a memorandum of understanding to standardise methods of co-operation and communication. In addition, the SIC's legislative proposal includes a provision vesting the SIC with criminal enforcement authority for bid rigging offenses under the anti-corruption chapter of the Penal Code. There is precedent in Colombia for assigning to agencies other than the Attorney General criminal enforcement authority with respect to white-collar type offenses.

#### **3.6.2 Private damage actions**

244. With respect to private enforcement, a party damaged by a competition law violation may file a private civil suit seeking damages under ordinary tort principles. Article 2341 of Colombia's Civil Code establishes a general cause of action in courts of ordinary jurisdiction for claimants seeking compensation for injuries, although punitive damages are not available. No predicate finding of

illegality in a SIC proceeding is required. A class action for damages may be filed by a group of similarly-situated victims under Article 4 of Law 472 of 1998, which provides that one of the “collective rights” eligible for vindication in a collective legal action is the right to free economic competition.

245. The SIC is unaware of any private civil case that has been filed, by either an individual or a class, to obtain damages for a violation of Colombia’s competition law. The SIC states that, although it has not formally studied the reasons for this phenomenon, several factors may explain the lack of private competition law litigation. Competition law enforcement in Colombia is fairly new, and the SIC’s law enforcement activities have thus far dominated the field. Further, the amount of private damages arising from competition law violations is often difficult to prove, and Colombian law does not offer claimants punitive damages as an additional incentive.

246. The SIC’s legislative proposal includes a provision intended to facilitate the recovery by private claimants of damages suffered due to competition law violations. The provision would vest the SIC with authority to adjudicate claims in individual and class actions for damages arising from violations of the competition law in the same manner that it now does for private claims under the unfair competition law, as described in section 2.5.1 of this report.

#### **4. International aspects**

247. This section of the report describes the international aspects of Colombia’s competition law regime, including jurisdictional issues, treatment of foreign parties, market openness, the SIC’s participation in trade remedy proceedings, co-operation between the SIC and foreign competition authorities, and the Andean Community’s role as a supra-national competition authority.

##### **4.1 Competition law and international trade**

248. Anticompetitive conduct occurring outside Colombia that affects Colombian markets is subject to attack under the competition law. Article 46 of Decree 2153/92 establishes an “extraterritorial effects” standard that does not depend on where the alleged anticompetitive agreement or merger takes place, but on where the anticompetitive impact is felt.<sup>182</sup>

249. Foreign and domestic firms are treated equally both under the competition law and in SIC proceedings.<sup>183</sup> With respect to assessing competition in Colombian markets, the SIC considers all relevant aspects of foreign trade, including the impact of imports, the existence of trade barriers, and the prospect of new foreign entry.<sup>184</sup>

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<sup>182</sup> In October 2012, for example, the SIC opened a formal investigation into a suspected cartel involving Japanese manufacturers of electrical wiring kits (Resolution 61570). Although the kits are manufactured in Japan, they are utilised in automobile assembly operations in Colombia.

<sup>183</sup> Colombia conforms to section IA6 of the Council’s Merger Review Recommendation, urging that merger laws accord equivalent treatment to foreign and domestic firms.

<sup>184</sup> Article 12 of Law 1340 provides expressly that the SIC “may refrain from objecting to a merger, regardless of the merging companies’ national market share, when the conditions of the international market guarantee free competition within the national territory.”

## 4.2 *Market openness*

250. The Council's 1986 Recommendation for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies [C(86)65] focuses on market openness. Most of the Recommendation's elements specify considerations that Members are urged to address in developing trade policies. Thus, Members should evaluate carefully the impact on domestic and international competition and on consumer welfare of "trade and trade-related measures,"<sup>185</sup> and ensure that competition policy considerations are taken into account in the formulation and implementation of unfair trade practice laws. Also, when considering action to approve or otherwise exempt export cartels, export limitation arrangements, or import cartels from the application of their competition laws, Members are encouraged to consider the impact of such practices on competition in domestic and foreign markets. In general, the anticompetitive exercise of market power through the creation of such arrangements should be discouraged. Finally, Members should ensure that the role of imports and the existence of trade barriers are taken into account when the competitive effects of restrictive business practices are being assessed, and that proceedings initiated under unfair trade practice laws are not misused for anti-competitive purposes.

251. Colombia conforms to the 1986 Recommendation.<sup>186</sup> Colombia is a WTO member and party to the WTO's Antidumping Agreement and the Subsidies and Countervailing Measures Agreement. These legally-binding WTO agreements contain provisions addressing many of the same topics covered by the 1986 Council Recommendation and establish even more detailed requirements. Although OECD legal instruments are independent of other international standards, Colombia's compliance with its obligations under these WTO agreements comports with the requirements of the 1986 Recommendation. Colombia's Ministry of Commerce, Industry and Tourism and the SIC have provided statements confirming that Colombia follows and conforms to the provisions of the 1986 Recommendation not covered by the WTO agreements.<sup>187</sup>

## 4.3 *SIC role in trade remedy proceedings*

252. The SIC has no decision making authority with respect to application of trade measures in Colombia, but holds a non-voting seat on two government committees involved in making trade measure determinations. The Restrictive Trade Practices Committee of the Ministry of Commerce, Industry and Tourism is responsible for processing trade cases seeking to impose anti-dumping duties or countervailing duties to offset subsidies. In 2012, the SIC issued an opinion on a committee anti-dumping investigation concerning aluminium sheets imported from China and Venezuela. The SIC advised against the imposition of duties, noting that the domestic market was concentrated, with only one Colombian producer, and that there was no other likely source of imports. The SIC added that, in any event, setting a specific duty amount unrelated to the price of unwrought aluminium was undesirable. The price of that input varied erratically and, if the input price dropped but the duty remained unchanged, there would be no market pressure on the domestic producer to reduce its price for finished products. The Ministry decided against the requested anti-dumping duties.

253. In early 2013, the SIC commented to the Committee in a case concerning whether to extend anti-dumping duties previously imposed on socks imported from China. The SIC observed that the

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<sup>185</sup> Such "measures" are defined to include export limitation agreements but to exclude "laws relating to unfair trade practices."

<sup>186</sup> This finding is subject to the conclusions of the OECD Trade Committee.

<sup>187</sup> For example, Colombia does not encourage the formation of export cartels and does not exempt such cartels from the competition law.

market share of Chinese socks had declined significantly since the duties were imposed, and that other foreign producers were presently exporting socks to Colombia for sale at prices 50% less than the lower boundary price established for Chinese socks in the anti-dumping order. The SIC recommended that, if the antidumping order were to be extended, the lower boundary price should be reduced so that Chinese exporters could meet existing competition. The Ministry ultimately decided to extend the antidumping duties for three years using the same price terms.

254. The second committee on which the SIC holds a non-voting seat is the Committee of Customs, Tariffs and Foreign Trade Affairs, also lodged in the Ministry of Commerce, Industry and Tourism. This Committee is responsible for processing trade cases involving the implementation of both safeguard measures under WTO procedures<sup>188</sup> and similar special measures under Colombia's trade laws<sup>189</sup> and trade agreements.<sup>190</sup> No WTO safeguard investigations were undertaken between 2005 and 2012. Since 2012, two safeguards have been imposed and 8 investigations were completed without imposing a measure. Currently, there are 11 investigations underway, most of them related to the textile industry. In October 2013, Colombia imposed WTO provisional safeguard tariffs against imports of certain non-alloy steel and iron products. The provisional safeguard tariffs were ultimately converted to formal status, applicable to steel wire for one year from April 30, 2014. On April 30, 2015, the safeguards were extended for one additional year, applicable only to smooth steel wire.

255. In a separate safeguard action, also taken in October 2013, Colombia imposed safeguard measures on imports to Colombia from members of the Andean Community and the Common Market of the South (MERCOSUR) with respect to certain agricultural commodities. The safeguards, adopted in accordance with provisions of the trade agreement between the Community and MERCOSUR, apply for two years and cover imports of onions, beans, potatoes, tomatoes, pears, cheese, and milk.<sup>191</sup> The SIC did not oppose either these actions or those involving steel products under WTO procedures, as the agency considered them to constitute a legitimate exercise of Colombia's trade agreement rights.<sup>192</sup>

256. The Secretariat's initial report recommended that the SIC be accorded a voting seat on the two committees cited and that committee decisions on trade measures be supported by reasoned opinions that respond to issues raised by any committee member, including the SIC. Decree 1750 of 2015, issued on September 1, 2015, vested the SIC with a voting seat on the Restrictive Trade Practices Committee, and Decree 1888 of 2015, issued on September 22, 2015, similarly vested the SIC with a voting seat on the Committee of Customs, Tariffs and Foreign Trade Affairs.

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<sup>188</sup> Under WTO rules, safeguard measures entail import restrictions imposed in response to an import surge that causes or threatens to cause serious injury to the domestic producers of like or directly competitive products.

<sup>189</sup> Decree 1407 of 1999, for example, establishes a special safeguard regime primarily for use with respect to non-WTO countries. No safeguard measures under that Decree have been undertaken since 2005.

<sup>190</sup> For example, the Andean Community, to which Colombia is a party, has established safeguard procedures in certain of its trade agreements.

<sup>191</sup> Ministry of Commerce, Industry and Tourism, Decrees 2210 and 2211 of 2013.

<sup>192</sup> None of the anti-dumping and safeguard measures described in this section of the report resulted in a challenge to Colombia by other countries under WTO, Andean Community, or MERCOSUR procedures, although there were unofficial statements from several countries, including Turkey, Brazil, and the European Union, suggesting the possibility of filing a WTO complaint with respect to the safeguard measures against non-alloy steel and iron imports.

#### 4.4 *International co-operation*

257. The SIC cannot compel evidence from foreign enterprises that have insufficient presence in Colombia to permit the Colombian authorities to take legal action against them. If the SIC wishes to obtain information from such firms, and does not receive voluntary disclosure, it relies on its co-operative relationships with foreign competition authorities.

258. The only instance in which the SIC has requested confidential information from a foreign authority occurred in 2012, after the SIC received a pre-assessment application for the proposed acquisition by Nestlé of Pfizer's infant nutrition unit. In that case, the SIC requested and obtained from Mexico's Federal Competition Commission, pursuant to confidentiality waivers by the merging parties, the confidential version of that agency's final resolution pertaining to the acquisition.<sup>193</sup> To date, no foreign competition authority has asked that the SIC share confidential information in its possession.

259. The May 2012 free trade agreement between Colombia and the United States contains a provision (Art. 13.3) under which the parties agree to "co-operate on issues of competition law enforcement, including notification of cases that affect the important interests of another Party, consultation, and exchange of information relating to the enforcement of each Party's competition laws and policies." Colombia's free trade agreements (FTAs) with the European Free Trade Association (EFTA) (Art. 8.3)<sup>194</sup> and the European Union (Arts. 261-62) contain similar provisions<sup>195</sup>. Colombia's other FTAs, with Chile, Venezuela, Mexico, Canada<sup>196</sup>, Cuba, Nicaragua, El Salvador, Guatemala, Honduras, the Caribbean Community (CARICOM)<sup>197</sup> and MERCOSUR<sup>198</sup> either contain no provisions dealing with competition, or include general references to competition laws without specifying mechanisms for exchanging information or otherwise co-operating in competition law enforcement.<sup>199</sup> The Andean Community, in which Colombia, Bolivia, Ecuador, and Peru are members, is based on an agreement contemplating that members will co-operate with competition law enforcement actions prosecuted by Community organs. That aspect of the Community's functions is, however, currently suspended.

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<sup>193</sup> The SIC ultimately resolved the case by requiring Nestlé to license Pfizer brands to a third party. Resolution 20968 of 2013.

<sup>194</sup> EFTA's members are Switzerland, Liechtenstein, Norway, and Iceland. At present, Colombia's agreement with EFTA has entered in force only with Liechtenstein and Switzerland.

<sup>195</sup> Similar provisions also appear in Colombia's FTAs with South Korea, Costa Rica, and Panama, all three of which are presently awaiting ratification.

<sup>196</sup> The FTA with Canada, however, has a provision committing the parties to develop a co-operation agreement between their respective competition agencies covering notifications, comity, technical assistance and exchange of information. That agreement is presently under negotiation.

<sup>197</sup> CARICOM's members are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Montserrat.

<sup>198</sup> MERCOSUR's members are Brazil, Argentina, Paraguay, Uruguay, Venezuela, and Bolivia.

<sup>199</sup> The FTA's negotiated with Israel and the Pacific Alliance and presently awaiting ratification similarly contain no provisions relating to co-operation in competition law enforcement. (The present members of the Pacific Alliance are Mexico, Chile, Colombia, and Peru, while Costa Rica and Panama are in the process of accession to full membership.)

260. The SIC has also entered bilateral agreements with the competition authorities in Peru, Mexico, Panama, and Spain, which contain co-operative provisions similar to that in the Colombia-US FTA. For example, the agreement with the Panamanian Consumer Protection and Free Competition Authority (ACODECO) provides (Art. 2(a)) that the parties can “exchange information and documentation for efficient implementation of the agreement’s purposes, subject to confidentiality restrictions,” while the agreement with the Peruvian National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI) anticipates (clauses 5 and 6) “the joint development of projects and the exchange of information and experiences to promote the development of best practices.”

261. As a practical matter, the presence or absence of FTAs and bilateral agreements has not been significant to the SIC in conducting its co-operative activities with other competition agencies. The SIC’s policy is to co-operate and co-ordinate fully with foreign competition agencies in mergers and conduct cases that may affect markets in multiple jurisdictions. Co-operative activities can include the exchange of non-confidential information, and confidential information when authorised by the affected parties; and consultations respecting the acquisition of evidence, the development of legal and economic analyses, the assessment of harm to consumer welfare, the identification of remedial options, and the co-ordination of case timing and remedy implementation. The SIC states that its staff is in consultations at least twice a month with other competition authorities, to discuss competition issues and to exchange non-confidential information. For example, after the September 2013 announcement of the SIC’s USD 47 million fine against the mobile telephone company Claro, the competition authorities of Mexico, Peru, Ecuador, and Nicaragua requested and received copies of the public version of the SIC’s final resolution in that case.

262. At the time of the Secretariat’s initial report, a number of Council Recommendations then in force focused in whole or in part on urging co-operation and co-ordination among competition agencies. These included (i) the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices,<sup>200</sup> (ii) section IB of the 1998 Council Recommendation concerning Effective Action against Hard Core Cartels, and the associated 2005 Statement of Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, and (iii) sections IB and IC of the 2005 Council Recommendation on Merger Review. In September 2014, at the recommendation of the Competition Committee, the Council adopted a new Recommendation concerning International Co-operation on Competition Investigations and Proceedings [C(2014)108]. This recommendation, which expressly replaces the 1995 Recommendation, consolidates and elaborates all the relevant elements of the previous recommendations concerning co-operation.

263. The initial provision of the 2014 Recommendation urges (Sec. II) that adherents “commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions” in their laws or policies (such as blocking statutes that prohibit private parties from responding to investigative demands from foreign competition authorities) that hinder effective enforcement co-operation among competition authorities. The Recommendation continues with detailed provisions concerning (i) proactive alerts, consultations, and co-ordination among authorities when competition-related activities in one jurisdiction overlap with or affect important interests of another, (ii) the co-operative exchange among competition authorities of information in investigations

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<sup>200</sup> The Council’s 1978 Recommendation concerning Action against Restrictive Business Practices affecting International Trade including those involving Multinational Enterprises [C(78)133] also deals with co-operation, but is not listed because its elements were effectively incorporated in the 1995 Recommendation on Co-operation.

and proceedings, and (iii) enhanced co-operation among authorities in the form of active investigative assistance, including the use of compulsory procedures.

264. Colombia accepts these recommendations. The SIC's policies and practice are congruent with the 2014 Recommendation, section IB of the 1998 Hard Core Cartel Recommendation, sections IB and IC of the 2005 Merger Recommendation, and the Competition Committee's 2005 Best Practices Statement. The SIC notes that it has no authority to provide confidential information to another competition law enforcement agency, except when permitted by a waiver from the affected party or under a treaty between Colombia and the receiving country. The SIC has no authority of its own to negotiate an exchange agreement directly with another agency that would cover confidential information, and does not anticipate that it could obtain delegated authority to establish such agreements.

265. The SIC does not consider these constraints to be a significant impediment to effective co-operation. It observes in this respect that, according to the discussion at the Competition Committee's June 2013 Roundtable on the exchange of confidential information,<sup>201</sup> most of the information actually exchanged between competition agencies in the course of co-operative consultations is either non-confidential or disclosed pursuant to a confidentiality waiver.<sup>202</sup> In the SIC's own experience, it has requested confidential information from another authority on only one occasion, and no foreign competition authority has asked the SIC to provide such information. The SIC also notes that, in any event, most of the information acquired in SIC investigations is public and can therefore be shared with competition authorities of other jurisdictions, and that confidential information in SIC investigations is predominantly information submitted by leniency applicants. Generally, among OECD Members and worldwide, leniency applications are closely controlled by competition agencies, and are not typically released, even to other competition agencies.

266. In the past several years, the SIC's Competition Division has significantly increased its involvement with the international competition community. It has filed reports and papers on numerous competition topics with the OECD's Competition Committee, and SIC representatives have participated in the Global Forum on Competition, the Latin American Competition Forum, and OECD Competition Committee sessions. In February 2014, the SIC served as an examiner for the Committee's peer review of Rumania.

267. The SIC has also been active in ICN activities, participating in ICN webinars, attending the ICN's Cartels Workshops in 2012, 2013 and 2014 and the ICN's Annual Conferences in 2013 and 2014; hosting the ICN's November 2012 Merger Workshop; presently serving as co-chair of the ICN's Cartel Working Group; and scheduled to host the Cartels Workshop in October 2015. The SIC has submitted papers on competition topics to UNCTAD and participated in UNCTAD conferences, and that organisation has funded competition law training for Colombian judges and a study for the SIC of conditions in Colombia's trash collection services market.

268. With respect to regional co-operation activities, the SIC is a member of the Regional Competition Centre for Latin America (Centro Regional de Defensa de la Competencia or "CRC") and

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<sup>201</sup> Working Party No. 3 on Enforcement & Co-operation, Roundtable on National and International Provisions for the Exchange of Confidential Information between Competition Agencies without Waivers (June 18, 2013). A SIC representative participated in that Roundtable.

<sup>202</sup> This point is bolstered by the OECD Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation (2013) pp. 68, 71, 73, available at <http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf>.

its associated group, the Inter-American Alliance for Competition Defence (Alianza Interamericana de Defensa de la Competencia). The CRC, established in September 2011, has as its members the competition authorities of Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, the United States, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and the Dominican Republic. The SIC participates in these organisations by attending online seminars and videoconferences aimed at fostering co-operation in competition enforcement among member agencies, discussing the features of each member's competition law system, and providing updates about modifications to the members' law enforcement regimes.

269. The SIC is also a party to the Lima Declaration, signed at the OECD Latin American Competition Forum in September 2013 by the competition agencies of Chile, Colombia, and Peru. The Declaration establishes a mechanism for the participating agencies to share their accumulated experiences relating to competition law and policy, analyse and discuss topics of common interest; and consider what steps could be taken to improve levels of integration among the member agencies. The members typically meet informally in conjunction with other regional or international forums, at sessions that are sponsored and supported by UNCTAD's Competition Policy and Consumer Protection Section.

#### **4.5 *Supra-national competition authorities***

270. The only supra-national competition law enforcement body with jurisdiction in Colombia is the Andean Community of Nations, the members of which are Colombia, Bolivia, Ecuador, and Peru. The Community's competition law regime is established by Commission Decision 608 of 2005, which prohibits and sanctions anticompetitive agreements and abuse of dominance when such conduct has a Community dimension. A violation is subject to Community investigation and sanction if it entails conduct affecting a Community member and is perpetrated by either another member or by a non-member. The Community's General Secretariat ("CGS") can initiate an investigation on its own initiative or at the request of a qualified national competition authority. CGS investigations are carried out jointly with the competition authorities of Member Countries. Before rendering a decision, the CGS must consult with the Andean Committee on the Defence of Free Competition, which is comprised of one representative from each Community Member. The execution of corrective measures and sanctions imposed by the CGS is the responsibility of the Member Country government that has jurisdiction over the sanctioned parties.

271. According to the SIC, cases that could be investigated by the Community are typically processed by one of the national competition agencies under its own authority. Members consider the Community's procedures to be slow and ineffective, and find no advantage in employing them, especially since execution of the Community's final decision will be remitted to a national authority in any event. The SIC is unaware of any case in which Colombia has referred prosecution of a competition law complaint to the Community.<sup>203</sup>

### **5. Limits of the competition law: Exemptions and Sectoral Regimes**

272. This section of the report discusses categories of conduct or markets that are excluded in some manner from the coverage of Colombia's competition laws, as well as regulatory regimes that limit the application of the competition law in particular sectors.

<sup>203</sup>

The Community also has enforcement authority for resolving complaints relating to dumping of, or providing improper subsidies for, exported products. In a 2005 case, Peru obtained a Community order permitting imposition of countervailing duties on palm oil products exported from Colombia, based on a claim that Colombia had improperly subsidised domestic palm oil producers.



### 5.1 *General principles and special provisions*

273. Colombia's competition law applies broadly to any person or enterprise, without regard to legal form, who engages in an economic activity or whose acts affect or may affect economic activity. Individual entrepreneurs, commercial enterprises of any size, SOE's and other government owned or operated business, non-profit institutions, and trade associations are all covered (Article 46, Decree 2153 of 1992 as amended by Article 2 of Law 1340 of 2009<sup>204</sup>).

274. The competition law has provisions exempting certain forms of conduct from its application, but none exempting certain kinds of actors. Labour unions, for example, fall under the law's scope and there is no exemption in the competition law itself for collective bargaining. There is, however, a Constitutional provision establishing the rights of workers (Art. 39), and Article 353 of the Labour Code confirms that workers may associate in unions and engage in collective bargaining activities. Strikes to obtain better working conditions are legal, provided that they are conducted in accordance with the Labour Code, while strikes in sectors considered essential public services are illegal.<sup>205</sup>

275. Although there are no minimum size or market share thresholds for application of the competition law, Article 1.3 of Decree 4886 of 2011 instructs the SIC to pursue, as a matter of prosecutorial discretion, only those cases that are "significant" for maintaining competitive markets or promoting efficiency and consumer welfare. Agreements among small firms with insignificant impact on the market are therefore unlikely to attract law enforcement interest, regardless of their nature.

276. Article 333 in Colombia's 1991 Constitution establishes a collective right to free competition, but also provides that the State may adopt laws that "limit the scope of economic freedom whenever the social interests, the environment, or the cultural heritage of the nation so require it." Colombia has adopted numerous laws that entail intervention in the economy, but its courts have not had occasion to develop doctrines, such as "state action," to address the interface between such legislation and the competition law. The fact that regulatory programmes "limit the scope of economic freedom" is recognised in the Constitution itself, so forbearance in applying the competition law to regulated activity is a matter of constitutional principle rather than judicially-created doctrine. The SIC's view on this point is that a regulatory programme constrains the application of the competition law only so far as necessary to permit the programme's proper operation.

277. As is true for "state action" issues, the courts also have never decided a "sovereign immunity" case in which a competition law claim was raised against a government agency engaged in executing official functions. An agency administering a regulatory programme is considered to be insulated from attack under the competition law by reason of the constitutional principle in Article 333 of the Constitution, which expressly contemplates market intervention by the government.

278. The competition law itself has provisions, both old and new, that limit its application and reflect this constitutionally-derived approach to the interface between regulatory programmes and the competition law. The competition law's original prohibitions, contained in Article 1 of law 155 of 1959, were supplemented four years after passage by the addition of a paragraph stating that "the

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<sup>204</sup> Prior to 2009, Decree 2153 had no provision specifying to what entities it applied. The SIC brought a number of cases during the mid-2000s that involved trade associations as defendants. Several associations argued (unsuccessfully) to the SIC that they were not subject to the law. The 2009 amendment to Article 46 was designed to eliminate such arguments.

<sup>205</sup> About 4 percent of the country's labour force is unionised. The largest and most influential unions are composed principally of public employees, particularly of Ecopetrol, the state-owned oil company, and of institutions in the state-run education sector.

government may, however, authorise the execution of agreements or covenants which, although limiting free competition, are aimed at defending the stability of a basic sector of the production of goods or services of interest for the general economy” (Decree 3307/63). The 1963 Decree was followed a year later by Decree 1302 of 1964, the terms of which appear in the following box.

**Box 11. Article 1, Decree 1302 of 1964**

For purposes of the paragraph of article 1 of Law 155 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.

279. The sweeping breadth of this language was tempered by the fact that the SIC was made responsible for approving applications for agreements to be protected under Decrees 3307/63 and 1302/64. The regulations adopted by the SIC to implement this authority<sup>206</sup> provide that applicants must submit a detailed statement describing the proposed agreement and explaining both the manner in which it would inhibit competition and the stabilising benefits it would secure for the affected sector. The proposal must also provide for SIC oversight of the plan’s operation and impact. The SIC may impose enforceable conditions on the plan in conjunction with authorising it, and retains authority to terminate the plan at such time as the market stabilises.

280. In fact, only two stabilisation agreements have ever been authorised by the SIC under the Decrees, one in 2003<sup>207</sup> and the second more recently in 2012. The 2012 agreement was motivated by the initiation of a government programme to construct 100,000 new housing units in the course of one year. The government anticipated that speculation in construction materials would be triggered by government purchases of that magnitude, and would result in substantial price increases affecting the stability of the construction sector. The government therefore negotiated with the suppliers of various construction inputs, winning an agreement from them to sell construction materials for use in the government’s project at a price 12% lower than the market price.

281. The stabilisation programme system that originated with Decrees 3307/63 and 1302/64, and that survives to the present, applies to all the basic economic sectors specified in Decree 1302. In 2005, the Agriculture Ministry secured adoption of Decree 3280, which established a separate stabilisation programme system for the agricultural sector. The principal distinguishing difference between the original programme and the agricultural version was an obligation imposed on the SIC to obtain a non-binding opinion on the proposed agreement from both the Ministry of Agriculture and the Ministry of Commerce, Industry and Tourism (the SIC’s home Ministry). No agreements were

<sup>206</sup> SIC Unified Circular, Title VII, Ch. 1. Proposed stabilisation agreements are examined by the Deputy Superintendent for Competition Protection (Decree 4886, Art.9), who prepares a recommendation that is resolved by the Superintendent (*Id.*, Art. 3.10).

<sup>207</sup> The 2003 agreement involved a group of five textile firms, each of which agreed to purchase, at a separately negotiated price, a specified volume of textured filament from the sole national supplier of that textile production input. At the same time, the government imposed antidumping duties against imports of filament from Taiwan and Malaysia, making evident that the stabilisation agreement was engineered by the government to support a domestic supplier pressured by cheaper foreign imports.

approved under this programme either and it was superseded four years later by Article 5 of Law 1340 of 2009.

282. Article 5 of Law 1340 affirms that, for purposes of the paragraph in article 1 of Act 155 of 1959, the agricultural sector is one of basic interest for the general economy. The text then states that the Ministry of Agriculture and Rural Development may issue a reasoned opinion, binding on the SIC, with respect to prior authorisation for agreements stabilising the agricultural sector of the economy. The effect of the provision is to vest the Agriculture Ministry with power to immunise from the competition law any agreement or system that can be characterised as a stabilisation device. The Secretariat's initial report recommended that Colombia consider revising Article 5 to conform with its predecessor provision in Decree 3280 of 2005, under which the SIC retained authority to approve agricultural stabilisation agreements and exempt them from the competition law after reviewing a non-binding opinion from the Agriculture Ministry. The rationale for this recommendation is that there is no valid justification for permitting sector regulators to create exclusions at will from the competition law without any involvement of either the legislature or the SIC. The SIC's legislative proposal has a provision that extends further than the Secretariat's original recommendation by eliminating Article 5 entirely.

283. As with the predecessor Decree 3280, no agreements have been approved under Article 5 since its enactment in 2009. The likely reason is that market interventions desired by the Agriculture Ministry can be accomplished in accordance with a variety of other regulatory programmes available to the Ministry under separate legislation. Those programmes, described in more detail further below, do not necessarily constitute stabilisation programmes for purposes of Article 1 of the 1959 Act, and thus might not be protected from application of the competition law on the basis of an Article 5 authorisation. Rather, these programmes trace their immune status directly to the language in Article 333 of the Constitution, providing that the State may adopt laws limiting the scope of economic freedom whenever the public interest so requires.

284. Another aspect of the agricultural sector's programme to limit the applicability of Law 1340 was to enact language explicitly confirming the immune status under the competition law of the Agriculture Ministry's many market intervention programmes. The result was Article 31 of Law 1340, which recites that "the mechanisms by which the State intervenes in the economy, as mandated in articles 333 and 334 of the Political Constitution, constitute a restriction to the right to competition in terms of the intervention." The Article then presents a list of agricultural intervention programmes, stating that the specified programmes "constitute State intervention mechanisms that limit the application" of the competition law. This language appears to recognise that the establishment of an intervention programme does not oust application of the competition law altogether, but rather "limits" its application "in terms of the intervention." The competition law therefore still applies to anticompetitive conduct that, even if related to an intervention programme, is not mandated by the programme or necessary for its operation.<sup>208</sup>

285. One additional provision in Law 1340, Article 32, also responds to concerns raised principally by the agricultural sector. Titled "External Situations," the Article provides that "the State may intervene whenever external situations or circumstances beyond the national producers' control affect or distort the conditions of competition in the national products' markets." The Article follows with the statement that such interventions "shall be conducted through the competent Ministry, by means of implementing measures that compensate or regulate the markets' conditions guaranteeing equity and competitiveness of national production." The legal significance of this provision is unclear,

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<sup>208</sup> The implications of Article 31 for the SIC's competition advocacy authority under Article 7 of Law 1340 is discussed in section 6.1.1 of this report.

because the provision merely describes the government's power, vested by the Constitution, to intervene in markets. Oddly, there is not even an express statement (such as found in Article 31) that Article 32 interventions constitute restrictions on the right to competition and thus limit application of the competition law. Subsequent to the enactment of Article 32 in 2009, no government action invoking it has been initiated and no court has had occasion to interpret it.

286. A final competition law exemption, unrelated to agriculture, appears in Article 28 of Law 1340. The Article, intended for use during financial emergencies, provides that regulations dealing with “restrictive competition practices and particularly those relating to the control of merger transactions” do not apply to “mechanisms designed to rescue and protect the public trust” ordered by the Superintendence of Finance (“SFC”) or to “decisions about their implementation and enforcement.”<sup>209</sup> Article 28 has never been invoked by the SFC. The SIC considers that the provision excuses the SFC from complying with the merger control standards and procedures under Article 58 of Decree 663 of 1993, discussed in the next section of this report. Article 58 restricts the bases upon which the SFC may disapprove a merger. In particular, the SFC may not invoke Article 58 to approve an anticompetitive merger by relying on prudential grounds. Article 28, in conjunction with article 113 of Decree 663, permits the SFC to set Article 58 aside in an emergency and approve mergers, anticompetitive or not, deemed necessary for maintaining public confidence in the financial system. Article 28 also has a “state action” aspect that protects private actors from exposure to the competition law for conduct either directly ordered by the SFC or appropriate for implementing the emergency “mechanisms” established by the SFC.

287. Reliance on prudential grounds in evaluating financial institution mergers poses competition policy issues only when the financial authority wishes to approve an anti-competitive merger.<sup>210</sup> The SIC recognises that the competition law should not impede adoption of prudential measures critical to maintaining the stability of the financial sector in a crisis. In its initial report, the Secretariat adopted the SIC's recommendation that Article 28 be modified so that the SIC could submit a non-binding opinion to the SFC on bank mergers proposed in a financial emergency, to ensure that the least anti-competitive alternative for government intervention is considered. The SIC's pending legislative proposal does not amend Article 28, and the SIC notes that such a proposal raises issues that require careful consideration and consultation with the SFC and the Finance Ministry. The SIC observes, for example, that requiring the SFC to await a SIC opinion and then respond to the SIC's objections before acting on a merger may be impractical in the emergency situations to which Article 28 is addressed.

## **5.2 Sectoral regimes**

### **5.2.1 Agriculture**

288. Article 31 of Law 1340, discussed above, provides a list of various market intervention programmes in the agricultural sector. The text of Article 31 appears in the following box.

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<sup>209</sup> The SFC's authority to impose such mechanisms is conferred by Article 113 of Decree 663 of 1993.

<sup>210</sup> If the financial authority and the competition authority either both approve or both reject the merger, no issue arises. If the financial authority wishes to reject a merger that the competition authority has cleared, there is likewise no issue, because failure to consummate a cleared merger does not violate the competition law.

**Box 12. Article 31, Law 1340 of 2009**

The mechanisms by which the State intervenes in the economy, as mandated in articles 333 and 334 of the Political Constitution, constitute a restriction to the right to competition in terms of the intervention. The following constitute State intervention mechanisms that limit the application of the provisions in this law:

- price stabilisation funds
- para-fiscal funds for agriculture sector promotion
- minimum price guarantee programmes for producers
- internal market regulation programmes for agricultural products under Decree 2478 of 1999
- chain agreements in the agricultural sector
- actions under the safeguards regime
- subsidies, special credit lines, and other economic incentives to the agricultural sector under Act 101 of 1993
- market price regulation under Act 81 of 1988

289. Each of the programmes listed in Article 31 is described below as it operates in the agricultural sector. Several of the listed programmes operate in other sectors as well, specifically including (i) price stabilisation funds, (ii) minimum price guarantee programmes for producers, (iii) safeguards, and (iv) market price regulation under Act 81 of 1988.<sup>211</sup>

**5.2.1.1 Price stabilisation funds**

290. Price stabilisation funds (Fondos de Estabilización de Precios, “FEP”), established under Law 101 of 1993, are presently in operation to provide income support to producers of palm oil, sugar cane, certain dairy products, cocoa<sup>212</sup>, beef, and cotton. The objective of a FEP is to subsidise exports of a commodity that is not produced domestically at a price low enough to be competitive in international markets<sup>213</sup>. The mechanism is complex, but involves collecting a fee from producers selling in the domestic market and using the fees collected to subsidise export sales by producers. The fees imposed on domestic sales are designed to drive up the domestic price to near equality with the

<sup>211</sup> Other government programs involving intervention in the agriculture sector are described in detail in OECD Review of Agricultural Policies: Colombia (2015), available at <http://dx.doi.org/10.1787/9789264227644-en>.

<sup>212</sup> For commodities that require processing, economies of scale typically result in a concentrated market at the processing level. This is true, for example, in the case of rice, and especially with respect to cocoa, a sector in which two processing enterprises hold 87% of the market in Colombia.

<sup>213</sup> There are, for example, 350,000 families in Colombia engaged as dairy farmers in inefficiently small-scale operations.

price at which imported products of the same kind are sold in Colombia.<sup>214</sup> As the programme operates over time, producers receive an average sales price that falls between the lower international market price and the inflated domestic market price.

#### 5.2.1.2 Para-fiscal funds

291. Para-fiscal funds for agricultural sector promotion, also created under Law 101 of 1993, are presently in operation for 15 commodity classes, including coffee;<sup>215</sup> cereal grains; poultry; fruits, vegetables and legumes; cocoa; and cattle. The programmes involve a mandatory fee imposed on products produced in the commodity class affected. The funds collected are used exclusively for the purposes specified in the programme, and are limited by Law 101 to: (i) research, technology transfer, technical assistance, and sanitary compliance; (ii) contributions of investment capital to enterprises; (iii) marketing; (iv) export promotion; and (v) social and infrastructure programmes for the benefit of the subsector.

#### 5.2.1.3 Minimum price guarantees

292. Minimum price guarantees applicable to sales by producers, established under Article 49.2 of Act 101 of 1993 presently apply to cotton, raw milk, and rice. With respect to unprocessed milk, for example, the Ministry of Agriculture establishes a formula for calculating the minimum price specific to each particular geographic area. The formula accounts for variations in milk quality (measured by fat and protein content) and sanitation (measured by bacteria count). Price guarantee programmes operate by making government payments to producers in an amount that covers the difference between market price and the guaranteed price.

#### 5.2.1.4 Market regulation under Decree 2478 of 1999

293. Decree 2478 of 1999 was repealed and replaced by Decree 1985 of 2013. Decree 1985 provides no market regulation authority to the Ministry that it does not already possess under one of the other provision listed in Article 31 of Law 1340.

#### 5.2.1.5 Chain agreements

294. Commercial chain agreements, established under Decree 3800 of 2006 (Art. 4), involve co-ordinated action among the enterprises engaged in producing, transforming, distributing and marketing a particular commodity. The agreements may or may not entail price setting and market allocation at any level of the production chain. Under article 5 of the Decree, agreements involving potential violations of the competition law must be authorised by the SIC in advance under Article 1 of Law 155 of 1959. This means, in accordance with Article 5 of Law 1340, that the SIC is obliged to issue such authorisations in response to a binding opinion from the Ministry of Agriculture. In fact, no commercial chain agreements have ever been authorised.<sup>216</sup>

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<sup>214</sup> Since imported products are subject to tariffs, the result is that Colombian consumers invariably pay high prices for products covered by FEPs. It is commonly accepted as true, for example, that Colombians pay higher prices for milk than do consumers anywhere else on the continent.

<sup>215</sup> Coffee is another exportable product afflicted with domestic production costs that exceed the international price. More than 500,000 families are engaged in coffee cultivation in Colombia.

<sup>216</sup> Another form of chain agreement, referred to as a “chain competitiveness agreement,” is authorised under Law 811 of 2003. Such agreements entail formation of a chain organisation by government and business representatives to improve the competitiveness and productivity of the distributive chain for

#### 5.2.1.6 Safeguards

295. Actions under the safeguards regime refer to import restrictions adopted in response to a surge of imported products that seriously injures domestic producers of competing products. Safeguard restrictions and similar special measures may be implemented by Colombia in accordance with its WTO and FTA commitments. As described in the section of this report on international issues, quotas were imposed in 2013 on imports of certain agricultural commodities to Colombia from Andean Community and MERCOSUR members.

#### 5.2.1.7 Direct subsidies, credit lines, and other incentives under Act 101 of 1993

296. With respect to direct subsidies, special credit lines, and other economic incentives to the agricultural and fisheries sectors under Act 101 of 1993, the three most significant programmes presently operating are the Income Protection Programme for Exportable Agricultural Producers, the Special Credit Line for Exporters, and the Programme for Rural Development. The Income Protection Programme subsidises up to 80 per cent of the cost of purchasing hedging instruments against currency exchange rate exposure. The Special Credit Line subsidises part of agricultural exporters' interest payments on bank loans and also guarantees re-payment to creditors of the loans undertaken. The Programme for Rural Development, which has as its main objectives the promotion of competitiveness and productivity in agriculture and the reduction of income inequalities in that sector, distributes funds for the support of small and medium-size agricultural producers.

#### 5.2.1.8 Market price regulation under Act 81 of 1988

297. Article 61 of Law 81 of 1988, authorises the Agricultural Ministry to regulate the prices charged by sellers of agricultural products and agricultural production inputs. The Ministry has discretion to select from among three price control regimes: (i) Direct Control: under which the regulator sets a specific maximum price that producers (or distributors at a particular level in the distribution chain) may charge; (ii) Regulated Freedom: under which the regulator establishes a methodology that producers and distributors must use to determine the maximum price that they may charge; and (iii) Supervised Freedom: under which the regulator merely requires that producers and distributors report the prices that they have decided to charge. At present, the Ministry employs only a "supervised freedom" regime for agricultural product prices, but does employ "direct control" authority to set maximum prices for a number of inputs, including fertiliser and animal vaccines.<sup>217</sup>

#### 5.2.2 Public Utilities: General

298. Law 81 of 1988, in addition to vesting the Agriculture Ministry with authority to regulate prices, also empowered the National Public Services Tariff Board (Nacional de Tarifas de Servicios Públicos) to establish price regulations for electric energy, natural gas for final users, water supply and sewage, trash collection, and a variety of communications services, including telephone, telegrams, fax, and electronic mail and data transmission.

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a particular commodity. The activities of the organisation focus on market research, product development, resource management, training, and other topics that do not implicate the competition laws. There are presently 33 competitiveness agreements in operation for commodities ranging from aloe to yucca, including livestock, dairy products, flowers, rice, fruit, meat, rubber, tobacco, potatoes, and cotton.

<sup>217</sup> Enforcement of Agriculture Ministry price regulations, whether the price caps described here or the minimum price guarantees applicable to sales by producers mentioned above, is the responsibility of the SIC's Division for Legal Metrology and Technical Standards.

299. The economic reforms of the 1990s, and the subsequent privatisation of many state-owned utility companies, led to the enactment of Law 142 of 1994,<sup>218</sup> which covered the same set of services as Law 81, but was expanded to include cellular telephony. The Law created the Superintendence of Public Utilities (Superintendencia de Servicios Públicos Domiciliarios, or SSPD) as the authority responsible for law enforcement respecting utilities (including enforcement of the competition law), and also replaced the Tariff Board with three separate regulatory commissions:

- CREG – the Commission for Electricity and Gas (Comisión de Regulación de Energía y Gas).<sup>219</sup>
- CRA – the Commission for Water and Sanitation (sewerage and trash collection) (Comisión de Regulación de Agua Potable y Saneamiento Básico).<sup>220</sup>
- CRC – the Commission for Telecommunications (Comisión de Regulación de Comunicaciones).<sup>221</sup>

300. Between 1994 and 2009, all of the regulated utility sectors were controlled in the same fashion under Law 142. A separate regime for telecommunications regulation was created in 2009, as described further below, but the scheme in Law 142 was left intact for the other sectors controlled by CGEG and CRA, and remains in effect today. Also in 2009, the amendments to the competition law contained in Law 1340 removed competition law enforcement responsibilities from sector authorities (such as the SSPD) and consolidated them with the SIC.

301. Under Article 73 of Law 142, regulatory commissions are assigned to regulate the provision of services in monopoly utility markets so as to promote competition and efficiency. The commissions do not have authority to engage in direct price regulation. Rather, the regulatory scheme follows the “Regulated Freedom” model, which entails the imposition of a tariff methodology for each type of utility service. The broad principles of tariff regulation described below are established by law, but the commission specifies how the provider companies must calculate the tariff to be charged.

302. The basic principles underlying the development of tariff formulas established under Article 87 of Law 142 are as follows:

- Economic efficiency: Tariffs should reflect the price that would arise in a competitive market, including compensation for capital investment costs.
- Neutrality: Equally situated consumers should be treated equally.
- Redistribution: Consumers with higher incomes should pay for a portion of the services consumed by those with lower incomes.

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<sup>218</sup> When Law 81 was amended by Law 142 of 1994, only the provisions of Law 81 dealing with public utilities were superseded. The applicability of Law 81 to the agricultural sector remained intact.

<sup>219</sup> CREG is lodged in the Ministry of Mines and Energy.

<sup>220</sup> CRA is lodged in the Ministry of Environment.

<sup>221</sup> The CRC is presently lodged in the Ministry of Technologies of Information and Communications, the successor to the Ministry of Communications.



- Financial sufficiency: Tariffs formulas should guarantee the provider's recovery of operating and capital costs, plus a return on equity comparable to that of an efficient firm in a comparable sector.
- Simplicity: Tariff formulas shall be comprehensible and readily applicable.
- Transparency: Tariff formulas shall be disclosed both to provider companies and to consumers.

303. Law 142 also anticipates that a tariff will comprise three elements: (i) a fixed charge reflecting the cost of service availability; (ii) a charge applied per unit of consumption, and (iii) a connection fee.

304. To implement the redistribution principle of tariff formulation, Law 142 includes provisions according to which regulatory authorities classify the neighbourhoods in a local utility service area into six "strata," based on the economic circumstances of the inhabitants and the physical condition of the houses and other buildings. The tariff formulation methodology requires that the tariffs for customers in strata 1 and 2 be reduced, while the tariffs for customers in the other strata be proportionately increased.

305. For all utility services, Law 142 permits the establishment of exclusive service areas ("áreas de servicio exclusivo") in circumstances where exclusivity is necessary to assure universal service. In such cases, competition among providers will be "for the market," rather than "in the market." The establishment of an exclusive service area requires express approval by the responsible regulatory commission, and the provider serving such an area remains subject to the full range of tariff control provisions and other regulatory requirements imposed by law or the responsible commission.

306. Law 142 also empowers municipalities to provide utility services directly, through a municipality-owned firm. This authority can be invoked, with the approval of the relevant regulatory commission, when no private company is interested in supplying the services or where the municipality concludes that it can provide the services in a more cost-efficient manner. A municipal enterprise will be subject to all the legal and regulatory requirements applicable to other utility companies. Tariff calculations under the applicable formula are the responsibility of the mayor, or of the board of directors if a government-owned firm is established.

307. In the SIC's view, the general structure and policies of Colombia's regulatory regime, including the principles applicable to tariff formulation and the establishment of exclusive service areas, are fundamentally sound. The SIC's principal focus in regulated sectors is to assure that regulation is implemented to minimise negative effects on competition.

#### 5.2.2.1 Electric power production and distribution

308. Law 142 controls tariff regulation in this sector; the regulatory agency is CREG. Before 1994, electricity was provided by vertically integrated SOEs. Law 143 of 1994 (Art. 75), the reform law that focuses specifically on the energy sector, sought to introduce competition where possible through vertical segregation. The Law provides that a single firm may not participate in more than two

of the three functions of generation, distribution, and commercialisation (local retail service).<sup>222</sup> There is also a limit on the stake that any company can hold in a transmission enterprise.<sup>223</sup>

309. Law 142 (Art. 73.25) also requires that all regulatory commissions limit horizontal concentration among firms that provide a public utility service. CREG imposes market share caps specifying that no firm may hold more than a 25% share of the national markets in generation, distribution, or commercialisation. The SIC states that the legislative justification for such caps is that a larger number of firms in the market sharpens competition and fosters efficiency, while also reducing the risk of abusive dominance and avoiding undesirable concentration in a critical public service market.

310. In a recent 2013 case, the SIC imposed a sanction of USD 2 million against Empresa de Energía de Boyacá (“EEB”), the monopoly provider of electric power in the department of Boyacá. The enterprise had imposed a discriminatory electric meter registration fee on users who employed technicians unaffiliated with EEB to calibrate newly-installed electric meters. The SIC concluded that the registration charges were unjustified and constituted an impediment to entry into the potentially competitive market for meter calibration. The SIC sanctioned EEB for violating Article 50.6 of Decree 2156, which provides that acts by a dominant firm impairing access to markets constitute an abuse of dominance.

#### 5.2.2.2 Natural Gas

311. Law 142 controls tariff regulation in this sector; the regulatory agency is CREG<sup>224</sup>. Natural gas distribution is regulated in the same way as distribution of electrical power. Natural gas production is treated differently, however, because production is highly concentrated. Ecopetrol, Colombia’s largest SOE, supplies more than 60% of the gas in Colombia, and there are only four actively-producing fields in the country. CREG regulates producer prices depending on the field from which the gas originates. For two of the fields, a price cap determined by formula is applied. For the other two fields, a fixed price tariff is imposed if the installed capacity of a producer’s plant falls below a certain installed capacity threshold specified by CREG. For plants with a higher capacity, there is no regulated tariff because competitive forces associated with excess available supply are expected to exert an adequate constraint on prices.

312. Vertical segregation in natural gas is implemented by regulations specifying that transportation companies may not directly operate at any other level (or vice versa). They may, however, own up to a 25% stake in a firm at another level,<sup>225</sup> and up to the same size stake in an important consumer of natural gas. Companies that produce or distribute natural gas may also commercialise it, but a producer may not own more than 20% of a distributor. There is also a regulatory constraint on integration between natural gas and electricity production. Natural gas

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<sup>222</sup> CREG’s implementing regulations constrain the size of the stake that a firm can hold in a vertically-related firm. For example, a generation company may not hold more than 25% of the equity of an energy distribution company and vice versa.

<sup>223</sup> Specifically, no generation, commercialisation, or distribution company may own more than 15% of the equity in an energy transmission company, provided also that the revenues of the energy transmission company do not represent more than 2% of the total revenues of the national energy transmission sector. Nor may a transmission company exercise control over a company engaged in any of the other functions.

<sup>224</sup> CREG also has authority for regulating the production and distribution of liquid petroleum gas (LPG).

<sup>225</sup> Likewise, production, distribution, and commercialisation companies are subject to a 25% cap on holdings in a transportation company.

producers may not directly engage in generation of electricity, but may own 25% of the equity of an energy generation company. This restriction is designed to forestall discriminatory treatment by natural gas producers who supply gas as an input to competing electrical power producers.

313. A 2013 SIC law enforcement case in this sector entailed an issue similar to that in the Boyacá electric utility case. The SIC imposed a fine of USD 282,000 on Gases de Occidente (“GdE”), a monopoly natural gas distributor in the city of Cali, for abuse of dominance. GdE charged a fee for issuing a technical conformity certification, but only when a technician unaffiliated with GdE connected a distribution line to a user’s facility.

#### 5.2.2.3 Water Supply, Sewerage, and Trash Collection

314. Law 142 also controls tariff regulation in this sector, but the regulator is CRA rather than CREG. Ordinarily, both water and sewerage systems are vertically integrated monopolies without structural separation. Further, water companies and sewerage companies are usually integrated with one another. Trash collection (which includes the collection and disposal of solid waste and such ancillary activities as street cleaning and mowing grass in public rights-of-way<sup>226</sup>) is subject to the same tariff regulatory regime as water and sewerage.

315. In April 2014, the SIC imposed sanctions totalling USD 25 million on three enterprises owned by the District of Bogotá for monopolising the waste disposal management market in the city of Bogotá. Under Colombia’s legal regime, waste disposal management must be provided either by (i) firms that compete “in the market,” or (ii) by a single firm that, through competition “for the market,” has been selected by means of a procurement process as the monopolist provider for a specified sector of the city. In derogation of these requirements, Bogotá’s public administration declared in December 2012 that only a public enterprise affiliated with the District of Bogotá could provide waste management services in the Bogotá area. The four incumbent private enterprises providing waste management services were excluded from the market by, among other means, denying them access to waste disposal facilities. The District’s actions enabled it to assume control over 80% of the relevant market. The SIC imposed sanctions on the enterprises involved and on their officers and managers.

#### 5.2.3 Telecommunications

316. Telecommunication regulation, part of the original regulatory regime established by Law 142 of 1994, was substantially overhauled by the enactment of Law 1341 of 2009. The CRC, created to regulate telephone services, was transformed into a regulatory agency for the whole telecommunications and information technologies sector, and lodged in the newly-created Ministry of Technologies of Information and Communications (itself transformed from the former Ministry of Communications).<sup>227</sup> The CRC was also granted authority by Law 1369 of 2009 to regulate postal services. In 2012, the CRC’s regulatory jurisdiction was further extended by Law 1507 to include markets, networks, and infrastructure for television services.

317. Law 1341 itself does not set out tariff principles for application by the CRC, as Law 142 previously did. Instead, the Law provides that all communication service operators may freely set prices to consumers, except that the CRC may intervene where (i) there is a market failure in the

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<sup>226</sup> Costs for these ancillary services are included in the formula used to calculate waste collection tariff charges for consumers.

<sup>227</sup> Law 1341 also transferred authority for enforcing CRC regulations from the Superintendence of Public Utilities to the Ministry of Technologies of Information and Communications.

market for services to consumers, (ii) asymmetries or other defects in market operations arise among service providers, or (iii) the quality of the services provided to consumers does not meet the standards established by regulation. If the CRC adopts tariff regulation, it can choose between price caps or fixed fees, as the situation warrants.

318. In mobile telephony, the CRC initially set a market-wide cap, in pesos per minute, for the termination fee that a network operator could charge to the originating operator for completing a call. Most of the calls made by customers of Comunicación Celular S.A. – Comcel (“Claro”), the dominant network, were to other Claro customers, so that Claro paid little to other operators in termination fees. In contrast, the customers of smaller operators made many of their calls to Claro customers, so there was a substantial flow of termination payments to Claro. The CRC dealt with this problem in two ways. First, it adopted a regulation establishing differential tariff caps for termination fees: the small operators can charge Claro up to COP 84.15 per minute for terminating off-net calls made by Claro customers, while the cap for Claro’s charge to smaller operators for terminating off-calls made by their customers is set at COP 42.49 per minute. Second, the CRC issued a regulation, applicable only to Claro, requiring that Claro’s charge to its customers for off-net calls be equal to or less than the charge for on-net calls.<sup>228</sup>

319. The CRC has also addressed essential facility issues in the mobile telephony sector. In February 2013, the CRC adopted a regulation defining as an essential facility any automatic roaming system that enabled completion of calls within Colombia to or from mobile phones used by customers of foreign networks.<sup>229</sup> The effect of the regulation was to require that Colombian mobile networks possessing such roaming systems must share access to them, at regulated rates, with other Colombian networks.<sup>230</sup>

320. With respect to law enforcement in this field, the SIC is currently investigating Comcel (Claro) to establish whether it is abusing its dominant position in the market for interconnection to Comcel’s mobile telephony network. Comcel allegedly has prevented Conmundata (a long-distance provider) and Avantel (a trunking network provider) from accessing the network by (i) deliberately delaying technical interconnection processes to Comcel’s network, (ii) imposing disadvantageous conditions compared to those offered to Infracel (Comcel’s subsidiary for international long-distance service), and (iii) setting Infracel’s access charges at a level significantly below that imposed on Infracel’s competitors.

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<sup>228</sup> In late 2012, a bill targeted at Claro was introduced in the Colombian Congress, proposing a 30% market share cap for any supplier of telecommunication network services. The CRC requested advice from the OECD Competition Committee staff, which responded with a memo advising against capping market shares that are achieved by legitimate competitive means. The memo noted that mergers resulting in a firm with a high market share presented a different issue and advised that such mergers should be “very closely scrutinised to see whether they harm competition.” The bill was later tabled without action.

<sup>229</sup> The facilities that are declared essential by the CRC, and to which the CRC regulates access, are specified in CRC Resolution 3101 of 2011. They include submarine communications cables; capacity for automatic roaming among mobile network providers; infrastructure that can be used simultaneously by multiple parties (such as rights of way, ducts, poles, towers, and physical facilities in general); billing and collection services (including all information needed to bill users); the physical space and services needed for the placement of equipment required for network access and/or interconnection; and certain user services such as emergency response, directory information, operator, and “intelligent” network features.

<sup>230</sup> The SIC had earlier issued an Article 7 opinion to the CRC commenting favourably on its proposed essential facility regulation.

321. Fixed voice telecommunications markets in Colombia were largely deregulated in 2009 (Resolution 2063) on the grounds that mobile telephony services offered a very close substitute. The CRC found at the time that there was one-way substitutability between fixed and mobile voice services, and that a hypothetical fixed line monopolist would not be able to increase prices without causing migration to mobile services. The CRC confirmed this finding in a subsequent market review conducted in December 2011. Consequently, retail fixed voice markets remain unregulated, except that there is a price cap, associated with the existing regulation of mobile termination rates, that constrains charges for terminating fixed to mobile calls.<sup>231</sup> For similar reasons of contestability, the CRC also leaves the fixed broadband market generally unregulated, imposing only reporting obligations on broadband providers.<sup>232</sup>

322. With respect to vertical integration, the CRC recognises that effective monitoring and cost-based wholesale price regulation of vertically-integrated telecommunications network providers requires separate accounting systems for the wholesale and retail service functions. In 2014, the CRC therefore established the “Separated Accounting Model” as a requirement for use by all telecommunications network providers.<sup>233</sup>

323. An older example of law enforcement in the sector is a SIC case opened in 2009 against Colombia Telecomunicaciones E.S.P. (Coltel). The SIC alleged that Coltel had infringed sections 3, 4 and 6 of article 50 of Decree 2153 of 1992 (abuse of dominance arising from tying, discrimination, and/or obstruction). Coltel was the sole administrator of access to the terminal facility of a submarine telecommunications cable. It was also a competitor in the service market for connecting transmissions across the cable to destinations overseas. Coltel’s rate structure offered a bundled rate for both services that was effectively equal to the separate rate for cable access only, effectively discriminating against customers who wished to use a rival firm for connection services to foreign destinations. The SIC closed the case in 2010, accepting guarantees under which Coltel agreed to specify a separate cable access fee in every contract and offer, and to cease charging different cable access fees depending on whether the customer used a competing firm for terminal connection services.<sup>234</sup>

#### 5.2.4 *Postal services*

324. The former government postal service, ADPOSTAL, was liquidated in 2006 and replaced by a state-owned enterprise affiliated with the Ministry of Technologies of Information and Communications. The firm, operating under the name “4-72,” retains a monopoly only for door-to-door delivery of mail sent by government entities. The government considers that vesting the firm with such a monopoly right is necessary to help generate the supra-competitive profits required for 4-72 to meet its obligation for maintaining universal mail delivery service. To ensure 4-72’s financial viability, the government also makes an annual contribution from the national budget. Law 1369, which establishes the tariff regime for 4-72’s basic postal services and vests the CRC with tariff-setting authority, specifies that the tariff should cover only operational costs.

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<sup>231</sup> CRC Resolutions 1250 of 2005 and 3497 of 2011.

<sup>232</sup> CRC Resolutions 3510, 3549, and 3616 of 2012.

<sup>233</sup> CRC Resolution No. 4577 of August 19, 2014.

<sup>234</sup> The SIC’s current administration does not consider that the guarantees accepted in the Coltel case would have been effective in interdicting anticompetitive conduct and would not today close the case on the basis of such guarantees.

325. Law 1369 also defines which types of mail delivery services are open to competition and designates the CRC as the regulatory authority for private sector postal service providers.<sup>235</sup> Three private postal operators have national networks, and other smaller enterprises operate in regional or local areas. These firms may offer any delivery service (including particularly “express delivery”) and, under Law 1369 (Art. 12), may freely set their own tariffs. As in the telecommunications services market, however, the CRC may intervene to regulate tariffs where (i) there is a market failure in the market for services to consumers, (ii) asymmetries or other defects in market operations among service providers exist, or (iii) the quality of the services provided to consumers do not meet the standards established by regulation. Further, in order to protect 4-72’s revenues, the CRC is required to set minimum tariffs for private express delivery services that are used to disseminate “mass mailings.”

#### 5.2.5 *Broadcasting and Media*

326. Law 182 of 1995 and Law 335 of 1996 significantly liberalised television programming, which up to that time had been closely controlled by the government. Concession contracts were issued to private operators RCN and Caracol, for two broadcast channels, which at present are still the only two concessionaire channels operating in Colombia.<sup>236</sup> Regulation of concessionaires was the responsibility of the National Television Commission (CNTV) until 2012, when Law 1507 revised the regulatory scheme and allocated CNTV’s powers to three different agencies:

- The newly-created National Television Agency (ANTV), which received the principal regulatory authority for television and is responsible for issuing and administering broadcast channel concessions and regulating subscription TV services (which include cable and satellite TV operators).
- The newly-created National Spectrum Agency (ANE), which is responsible for allocation and control of the electromagnetic spectrum.
- The CRC, which is responsible for regulating the operational conditions for television services, including technical configuration and quality of the service, and which may also establish regulations to address anticompetitive conduct by television service providers arising from market power or market failures.<sup>237</sup>

327. Among ANTV’s duties are establishing tariffs, caps, and prices for the provision of public television services. For example, ANTV sets a monthly fee per subscriber (COP 1875, about USD 1) that operators of subscription TV services (both satellite and cable based) must remit to the government as a fee for their licenses.

328. Foreign investment in television broadcasting is restricted by Law 182 of 1995 (as modified by Law 680 of 2001). Investments from foreign sources may not exceed 40% of a broadcast

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<sup>235</sup> CRC postal service regulations are enforced by the Ministry of Technologies of Information and Communications.

<sup>236</sup> Efforts are underway to resume at some point in 2015 a long-delayed project for issuing a concession for a third broadcast channel. There is also a government-operated channel, Señal Colombia.

<sup>237</sup> CRC Resolution No. 4577 of 2014, described above as establishing a separate accounting system requirement for telecommunications network providers, also applies to subscription TV service providers.

company's capital. The SIC considers such a restriction to be justified for security and cultural reasons, and notes that such restrictions exist in other jurisdictions.<sup>238</sup>

329. Colombia has also imposed certain regulatory restrictions designed to avoid concentration of control over broadcast content for national public television channels. Law 680 of 2001 provides that, for such broadcast channels, (i) no concessionaire may control, directly or indirectly, more than 33% of the total hours allocated to a channel; (ii) no natural person or legal entity may participate, directly or indirectly, in more than one concession or channel, and (iii) no concessionaire may own more than one news programme. The SIC states that it considers these restrictions are properly designed to ensure political, social, cultural, and religious diversity in television content.

## 5.2.6 *Transport*

### 5.2.6.1 Road transportation: trucks and buses

330. There are two general laws with national application affecting regulation of road transportation: (i) Law 105 of 1993, which distributes regulatory authority among various national, territorial, and municipal entities, and (ii) Law 336 of 1996, which establishes the regulatory principles applicable to the sector. The Ministry of Transportation is the principal national regulatory authority. Virtually every feature of the sector's operation is (or under the law could be) regulated. Examples of regulation include tariffs for the transportation of freight by truck, fares for bus passengers, and tolls for highways. Much of the regulatory authority has been delegated to local governments, which are empowered to set tariffs after conducting a study of transportation costs and applying the methodology specified by the Ministry. Alternately, local authorities may increase tariffs annually by applying an inflation rate calculated by the Central Bank.

331. By Decree 2092, issued in June 2011, the Ministry eliminated the existing system of tariffs for freight transport and introduced a new system, which, at the outset, required only that haulage companies report the prices they decided to charge. The programme provided that if the average reported price fell below the level of "efficient costs" determined by the Ministry, then the Ministry would intervene to set a minimum compensatory tariff. In May 2013, the SIC issued an Article 7 competition advocacy opinion to the Ministry on a proposal to set minimum tariffs for freight services on certain routes between major cities in Colombia. The regulation was based on a Ministry finding that reported rates on those routes were below the Ministry's "efficient costs" trigger. The SIC argued that setting minimum rates might protect truckers from price competition, but would likely also raise prices for the many products that included transportation expenses as a significant element in their cost structure. The SIC also noted that certain other city-pair routes were not being regulated, even though they were also experiencing rates below "efficient costs." This raised the prospect that freight traffic would be diverted from regulated routes to inefficiently longer unregulated routes. The Ministry withdrew its proposal.

### 5.2.6.2 Taxis

332. The Transportation Ministry delegates regulatory authority over taxi service to the mayors of municipalities, who in turn issue decrees setting the terms of regulation. Taxi decrees are typically detailed, establishing conditions for licenses (and often capping the number of licenses available), setting meter rates and surcharges for extra passengers and waiting time, and specifying the manner in

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<sup>238</sup> Television broadcasting is one of the few areas in which Colombia restricts foreign investment. Other restricted areas are national defence and national security; disposition of toxic, hazardous, or radioactive waste produced outside the country; and certain private security services.

which rates are disclosed to passengers and meters are operated. There is in Bogotá a chronic oversupply of taxis, caused in part by high meter rates that draw unlicensed operators into the market.

#### 5.2.6.3 Ports and water transportation

333. Government operation of port facilities ended with the enactment of Law 1 of 1991 (the Law of Maritime Ports). That Law, as well as the other basic transportation laws (Law 105 of 1993 and Law 336 of 1996) comprise the main elements of the present regulatory regime. Three types of ports are in operation: (i) private service ports, which provide services only to companies associated with the port society owning the port infrastructure, (ii) public service ports owned by the government and operated by concessionaires, and which offer services to any customer in accordance with the applicable tariffs and port regulations, and (iii) public service ports operated by regional port societies, which are joint government-private entities that engage in the construction, management, and maintenance of port facilities.<sup>239</sup> The Superintendence of Ports and Transport is responsible for establishing general tariff formulas for use by public service port concessionaires in determining tariffs. Regional port societies are permitted to set their own tariffs and need only report them to the Superintendent. Charges by private port societies to their members are not controlled by the government.

#### 5.2.6.4 Railways

334. The current railway system in Colombia consists of a small number of dispersed lines, mainly engaged in the carriage of coal and cement. The facilities, which were once state enterprises, are now operated by concessionaires. Law 336 of 1996 applies and the Ministry of Transportation has general supervisory responsibility for technical regulation of rail infrastructure. The National Agency of Infrastructure regulates the planning, award, and performance of concession contracts and public-private partnerships for the design, construction, maintenance, and management of railway infrastructure. The activities of the concessionaires are supervised by the Superintendence of Ports and Transport. Concessionaires are free to set their own tariffs and need only report them to the Superintendent.

335. In 2006, the SIC reviewed a proposed acquisition by a consortium of seven mining companies of FENOCO, a railway system operating in the Atlantic Coast area of Colombia. The SIC approved the vertical merger subject to conditions requiring FENOCO to allow access to its railway network by non-consortium mining companies on non-discriminatory terms and conditions.

#### 5.2.6.5 Airlines

336. Until 1991, airfares were fixed by the Civil Aeronautic Authority (“Aerocivil”). In 1992, a new regime was introduced under which Aerocivil is authorized to issue a regulation establishing the method it will employ in reviewing tariffs proposed by the airlines. Under current regulations,<sup>240</sup> airlines must file a proposed tariff specifying minimum and a maximum values, but are permitted to charge any amount within the stated range unless the authority intervenes to adjust a particular rate.

337. Certain transactions in the aeronautical sector, including mergers, are subject to prior approval exclusively by Aerocivil. The supplemental Paragraph to Article 8 of Law 1340, which is the

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<sup>239</sup> There are presently five such regional societies (for ports in Santa Marta, Barranquilla, Cartagena, Buenaventura and Tumaco), all of which are structured with a majority of private capital.

<sup>240</sup> Resolution 904 of 2012.



provision requiring the SIC to notify the relevant regulatory agencies when it initiates a merger review or case investigation involving firms in a regulated sector, provides that Aerocivil “shall continue to have jurisdiction over the authorisation of all business operations between aircraft operators” that involve “codeshare agreements, joint service operations, charter aircraft use, aircraft exchanges,” and “block space” arrangements under which one operator contracts to use a specified number of seats or amount of cargo space on another operator’s aircraft. The Aerocivil “jurisdiction” referred to is that in Article 1866 of the Commercial Code (Decree 410 of 1971), which provides broadly that “agreements between [aircraft] operators that entail collaboration, integration or joint exploitation, connection, consolidation, or merger of services, or in any way tend to regulate or limit air traffic competition are subject to prior authorisation” by Aerocivil.

338. The SIC’s view has always been that Aerocivil’s prior approval authority requirement under Article 1866 applies only to agreements that constitute a merger. As for Article 8, its reference to the continuation of Aerocivil’s existing prior approval jurisdiction under Article 1866 led the SIC to conclude that it too applied only to mergers. On the related question of whether Aerocivil’s prior approval jurisdiction over mergers was exclusive, the SIC’s view was influenced by the fact that Article 8 lists just five specific functions and lacks the “catch all” language of Article 1866 covering agreements that “in any way tend to regulate or limit air traffic competition.” The SIC considered that this apparent divergence in scope raised the possibility that the SIC shared joint jurisdiction with Aerocivil over mergers falling outside Article 8 but within Article 1866.

339. Subsequent to the enactment in 2009 of Article 8, Aerocivil reviewed only one transaction under its Article 1866 authority – a 2011 agreement among Delta, Air France, KLM, and Alitalia that involved joint operations on certain routes, and entailed sharing aircraft and other equipment, and jointly negotiating flight schedules, staff assignments, aircraft service capacities, and quality standards. In conjunction with the airlines’ application to Aerocivil for prior approval, the SIC submitted to the Council of State’s Consultations and Civil Service Chamber an inquiry concerning which agency or agencies had jurisdiction over the application. The Council’s opinion, issued in November 2012, concluded that Article 8 should be read expansively as co-extensive with Article 1866, and that Aerocivil should exercise exclusive jurisdiction over all transactions falling under those two Articles.<sup>241</sup> The Council did not, however, express an opinion on which transactions the Articles cover, although the fact that a joint venture was under review implies that the provisions are not strictly limited to agreements that constitute mergers. The precise scope of Articles 8 and 1866 thus remains unclear.

340. Aerocivil subsequently approved the Delta/Air France joint venture. The SIC states that it likewise would have made the same decision had it been the reviewing agency, noting that the relevant markets involved were not concentrated, that the existing concentration levels were not materially affected by the transaction, and that entry barriers were not significant.

341. There is no specific law or regulation that establishes the standard to be employed by Aerocivil in evaluating proposed agreements under Article 1866. Aerocivil states that, in considering whether to grant approval, it considers whether a transaction will produce an undue restriction on competition. According to Aerocivil, this determination is made by applying the same criteria used by the SIC in evaluating merger transactions, and proceeds by defining the relevant market, ascertaining market concentration, identifying barriers to entry and expansion and, where appropriate, considering the efficiencies created by the merger and the applicability of the failing firm defence. Aerocivil does

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<sup>241</sup> Council of State Consultations and Civil Service Chamber, Ruling of November 18, 2011. Reporting Judge: Augusto Hernández Becerra.

not solicit the SIC's opinion on the competitive implications of mergers or other transactions that Aerocivil reviews.

342. Aerocivil has provided a justification statement for Articles 8 and 1866, asserting that “the aeronautics industry differs from other industries in economic, regulatory, and technical matters.” The agency states that (1) market entry in international routes is regulated by the Convention on International Civil Aviation and entails negotiation of air traffic rights, and (2) regulation of the sector entails various forms of market intervention that potentially constrain application of the competition law, including restrictions on entry, tariff regulation, and *ex ante* approval of various activities, operations, and agreements involving airlines. Aerocivil concludes that, because “it is the one agency that fully comprehends the particularities of the aeronautic sector,” it is “best suited to establish whether a merger between aircraft operators would unduly restrict competition.” The SIC responds that Aerocivil’s statement disregards the fact that the SIC is the national competition authority and is responsible for competition law enforcement in many specialised sectors, some of which are more heavily regulated than the aeronautical sector. The SIC sees no unique feature of Aerocivil’s jurisdiction that would justify different treatment for it and does not agree “that the existence of specialised regulation in a sector is sufficient to remove a sector from the SIC’s merger review authority.”<sup>242</sup>

343. The Secretariat’s initial report adopted the SIC’s recommendation that Article 8 of Law 1340 and, if necessary, Article 1866 of the Commercial Code be modified to vest the SIC with the same approval authority for airline mergers as it exercises for mergers in other market sectors. The SIC’s legislative proposal takes a different approach but arrives at the same result. The proposal repeals Articles 8 and 1866 and adds a new provision to Article 9 of Law 1340 that vests Aerocivil with authority over airline “merger transactions.” Aerocivil is, however, required to obtain the SIC’s views on the merger’s competitive effects and is bound by the SIC’s resulting opinion. Thus, a SIC opinion to reject a merger would have conclusive effect. If the SIC were to approve a merger, with or without conditions, then Aerocivil could (i) reject the merger, or (ii) approve it with the same conditions imposed by the SIC, along with such additional conditions (based on grounds other than the protection of competition) as Aerocivil deemed necessary.<sup>243</sup>

## 5.2.7 Hydrocarbons

### 5.2.7.1 Petroleum

344. In 2003, the Colombian government separated regulatory responsibilities from Ecopetrol, the state-owned oil company, and assigned them to the National Hydrocarbons Agency (“Agencia

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<sup>242</sup> The SIC notes that it retains full jurisdiction over airlines with respect to the enforcement of the competition law’s prohibitions against unilateral conduct and believes that it also retains jurisdiction over at least some forms of anti-competitive agreements.

<sup>243</sup> Another jurisdictional issue involving the airlines sector relates to the consumer protection law enforced by the SIC. The airlines were initially subject to the revised consumer protection law (Law 1480) enacted in 2011. In 2012, however, Law 1558, which modified Law 300 of 1996 (the tourism law), removed the airlines from the ambit of Law 1480 and subjected them instead to the sanctions regime in Law 300. The penalties for violating the tourism law are much lower than those applicable under Law 1480. Maximum fines for business entities violating Law 1480 are set at COP 1.18 billion (USD 626,500) and for natural persons at COP 176.8 million (USD 94,000). In contrast, the penalties for violation of the tourism law range from COP 2.8 million (USD 1500) to COP 11.4 million (USD 6000).

Nacional de Hidrocarburos” or ANH).<sup>244</sup> The ANH administers auctions for drilling rights, at which Ecopetrol is treated as any other competitor.

345. Under Article 212 of Decree 1056 of 1953 (the Oil Code), oil pipelines (some SOEs and some privately owned) are designated as public utilities subject to regulation. The Ministry of Mines and Energy, which exercises regulatory authority for pipelines under Decree 070 of 2001 (Art. 5.4), reserves 20% of private pipeline capacity for use by ANH to transport crude oil. The Ministry also establishes a mechanism that provides access to oil pipelines under reasonable and non-discriminatory terms. To assure an evidentiary basis for determining reasonable rates, the Ministry requires that the activities of exploration, exploitation, transportation, distribution, and commercialisation be conducted by separate entities that, if commonly owned, must be operated independently and must maintain separate accounting systems available for audit.<sup>245</sup>

#### 5.2.7.2 Gasoline

346. Law 39 of 1987 defines the distribution of gasoline and diesel fuel as a public service subject to regulation and Decree 4299 of 2005 establishes the applicable regulatory regime. Fuel prices in Colombia are regulated at each level in the distribution chain by the Ministry of Mines and Energy under Decree 381 of 2012. At the production level, the Ministry sets price caps.<sup>246</sup> At the regional distribution level, price regulation is imposed according to one of two regimes. Under supervised liberty, each retail fuel distributor determines a price and reports it to the Ministry. This regime, which is implemented in locations where there is a sufficient number of competing distributors, applies in Colombia’s principal cities.

347. In less competitive markets, a regulated liberty scheme is employed. The Ministry establishes a price cap formula that each fuel distributor uses to determine the maximum price it can charge. The formula accounts for the transportation cost of delivering gasoline to each gasoline station; the evaporation costs of the product; the maximum price of the gasoline sold to the final distributor; and the distributor’s profit margin, which is calculated to reflect the distributor’s investments in infrastructure, operational expenses, and management costs. A regulated liberty regime presently applies in 25 geographic zones. A similar bifurcated regulatory scheme applies at the retail level.

348. One of the SIC’s prominent recent cases involved a group of six gasoline retailers operating under a regulated liberty regime in the city of Duitama (Department of Boyacá). The retailers had dissimilarities in operating and investment costs that should have produced different price calculations when applying the Ministry’s formula. Instead, the SIC found that the gasoline prices set by the stations, although falling below the regulated price cap, were almost identical to one another and changed in synchronisation during an extended period of time from 2007 to 2009. Further investigation revealed that the local section of the retailers’ trade association (Fendipetróleo), with the encouragement of the association’s national office, had strongly suggested that the retailers charge nearly uniform prices. The SIC concluded the case in 2011, imposing fines of USD 455,000 each on Fendipetróleo and the six retailers, and USD 68,130 each on the officers of the defendant companies and association.

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<sup>244</sup> Decree 1760 of 2003.

<sup>245</sup> Ministry Resolution 72415 of 2014.

<sup>246</sup> Resolution 90743 of 2013.

### 5.2.8 Professions

349. Colombia's Constitutional Court has been called upon to consider the constitutional validity of legislation authorising professional associations to control certification of fitness to practice. Various constitutional provisions establish rights in individuals that are implicated in the issue, including Article 26 stating that Colombians are free to choose their own profession. Nonetheless, the Court has consistently ruled that public necessity warrants exercising control over practitioners in professions that entail a high degree of social responsibility and pose a potential risk to the community<sup>247</sup>. Control by means of a professional association must, however, be established by legislation and entail a degree of control that is proportional to the risk addressed.

350. In Colombia, there are about 60 professions subject to control, in some cases by a government entity (lawyers, for example, are subject to the Superior Judiciary Council and the Ministry of Justice), or jointly by a government entity and a trade association (anaesthesiologists are subject to the Ministry of Health and Public Protection and the National Committee on the Practice of Anaesthesiology), or solely by a trade association (engineers are subject to the Professional National Council of Engineers). In each case, the authority deals with matters of qualification and professional ethics, but there is no constraint on the number of practitioners or regulation of the fees that they charge. The SIC states that anticompetitive regulation by associations of professional advertising has not been an issue in Colombia.

### 5.2.9 Health care

351. The National Commission on Prices of Medicines and Medical Devices, a three-member body comprised of one representative each from the Ministry of Health and Social Protection; the Ministry of Commerce, Industry and Tourism; and the Office of the President, regulates the price of all prescription drugs sold in Colombia under Article 3 of Decree 1071 of 2012. Price regulation is imposed at the wholesale level according to one of two regimes. Under the first, a "supervised liberty" approach, wholesale distributors freely determine a price and report it the Commission. Under the second, a form of "regulated liberty," the Commission sets a maximum price cap for a particular drug equal to the drug's "international reference price" ("IRP"). The Commission calculates the IRP by determining the drug's average wholesale sale price in seventeen reference OECD and Latin American countries<sup>248</sup>, arranging those prices in order from highest to lowest, deleting atypical values, and then selecting the price displayed at the 25<sup>th</sup> percentile.<sup>249</sup>

352. The default regime is the "supervised liberty" approach. The "regulated liberty" approach is applied to set price caps only for drugs sold in markets that meet either of the following two criteria:

- markets in which there are three or fewer competing wholesalers and the price of the drug exceeds the IRP, or
- markets in which (a) although there are more than three wholesalers, the Herfindahl-Hirschman Index exceeds 2500, *and* (b) the drug has both a high market share (due to few substitute drugs) and a price that exceeds the IRP. Drugs in markets that meet the criterion

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<sup>247</sup> See, for example, Constitutional Court Decisions C-191 of 2005, C-212 of 2007, and C-296 of 2012.

<sup>248</sup> The reference markets are Argentina, Brazil, Chile, Ecuador, Mexico, Panama, Peru, Uruguay, Spain, the United States, the United Kingdom, Australia, Canada, France, Norway, Germany, and Portugal.

<sup>249</sup> All price controls for regulated drugs are enforced by the SIC's Division for Legal Metrology and Technical Standards in accordance with Law 1438 of 2011 (Art. 132).

for sub-category (a) but not for sub-category (b) are monitored and, if prices increase above the inflation rate without justification, are then made subject to the IRP cap.

353. The SIC commented on the standards for applying the regulated liberty regime to drug prices in a May 2013 competition advocacy opinion issued under Article 7 of Law 1340. The SIC raised no objection to the Ministry's methodology for defining relevant markets and determining concentration, as the same approach is employed by the SIC in enforcing the competition law. Nor did the SIC identify a problem with defining reference prices by relying on the weighted average price of the product in an international market comprised of the specified OECD and Latin American countries.

354. Although drug price regulation is ordinarily applied at the wholesale level, the Commission may also impose regulation at other levels in the distribution chain where (i) high prices adversely impact implementation of the government's health care programmes or prejudice the public interest, (ii) unjustified price increases exceed the previous year's global inflation rate, or (iii) the domestic price is substantially higher than the IRP.

#### 5.2.10 *Financial institutions*

355. While financial institutions in Colombia, as elsewhere, are heavily regulated for prudential reasons, the fees charged for financial services in Colombia are largely determined by the market. The Superintendence of Finance (SFC), which is responsible for imposing market regulations as needed, considers that the financial sector is vigorously competitive.<sup>250</sup> The only two regulatory interventions that have been implemented are caps on interest rates charged for standard loans and microcredit loans. The present rate cap is set for the former at 29.79% (effective annual interest) and at 51.18% for the latter – higher rates are deemed unlawfully usurious.

356. The banking sector is subject to the competition law. In 2008, the Consultation Section of the State Council responded to a joint request by the SIC and the SFC for an opinion on whether the SIC could enforce against financial institutions the competition law's prohibitions on anticompetitive agreements. The Council concluded that the SIC had such authority.

357. An important horizontal agreement case settled in June 2012 addressed the issue of bank interchange fees for processing credit and debit cards transactions. In May 2011, the SIC opened an investigation of 15 banks, two payment networks, and a trade association (Asobancaria) for an alleged anticompetitive agreement to fix the fee charged by banks to commercial establishments for credit and debit card payments made by final consumers. Under the settlement, the banks and the networks agreed to adopt a programme known as the "Method for Remunerating the Issuing Bank" ("Modelo de Remuneración al Emisor") or "REMI," developed by the SIC to promote the establishment of interchange fees in a pro-competitive manner (Resolution 40478 of 2012).

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A recent OECD study of Colombia's banking sector concluded, however, that although concentration in the sector was relatively low, the market's contestability (and hence competitiveness) was nonetheless "subpar." Efficiency and Contestability in the Colombian Banking System (2015) 3, 12-13, 26-28, OECD Economics Department Working Papers, No. 1203, available at <http://dx.doi.org/10.1787/5js30twjgm6l-en>.

### Box 13. Asobancaria: Interchange Fees by REMI

When consumer uses a credit or debit card to make a purchase from a merchant, the transaction details are passed from the “acquiring bank” (which is the bank used by the merchant to process charges made by the merchant’s customers) to the “issuing bank” (which is the bank that issued the card used by the consumer). The issuing bank pays the acquiring bank the amount of the transaction less the “interchange fee,” which compensates the issuing bank for its costs involved in the transaction, among which are the costs of bearing the risk that the card holder may default and any “rewards” that the issuing bank offers its card holders. The acquiring bank then deducts an additional (typically much smaller) amount from the payment to cover its transaction costs, before passing the remaining amount on to the merchant. The merchant ordinarily receives, on average, about 98% of the original amount charged, although interchange fees differ significantly.

All banks in a network act as both acquiring and issuing banks, although there are usually net acquiring banks and net issuing banks. Any particular bank will prefer a low fee for its transactions as an acquirer and a high fee for its transactions as an issuer.

The REMI programme accepted by the parties in the Asobancaria case involves a blind voting process in which all issuing and acquiring banks submit a proposed percentage figure for each type of credit or debit card employed by their networks. The percentage reflects the portion of the transaction amount that would be collected by the issuing bank for transactions involving the specified card. Voting is conducted every three months. The interchange fee to be used for each card type for the following calendar quarter is determined by the median values of the votes submitted, corrected according to certain specified variables, such as the total number of participating banks and their market shares.

Since each bank is voting for a single percentage fee that would be applicable to all transactions involving a particular card, it will face divergent voting incentives depending on whether it is a net issuer or a net acquirer. The system relies on that divergence to avoid a race to the top or the bottom. Additionally, there are certain boundary constraints that are applied in determining the percentage fee that emerges from the vote. For example, for votes in which more than five banks participate, the two highest and two lowest votes are eliminated from the calculation.<sup>251</sup> The fee calculation is also subject to a minimum floor and a maximum cap keyed to variations in the consumer price index.

The settlement also includes requirements that the parties (i) hire auditors to monitor the operation of the programme at the two payment networks involved and (ii) expend funds equivalent to USD 1.5 million for television advertising directed to consumers for promoting competition in the Colombian banking sector. The parties agreed to maintain the programme in effect for a minimum period of 24 months after its implementation. Both the banking community and the SIC have been satisfied with the operation of the system thus far. Recent credit card interchange fees have averaged 1.48%, in contrast to the 2% average experienced in 2009.

358. Article 6 of Law 66 of 1993 provides that money lodged in escrow with a court during the course of any legal proceeding must be deposited in the Banco Agrario de Colombia, a state-owned bank. Similarly, all fines or other payment requirements imposed by courts in favour of the state must also be deposited with the Banco Agrario. The disposition of such funds is controlled by the Superior Judicature Council. The Law provides that 70% of the interest earned on deposited funds must be used to finance projects listed for the judicial branch in the government’s current National Development Plan. The remaining 30% must be allocated to projects relating to improvements in prison facilities and programmes.

359. Mergers among financial institutions under the jurisdiction of the Superintendence of Finance (SFC) are remitted to that agency’s control under Decree 663 of 1993. Article 9 of Law 1340, which establishes the prior notification requirements applicable to mergers, stipulates that the Superintendence of Finance “shall study and decide upon” mergers that exclusively involve entities

<sup>251</sup> If the number of voting banks is 4 or 5, just one vote from each end of the distribution is eliminated. If fewer than 4 banks participate (an unexpected case), no votes are eliminated.

subject to its control. This provision effectively makes inapplicable to financial institution mergers the competition law's merger notification requirements and the SIC's merger review authority. The SFC's jurisdiction covers banks, insurance and reinsurance companies, securities brokers, financial co-operatives, bonded warehouses, foreign exchange houses, trust companies, pension funds, and similar financial institutions.

360. Decree 663 also establishes the procedures and substantive standards applicable to merger reviews conducted by the SFC. Financial institutions must notify the SFC of their intention to merge within 10 days after the merger agreement is ratified by the parties' corporate boards. The Superintendent of Finance has two months to either reject or approve a merger, and the parties may not consummate the transaction before the Superintendent acts.<sup>252</sup> Before reaching a decision, the SFC is required by Article 9 of Law 1340 to request the SIC's non-binding opinion concerning the transaction's competitive effects, and the SIC may suggest conditions designed to ensure the effective preservation of competition. Although the SIC's opinion is non-binding, the SFC must explain its reasons if it chooses to reject the SIC's advice.

361. Article 58 of Decree 663 provides that the Superintendent of Finance may object to a merger only if one or more of the following grounds applies:

- the merged entity would not meet the minimum equity or capital requirements established by law.
- one or more managers or stockholders controlling more than a 5% capital share of a merging party does not meet the minimum eligibility and liability requirements for participation in a financial sector merger.
- as a result of the merger, the merged entity could "maintain or fix discriminatory prices, limit the supply of a service, or impede or restrict competition in the markets where the merged entity participates." Article 58 adds that "None of these effects is presumed to exist whenever the merged entity has a participation of less than 25% in the market affected by the merger."
- the merger may affect the public interest or the stability of the financial sector.

362. In the period from 2009 to March 2015, the SFC assessed and approved 28 mergers involving financial institutions. The SIC submitted in each case an Article 9 opinion concluding that none of the transactions posed competitive issues.<sup>253</sup>

363. The restricted set of elements controlling an Article 58 decision means that the SFC could not rely solely on prudential grounds to approve an anticompetitive merger (although it could rely on such grounds to reject a competitively innocuous merger). If the SFC wishes to approve an anticompetitive merger on prudential grounds, it must invoke Article 28 of Law 1340, which is an exemption from the competition law for financial emergencies described previously in this report.

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<sup>252</sup> Decree 663 establishes a one-month deadline for SFC review of transactions that are notified at least three months before the scheduled date for ratification of the merger agreement by the parties' corporate boards.

<sup>253</sup> The law does not establish the time period within which the SIC must respond to the SFC. In 2014, the SIC's average time for rendering opinions to the SFC on proposed mergers was 15.5 days.

364. The SFC provided a justification statement for Article 9, asserting that the fundamental reason for maintaining SFC control over financial institution mergers is “the necessity of protection and preservation of the financial system’s stability.” As just noted, however, the authority provided in Decree 663 does not enable the SFC to approve an anti-competitive merger.<sup>254</sup> The Secretariat’s initial report recommended modifying Article 9 of Law 1340 so that mergers of financial institutions (other than those addressed in financial emergencies under Article 28 of Law 1340) would be evaluated jointly by both the SIC and the SFC. Each agency would examine a proposed merger with respect to the issues arising under that agency’s jurisdiction, and a proposed merger would be disapproved if either agency objected. The SIC’s legislative proposal essentially adopts this recommendation, amending Article 9 to provide that the SIC’s opinion on the transaction’s competitive effects is binding on the SFC. Consequently, if the SIC’s opinion were to reject a merger, then the SFC must also. If the SIC were to approve a merger, with or without conditions, then the SFC could (i) reject the merger, or (ii) approve it with the same conditions imposed by the SIC, along with such additional conditions as the SFC determined were appropriate. The amendment leaves unaffected the applicability of both Decree 663 of 1993 and Article 28 of Law 1340 to the SFC’s merger control functions.

*5.2.11 The Council’s Structural Separation Recommendation and related OECD competition policy instruments*

365. The Council’s Recommendation on Structural Separation in Regulated Industries [C(2001)78, C(2011)135/CORR1] deals with re-structuring markets in which a regulated firm is operating in both a non-competitive activity and a competitive complementary activity. The Recommendation urges that, in such circumstances, Members should carefully balance the benefits and costs of structural separation measures against the benefits and costs of behavioural measures. The benefits and costs to be balanced include the effects on competition, effects on the quality and cost of regulation, effects on corporate incentives to invest, the transition costs of structural modifications, and the economic and public benefits of vertical integration, based on the economic characteristics of the industry in the country under review.<sup>255</sup>

366. As to this Recommendation, the SIC states that the principal opportunities for structural separation in Colombia have been exploited, although previously unnoticed situations occasionally come to light. For example, in March 2013, the SIC issued to CREG a competition advocacy opinion under Article 7 of Law 1340, commenting favourably on a proposed CREG regulation under which housing project developers could freely select any certified company to install natural gas service lines within residential units. The SIC noted that gas distributors are vertically integrated into the installation market and that the CREG regulation was designed to facilitate entry and competition in that market.

367. The market sectors in Colombia to which the Recommendation applies, including the production, transportation and distribution of electricity and natural gas, and the production, transportation and refining of petroleum products, were previously re-structured to achieve structural separation. There are, however, regulations in these sectors that permit a certain degree of vertical integration through ownership stakes. The Secretariat’s initial report suggested that the SIC exercise

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<sup>254</sup> The SIC notes that it retains full jurisdiction over financial institutions with respect to the enforcement of the competition law’s prohibitions against anti-competitive agreements and unilateral conduct.

<sup>255</sup> The reference to considering effects on corporate incentives to invest was added by the 2011 amendment to the Recommendation.



its competition advocacy authority to examine those regulations and determine whether to recommend further restrictions on such ownership. The SIC has stated that it intends to follow this suggestion.

368. Section 5.3 of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance urges that (i) all market participants be assured non-discriminatory access to essential network facilities on a timely and transparent basis, and (ii) price regulation mechanisms, including price caps and other mechanisms such as price monitoring and disclosure regimes, be utilised to encourage efficiency gains when price controls are needed. Colombia's policies are consistent with these principles. An unjustified refusal by the operator of an essential facility to grant access on reasonable terms constitutes a violation of the competition law. Under the terms of Article 50.6 of Decree 2153, "obstructing or impeding third parties' access to markets or marketing channels" is rebuttably presumed to constitute an abuse of dominance. Regulatory regimes in Colombia are designed to require price monitoring rules as the default method of regulation; followed, where necessary, by the imposition of price caps as the next step; and resorting to direct price setting only where no feasible alternative is available.

369. Under Paragraph 4 of the 1979 Council Recommendation on Competition Policy for Exempted or Regulated Sectors[C(79)155], Members are urged to assure that competition authorities are "granted appropriate powers to challenge abusive practices by [regulated] enterprises, including unfair discrimination and refusals to deal, particularly where such conduct is beyond the purposes for which the regulatory scheme was enacted." Paragraph 5 of the same 1979 Council Recommendation urges that Members undertake to detect and investigate anticompetitive agreements "which, although lawful if notified to or approved by the competent authorities, have not been so notified and approved." Colombia accepts and conforms to these elements of the Recommendation. The SIC has full authority to investigate and sanction abusive conduct, including abusive conduct by enterprises that hold a dominant position by virtue of law or government regulation (paragraph 4). The SIC states that it is committed to detecting and investigating anticompetitive agreements in regulated sectors that have not been appropriately notified and approved (paragraph 5).

370. Section 4.1 of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance recommends that competition law enforcement and sector regulation should be co-ordinated to ensure consistency. The SIC states that it effectively co-ordinates its law enforcement activities with sector agencies and regulatory regimes, and avoids interfering with conduct that properly implements a valid regulatory objective. The SIC notes that, under Article 8 of Law 1340, it is required to notify the initiation of a law enforcement investigation or merger review to any government agencies that regulate or control the enterprises or the market sector(s) involved in the case. The notified agencies may then provide a technical evaluation of the case to the SIC. In response to the recommendation in the Secretariat's initial report, the SIC has recently subscribed Memorandums of Understanding with various governmental agencies, including the Ministry of Commerce, Industry, and Tourism; the Ministry of Mines and Energy; the Commission of Electricity and Gas (CREG); the Commission for Water and Sanitation (CRA); and the National Agency of Hydrocarbons; and the NPPA, among others. Among the prime objectives of the memoranda is to facilitate the co-ordination of competition enforcement and sector regulation.

## **6. Competition advocacy**

371. This section of the report addresses how the process of developing and applying regulations and laws considers and incorporates competition policy principles, and describes the SIC's performance as a competition advocate.

## **6.1 Competition principles and competition assessment in legislative and administrative processes**

372. Article 333 in Colombia's 1991 Constitution establishes a collective right to free competition, but also provides that the State may adopt laws limiting the scope of economic freedom "whenever the social interests, the environment, or the cultural heritage of the nation so require it." All of the laws that establish regulatory regimes for various economic sectors have provisions requiring the regulator to promote competition to the greatest extent possible in issuing and implementing regulations. For example, Law 142 of 1994, which establishes the general principles to be incorporated in tariff methodologies developed for public utilities, specifies (Art. 87) that one objective of a tariff regime is to "reflect the prices of a competitive market, exclude inefficient costs, and encourage future increases in productivity." Likewise, Law 1341 of 2009, which describes the principles that underpin regulation in the telecommunications sector, states (Art. 2) that the central aim of regulation is "to promote environments of free and fair competition that encourage present and future investment in the telecommunication information sector and that allow access to the market, in compliance with the competition regime, under market prices and equality of conditions." Law 1369 of 2009, defining the regulatory regime for postal services, stipulates (Art. 2) that government intervention in postal services is undertaken for the purpose, among others, of "promoting free competition and avoiding abuses of dominant positions and practices restricting competition."

373. Prior to the enactment of Law 1340 in 2009, the SIC had no formal role in monitoring how regulatory decision-makers employed competitive principles in developing or implementing regulations. Nor did the SIC play a significant informal role in advising sector regulators, with the exception that the Telecommunications Regulatory Commission consulted periodically with the SIC concerning the regulation of telephony services. In general, before 2009, the SIC focused on law enforcement activities and did not act as a competition advocate with respect to the government's regulatory policies.<sup>256</sup>

### **6.1.1 Ex ante SIC review under Article 7**

374. Article 7 of Law 1340 mandated a new function for the SIC. Under that provision, regulatory authorities must advise the SIC in advance of regulations they propose to issue, so that the SIC may issue a non-binding opinion assessing the proposal's effect on competition. If the originating agency disagrees with the SIC's opinion, it is required to "clearly state the reasons supporting that conclusion in its decision." Decree 2897 of 2010 implements Article 7, specifying (in Art. 2) that the government entities required to comply with Article 7 are "the Ministries, Administrative Departments, Superintendencies, and Administrative Public Units." The Law's limitation to national agencies means that actions taken by regional and municipal governments are not subject to Article 7. Further, Article 2 of the Decree expressly exempts from coverage certain national entities that Colombia's Constitution protects from Executive branch control, including Colombia's central bank, autonomous universities, regional autonomous corporations, and the National Television Agency.<sup>257</sup>

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<sup>256</sup> The SIC was not, for example, involved in designing any of the privatisations of state enterprises that occurred in the 1990s.

<sup>257</sup> The National Television Agency ("Autoridad Nacional de Televisión" or "ANTV") has authority to award concessions and licenses for providing television services, administer and control the electromagnetic spectrum in co-ordination with the National Spectrum Agency, adopt plans and programs aimed at ensuring public access to television, guarantee pluralism and impartiality of information broadcasts, and promote competition and efficiency and avoid monopolistic practices in the operation and exploitation of television services.

375. Besides limiting the range of government agencies to which Article 7 applies, Decree 2897 also limits the proposed government actions that must be submitted for an opinion. Article 3 specifies that an SIC opinion is required only for those “administrative acts” that (1) have “a regulatory aim,” and (2) “may affect free competition in the marketplace.” The first element, referring to acts with a “regulatory aim,” means that Article 7 covers only acts of a regulatory character applicable to a class of commonly-situated parties in a given sector.<sup>258</sup> Acts that are not “regulatory” in this sense, such as legislative proposals, do not qualify, even if initiated by a Ministry or other covered government agency. Other non-regulatory acts to which Article 7 does not apply include the award of a procurement contract, the grant of a government subsidy, the imposition of a countervailing duty, or the entry of a sanction or cease and desist order against a party in a law enforcement proceeding.

376. The second requirement, referring to “acts that may affect free competition in the marketplace” is elaborated in Decree Article 3, using language taken directly from Section IA2 of the Council’s Recommendation on Competition Assessment. Under the Decree, a regulatory act will be presumed to affect competition, regardless of its formal legal objective, if it has the purpose or may have the effect of (i) limiting the number or diversity of competitors in one or more relevant markets, and/or (ii) limiting the ability of companies to compete, reducing their incentives to compete, or limiting the freedom of choice or the information available to consumers in one or more relevant markets.

377. Decree Article 4 expressly exempts certain acts that are otherwise covered by Article 7 of Law 1340, if they involve (1) a temporary emergency measure that must be implemented to stabilise an economic sector or guarantee a safe supply of services provided by an essential public utility, (2) a deadline extension, the clarification of conditions under which a previously imposed requirement is enforceable, or the correction of mathematical or typographical errors, (3) a decision resolving a dispute between businesses, (4) compliance with a court order or a legal or regulatory rule that requires immediate adherence, or (5) establishing an “exclusive service area” in a regulated sector. In any case where an agency invokes an Article 4 exception, it must cite the provision relied upon in its regulatory order. The rationale for these exceptions is self-explanatory, except for item (5) relating to the establishment of exclusive service areas. Regulatory agencies responsible for public utility networks derive their authority from Law 142 of 1994, which generally requires the promotion of competition in the production and delivery of public utility services. Article 40 of Law 142, however, creates an exception to that principle by permitting the establishment of exclusive service areas when necessary to assure universal service. Requiring a SIC opinion assessing the competitive effects of a decision invoking Article 40 is not considered necessary, because the regulatory act entails an overt displacement of competition for public policy reasons.

378. In 2013, Colombia’s Ministry of Agriculture asserted that none of its regulatory initiatives are subject to Article 7 and that therefore advance notification of the Ministry’s regulatory proposals need not be provided to the SIC.<sup>259</sup> The Ministry’s position, stated in an August 23, 2013 letter from

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<sup>258</sup> The Constitutional Court, in Ruling C-150 of 2003, established that “regulation is a continuous activity that comprises the oversight and development of a sector and that implies the adoption of different types of decisions and acts that are appropriate to achieve the objectives that underpin such regulation and allow the development of the socioeconomic activity involved.”

<sup>259</sup> The Ministry’s position has not always been that Section 7 is inapplicable, because the Ministry transmitted three proposed regulations to the SIC under Article 7 in September 2010 (although none have been transmitted since that time). On August 23, 2012, a letter from Juan Camilo Restrepo Salazar, the Minister of Agriculture and Rural Development to José Miguel de la Calle Restrepo, then the Superintendent of Industry and Commerce, emphasised that, under Articles 5 and 31 of Law 1340 of 2009, the market intervention programs administered by the Ministry were exempt from application

its Chief Legal Officer,<sup>260</sup> is based primarily on two legal provisions -- Article 1 of Act 155 of 1959 (the introductory section of the original 1959 competition law) and Article 31 of Law 1340 of 2009. The 1959 provision states that the Government can limit the competition law's applicability by authorising agreements necessary to stabilise a "basic sector of the economy" (such as agriculture). Article 31 of Law 1340 identifies the Agriculture Ministry's market intervention programmes as "State intervention mechanisms" that "constitute a restriction of the right to competition in terms of the intervention." The letter concludes that these provisions exempt the Ministry's programmes from the competition law and that the SIC's powers under Article 7 "are [therefore] not applicable to the agricultural sector."

379. In the SIC's view, although Article 31 may protect enterprises participating in the Ministry's intervention programmes from prosecution under the competition law, it does not affect the applicability of Article 7 to the Ministry's proposed regulations.. The SIC notes particularly that Article 7 does not conflict with the Ministry's market intervention authority, and merely requires the Ministry to notify the SIC of proposed regulations that may affect competition and comment on non-binding SIC opinions suggesting less anticompetitive methods of achieving the Ministry's regulatory objectives. A private party could test the Ministry's position by filing a nullity action against a Ministry regulation promulgated in derogation of Article 7, but no such case has been initiated.<sup>261</sup> The SIC's legislative proposal includes a provision designed to foreclose the Ministry's Article 31 argument by adding to that Article a savings clause clarifying that the Article 7's requirements are not trumped by Article 31.

#### 6.1.1.1 Ex ante SIC review under Article 7: Process

380. An agency intending to issue a regulatory act determines whether referral to the SIC is necessary based on a standard SIC questionnaire (Decree Article 5). The questionnaire (issued as SIC Resolution 44649 of 2010) is modelled closely on the question sets in the original version of the OECD's Competition Assessment Checklist<sup>262</sup> and focuses on whether the proposed regulation limits the number or diversity of competitors or their ability or incentives to compete.<sup>263</sup> In February 2012, the SIC issued detailed Competition Advocacy Guidelines for use by agency officers engaged in developing proposed regulations that fall under Article 7. The Guidelines discuss the importance of competition and the role of competition advocacy in the formulation of regulatory interventions in the market, explain the legal and procedural elements of the Article 7 review process, elaborate on the

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of the competition law. (Letter on file with the OECD Competition Division.) The Ministry's position on Article 7 may well date at least from that point.

<sup>260</sup> Letter from Andrés Bernal Morales, Chief Legal Officer, Colombian Ministry of Agriculture, to Jay C. Shaffer, OECD Consultant, Aug. 23, 2013. On file with OECD Competition Division. The Ministry's letter was precipitated by an inquiry made during the course of collecting information for the present accession review.

<sup>261</sup> The availability of a nullity action to challenge a regulation issued in derogation of Article 7 is discussed in section 6.1.1.3 of this report.

<sup>262</sup> OECD, Competition Assessment Toolkit, vol. I, Principles, pp. 8-9 (version 2.0).

<sup>263</sup> The questionnaire is based on the original OECD Checklist. It does not contain a question set that appeared only in a subsequent version of the OECD Checklist and that focused on regulatory limitation of consumer choices or information.

application of the competition assessment checklist,<sup>264</sup> and provide descriptions of SIC advocacy opinions addressing various kinds of competitive restrictions.

381. If the proposing agency determines that the answer to any of the questions in the SIC's questionnaire is affirmative, it may opt to reconfigure the proposed regulation so that all of the answers will be negative, in which case it need not notify the proposal to the SIC<sup>265</sup>. If the proposal entails an affirmative answer despite modification, the agency must notify the proposal. In that event, the agency must consider whether the proposal is structured so that the intended regulatory objective is accomplished in the least anticompetitive manner possible. Under Decree 2897, notification to the SIC is accomplished by transmitting the proposed regulation, along with the questionnaire responses, the regulatory options considered, the studies undertaken in evaluating the proposal, and any third party comments about the proposal that the agency received (Art. 8).

382. Upon receipt of the necessary documents, the SIC first determines whether the proposal entails the establishment of a tariff by a regulatory commission. If not, the SIC has ten business days (Decree 2897, Art. 10) to issue an opinion addressing whether or not the proposal entails an unduly negative effect on competition.<sup>266</sup> If the proposal involves a regulatory agency tariff, the SIC's opinion is due thirty business days (Decree 2897, Art. 10.2(b)) after the originating agency submits to the SIC, in addition to the documents mentioned previously, a final report prepared by the originating agency's "Experts' Committee."<sup>267</sup> The Experts' Committee, which is comprised of the originating agency's commissioners, is responsible for preparing a report describing the public comments received on the proposal, analysing the arguments for and against the proposed regulation, and explaining why the proposal should be adopted. The SIC subsequently transmits its non-binding opinion to the originating agency and posts the opinion on the SIC website. The recipient agency is required to state in its final decision whether it notified the SIC of the proposed regulation and whether the SIC issued an opinion. If the agency disagrees with the SIC's opinion, it must explain the reasons for its position.

#### 6.1.1.2 Ex ante SIC review under Article 7: Experience

383. For the period from July 24, 2009, the effective date of Law 1340, to December 31, 2014, the SIC issued 158 opinions to 22 agencies under Article 7.<sup>268</sup> The agencies that received SIC opinions and the nature of the opinions rendered are shown in the following table. Where an agency response to an adverse SIC opinion is listed in the "rejects" column, the recipient agency declined to modify or terminate the proposed administrative act.

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<sup>264</sup> The Guidelines discussion of the checklist includes the question set about consumer choice and information that does not appear in the SIC's 2010 questionnaire.

<sup>265</sup> The agency may opt to request a SIC opinion, even if not required to do so (Decree 2897, Art. 6.1).

<sup>266</sup> The SIC may also decline to issue an opinion (Decree 2897, Art. 9.3).

<sup>267</sup> See Article 11.6 of Decree 2696 of 2004.

<sup>268</sup> The number of opinions issued per year was 8 in the partial year 2009, 27 in 2010, 28 in 2011, 18 in 2012, 26 in 2013, and 51 in 2014.

**Table 17. Volume and disposition of SIC Article 7 advocacy opinions 2009 – 2014**

Agency	Opinions issued to agency	SIC opinion re competitive effect		Agency response to adverse SIC opinion		
		No undue restriction	Undue restriction	Accepts	Rejects	Awaiting response
Aerocivil	2	1	1	1	0	0
CRA	7	5	2	1	0	1
CRC	35	27	8	3	2	3
CREG	33	27	6	1	4	1
Health Regulatory Commission	1	1	0	0	0	0
Ministry of Agriculture	1	0	1	1	0	0
Ministry of Environment	4	4	0	0	0	0
Ministry of Finance and Public Credit	1	1	0	0	0	0
Ministry of Health and Social Protection	10	8	2	1	1	0
Ministry of Mines and Energy	20	13	7	3	4	0
Ministry of Technologies of Information & Communication	9	3	6	3	2	1
Ministry of Commerce, Industry & Tourism	14	12	2	0	1	1
Ministry of Culture	1	1	0	0	0	0
Ministry of Transportation	8	5	3	1	0	2
Ministry of Housing, City & Territory	1	1	0	0	0	0
National Agency of Hydrocarbons	3	2	1	1	0	0
National Agency of Public Procurement	1	0	1	0	1	0
National Metrology Institute	1	0	1	1	0	0
National Commission of Television	2	2	0	0	0	0
National Spectrum Agency	1	1	0	0	0	0
Superintendence of Finance	1	1	0	0	0	0
Unit of Normative Projection and Financial Regulation	2	1	1	1	0	0
<b>Total</b>	<b>158</b>	<b>116</b>	<b>42</b>	<b>18</b>	<b>15</b>	<b>9</b>

384. Of the 42 opinions in which the SIC found the proposed regulation to entail undue competitive restrictions, 9 were pending a response from the originating agency at the end of 2014. Of the 33 SIC opinions to which the originating agency had responded, the agency disagreed with the SIC on 15 occasions (45%).<sup>269</sup> Among these cases were the following:

- A regulation by the Ministry of Health and Social Protection establishing detailed requirements for the establishment and operation of slaughterhouses for cattle, buffalo, pork and poultry. The SIC objected to provisions that limited entry by setting a maximum production volume for slaughterhouses serving municipal areas and prohibiting the establishment of a slaughter house to serve a municipal area if the area was already the site of a slaughterhouse serving the national market. The Ministry did not state its reasons for rejecting the SIC's opinion.
- A regulation by the Ministry of Information and Communications Technology setting requirements to obtain or retain a license for express mail delivery services. The SIC objected to provisions requiring that licensees employ a specific technology for tracking package delivery, recommending instead that a performance standard be employed that

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In some of these cases, the originating agencies did not fully join issue on the merits of the SIC's objections. In one case, for example, the originating agency advised that it did not have authority to establish certain asset valuation criteria that the SIC recommended. In another instance, the originating agency asserted – over the SIC's objection – that the SIC's opinion had been submitted after the deadline established by Decree 2897.

would allow licensees to select the tracking technology they preferred. The SIC was particularly concerned that the high cost of the Ministry-endorsed technology would reduce the number of competing licensees. In its reply, the Ministry emphasised that the favoured technology would guarantee effective tracking of packages and delivery to their destinations within the time period specified by law.

- Another regulation by the Ministry of Information and Communications Technology instituting requirements to obtain a license for providing postal services. The SIC objected to provisions requiring that the applicant (1) provide services in the capital cities of at least eight departments in Colombia, (2) contract for overseas delivery services in at least twenty foreign countries on three different continents, and (3) maintain package handling facilities of a specified minimum physical size. The Ministry stated that the requirements were justified because otherwise licensees would be unable to handle the volume of packages presented for delivery or incapable of providing delivery to Colombian and overseas destinations demanded by consumers.
- A regulation by the Communications Regulatory Commission (CRC) proposing to introduce rate regulation for SMS (short message service). The CRC's objective was to facilitate the use of mobile banking services by reducing the prices charged by mobile phone network operators to content and application providers. The SIC, noting that price regulation was a disfavoured form of market intervention, argued that the scope of the intervention should be minimised. If the public policy justification is the promotion of e-banking, then the regulation should apply exclusively to the prices charged by mobile operators to banks and not universally to all content and application providers. The CRC rejected that advice, reducing the SMS price for every provider. The CRC explained that it was required to extend the reduced prices to all customers due to (i) the principle of non-discriminatory treatment established in Article 50 of Law 1341 of 2009 (the "IT Law"), (ii) the efficient costs constraint, which prohibited differential prices based on the type of content being transmitted; and (iii) the technological neutrality principle, according to which the government must allow the free adoption of information and communication technologies that foster the efficient provision of services, contents and applications that use those technologies (Article 2.6 of Law 1341).

385. The proportion of SIC opinions with which the originating agency disagrees has been declining as the programme matures. For the years 2009 through 2012, the rejection rate was 69%. The SIC suggested that there were two factors explaining the high initial rejection rate. First, the competition advocacy system imposing requirements on originating agencies had only recently been introduced by Law 1340 of 2009, and many government agencies were still unfamiliar with their obligations under the system. Second, it was not clear at that point whether an originating agency's failure to follow system requirements exposed it to any significant adverse effects.

386. Following the issuance of the Secretariat's initial report, the SIC in March 2014 created the Competition Advocacy Group,<sup>270</sup> partly for the purpose of promoting an increase in the rate at which

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The Group's functions include (i) issuing ex ante advocacy opinions on proposed government regulations; (ii) monitoring agency regulatory agendas to identify proposals appropriate for competition advocacy analysis; (iii) monitoring regulations that have been the subject of a SIC comment to determine if the recipient agencies adopted the SIC's recommendations; (iv) undertaking market studies to identify laws and regulations adversely affecting competition, in preparation for developing advocacy opinions; (v) participating in institutional debates and offering advice

agencies responded affirmatively to the SIC's competition advocacy opinions. Additionally, as described in more detail below, the Council of State ruled that an agency's failure to comply with the requirements of Article 7 could lead to annulment of the regulation. For the two-year period of 2013-2014, the rejection rate for SIC Article 7 opinions fell to 30%, a 43% decrease (or 39 basis points) compared to the period from 2009 to 2012.

387. Among the 18 cases in which the originating agency responded affirmatively to the SIC's objections by modifying or terminating its proposed regulation were:

- A proposed regulation by Ministry of Health and Social Protection to regulate operation of the government's health care system. The government pays a per capita premium to management companies ("EPSS" by their Spanish acronym) to deliver basic health care services for low income people. The proposed regulation was intended to ensure the financial viability of EPSS operating in sparsely populated areas by establishing a minimum number of clients that an EPSS had to serve in order to participate in the government's programme. The SIC objected that the minimum was set inappropriately high, so that some local areas able to support two or more EPSS would be served by a monopolist. Even for areas that could support only one EPSS, the regulation contemplated a five year duration for the EPSS operating permit, which the SIC noted would unnecessarily restrict the frequency of opportunities to compete for the market.
- A proposed Aerocivil regulation establishing a minimum service fee to be charged for online ticket sales by all sellers of airline tickets. The genesis of the proposed regulation was competition between airlines and travel agencies for ticket sales. Airlines typically imposed no surcharge for tickets purchased from them over the Internet. Travel agencies, which had incurred costs to establish an Internet platform for online ticket sales, wished to impose a surcharge without disadvantaging themselves versus the airlines. The SIC pointed out that "equalising" service charges in the manner proposed unnecessarily suppressed competition and increased prices to consumers. Aerocivil withdrew its proposal, letting service fees for online ticket sales be determined by market forces.
- A draft regulation by the Ministry of Mines and Energy under which only certain designated sellers would be permitted to sell inexpensive decorative Christmas lighting that did not meet the technical standards otherwise applicable to outdoor lighting products. The SIC concluded that implementation of the regulation would create market asymmetries and could lead to distortions in competitive conditions. The Ministry cancelled the regulation.
- A regulation proposed by the Ministry of Transportation to set minimum rates for freight services on certain routes between major cities in Colombia. The Ministry withdrew the proposal, as described in section 5.2.6 of this report.

388. Among the cases in which the SIC found no undue anticompetitive restriction was a regulation proposed by the Communications Regulation Commission for controlling access by content and application providers to telecommunication networks. The rule provided that networks could not impose wholesale access fees for content providers that were higher than the lowest rate available for retail access. Also, networks were prohibited from (i) denying access completely unless access was economically and technically infeasible, (ii) discriminating among content providers, and (iii)

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concerning the design and implementation of competition laws; and (vi) promoting public and academic understanding of and appreciation for the benefits of competition.



including provisions in access contracts enabling the network to terminate contracts unilaterally or requiring providers to deal exclusively with the network.

389. Another case in this category involved a 2014 proposal by the Ministry of Housing, City and Territory for regulating the use of biosolids resulting from wastewater treatment processes. The objectives pursued by the Ministry were to prevent the deposit of biosolids in landfills and to protect the environment by promoting the use of biosolids for purposes such as soil enrichment. The SIC considered the proposed regulation to be positive for competition because it promoted the development of an emerging market while also protecting the environment.

390. The agencies are generally positive about SIC's input, although, as mentioned previously, there are instances in which agencies questioned the SIC's grasp of the technicalities involved in the issue under examination. This issue may arise in part from the fact that, under Decree 2897 (Art. 10), the SIC ordinarily has only ten business days to formulate a response to an Article 7 notification (extended to thirty days in cases involving a tariff). The staff of the SIC's Competition Advocacy Group, which is responsible for preparing Article 7 opinions, considers that ten days is inadequate to deal with technical issues. The practical aspects of this issue have been partially addressed by an SIC programme, initiated in 2014, to involve SIC staff in agency rulemaking procedures at the initiation of the analysis and before a regulatory response has been determined. In addition, the 10 day period does not commence until the regulatory agency has provided complete information to the SIC. If the submission is incomplete, the matter remains in suspense until the required documentation is provided, thus allowing additional time for the SIC to prepare its analysis.

391. With respect to general relations and co-ordination between the SIC and the regulatory agencies, the prevailing view among the agencies is that relations are cordial and functional. The CRC noted that the tradition of frequent informal contact between the two agencies has continued. One agency, the SFC, observed that it had provided training to SIC personnel to enhance their understanding of the finance sector's operations, adding that it would welcome more frequent contact with the SIC.

#### 6.1.1.3 Ex ante SIC review under Article 7: Agency compliance

392. Although the SIC did not until recently begin compiling data about the compliance of originating agencies with the requirements of Article 7, anecdotal evidence suggests that compliance varies considerably.

- Agencies apply the SIC's checklist for themselves in determining whether a proposed regulation could affect competition, and an agency's disinterest in or reluctance to involving the SIC in its regulatory programme can obviously skew the results of such an exercise. The SIC's view is that the sector regulatory agencies generally file with the SIC when required, while ministries that exercise regulatory power are less conscientious.
- When an agency issues a final rule, it is required to indicate whether or not the SIC was notified. Monitoring the record of regulations issued would therefore reveal failures to notify, but the SIC's capacity to conduct such surveys was constrained in the past by resource limitations.
- Another point at which compliance can falter is when an agency decides to reject an adverse opinion from the SIC. The agency is obliged to state its reasons for disagreement when it issues the final rule. This requirement is sometimes ignored, although each time an advocacy

opinion is issued, the SIC reminds the recipient agency of this point. Over the past year, the SIC has noticed an improvement in the degree of agency compliance with this requirement.

- Yet another issue can arise when the SIC's opinion to the originating agency raises no objection to the proposed regulation, but the agency thereafter makes problematic changes to the proposal before issuing it in final form. To address this issue, the SIC's advocacy opinions emphasise that the pronouncement is limited to the version submitted by the regulator and that any substantial amendment to the text requires the initiation of a new advocacy proceeding before the SIC. The SIC did not encounter any instances of this problem during 2014.

393. The SIC has no authority to enforce the requirements of Article 7 when compliance fails. The issue of what legal consequences flow from a failure to comply was recently addressed by the Council of State in response to an inquiry submitted by the SIC. The Council's July 26, 2013, opinion concluded that notification to the SIC of a proposed regulation is an essential legal requirement for issuing a regulatory administrative act that may affect competition. Likewise essential is a statement in the final text of the regulation explaining the originating agency's reasons for rejecting the SIC's opinion concerning the competitive effects of the proposed regulation. The Council further concluded that failure to comply with these requirements could lead to annulment of the regulation under Articles 46 and 137 of the APC, which provide that regulations issued in violation of required procedures may be rendered void.<sup>271</sup>

#### *6.1.2 Competition assessment activities by the SIC under Decree 4886*

394. The SIC is the only agency in Colombia with the responsibility to engage in competition advocacy, but its role under Article 7 does not represent the full scope of its authority. Article 1.1 of Decree 4886 of 2011 (the SIC's organisational instrument) provides that one of the agency's prime functions is to "advise the National Government and participate in the formulation of policies in all matters related [to the] . . . promotion and protection of competition." This enables the SIC to give opinions on various government actions that may have competitive implications, but that are not subject to Article 7. Specifically, there are four types of government acts that meet this definition: (1) legislation proposed to or adopted by Congress, (2) Executive branch proposals that do not, in the language of Decree 2897, constitute acts with "a regulatory aim," (3) Executive branch acts of any kind (including regulations) that are already in effect, and (4) government acts of any kind proposed or adopted by local governments.

##### *6.1.2.1 Competition assessment under Decree 4886: National legislation*

395. Executive branch agencies engaged in developing legislative proposals are not required to consult in advance with the SIC's Competition Division regarding laws that may affect competition, but a few agencies have done so voluntarily. In any event, one of responsibilities of the SIC's Legal Unit is to monitor legislative developments relating to the agency's jurisdiction and functions (Decree 4886, Art. 7.8). If the Competition Division learns, from the Legal Unit or by other means, that an anticompetitive legislative proposal is being developed in the executive branch, the SIC can raise its concerns with the originating agency or with the Legal Secretariat of the Presidency, which is the office charged with reviewing executive branch legislative proposals before they are lodged with the legislature. If the legislation has already been introduced, the SIC can consult with the legislative committee before which the proposal is pending.

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<sup>271</sup> Subsequent to the 2013 Council of State decision, there have been no cases challenging agency regulations for failure to comply with Article 7 procedures.

396. Since 2009, the SIC has not provided advice on any legislative proposals developed by the executive branch, other than the proposal that led to the Penal Code amendment imposing criminal penalties for bid rigging.

397. With respect to legislative proposals initiated by members of the legislature, the SIC is sometimes approached in advance by members requesting consultations on proposals affecting competition. In any event, if the Competition Division is alerted by the Legal Unit concerning a member-initiated proposal about which the Division was previously unaware, the SIC can raise its concerns directly with the legislative committee before which the proposal is pending. The SIC's competition advocacy activities since 2009 with respect to member-initiated proposals included support for a proposal to prohibit minimum duration clauses in mobile telephony contracts and opposition to a proposal establishing a 30% market share cap on mobile telephony service providers.

398. As to laws already in force, the SIC can at any time conduct an analysis and issue a report calling for modifications. SIC efforts of this kind can arise in several ways. In 2012, for example, the SIC undertook a review of Colombia's government procurement laws in conjunction with its project to comply with the OECD's Recommendation on Fighting Bid Rigging in Public Procurement. The review identified various elements of existing laws (and implementing regulations as well) that constrain competition in procurement proceedings and increase their vulnerability to bid rigging.

399. Another method for identifying existing laws and regulations that unduly restrict competition is by undertaking a market study. Market studies, which the SIC can conduct under Article 9.18 of Decree 4886 to support any of its functions as the National Competition Authority, enable the agency to examine market operations in detail<sup>272</sup>. The resulting analysis can identify features of the market that unduly impair its competitive vitality, including structural conditions, conduct by market participants, and regulation or other forms of government intervention.

400. The SIC's position is that it may employ compulsory process, if necessary, to collect information in the course of conducting a market study. Article 1.63 of Decree 4886 enables the agency to "request individuals and legal entities to supply data, reports, accounting books, and papers as required to properly carry out its duties" and, under Article 1.61 of the same Decree, the SIC may "issue instructions" to private parties as needed accomplish its competition protection functions. In turn, Article 3.11 of the Decree provides authority for the SIC to impose "the applicable fines, pursuant to the law, resulting from the violation of the provisions on protection of competition or unfair competition, including the omission to duly comply with information requests." The applicable law underlying the fine imposition provision in Article 3.11 is Article 25 of Law 1340, which provides that the SIC may sanction "Violation of any of the provisions on protection of competition, including omissions to duly comply with [SIC] information requests, orders and instructions, . . . ."

401. Some practitioners dispute whether the SIC can enforce compulsory process in the context of a general market study unrelated to a law enforcement investigation. The argument against enforceability in a general market study context reads Article 25 as if it covered only information requests related to violations of the law. As a practical matter, the SIC has not encountered resistance to its market study information requests, so the issue has never been tested in court. The SIC's legislative proposal nonetheless includes language intended to forestall the argument by providing expressly that sanctions apply to enforce information requests issued in the course of economic studies.

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<sup>272</sup> Article 9.18 authorises the Deputy Superintendent for Competition Protection to "carry out the technical and economic studies required to comply with the Office's duties."

402. Market studies at the SIC are currently conducted by three groups -- the Mergers Group and the Competition Advocacy Group in the Competition Protection Division, and the Economic Studies Group attached to the Superintendent's Office. The Merger Group's studies are undertaken to enhance staff expertise for evaluating mergers in the sectors studied. Similarly, the Competition Advocacy Group's studies are prepared in conjunction with the Group's function of preparing competition advocacy opinions under Article 7 of Law 1340.<sup>273</sup> The Economic Studies Group (ESG) has broad responsibility for analysing market operations and competitive issues in all sectors of the Colombian economy. The ESG issued reports in 2013 on the fertiliser, credit cards, and pesticide markets, and in 2014 on the debit card market, the application of legal metrology regulation, and credit card transactions sorted by geographic market and type of product or service purchased. Studies produced by any of the SIC's groups may also reveal market failures or suspicious behaviour by economic agents, and thus provide a basis for opening law enforcement investigations *ex officio*.<sup>274</sup>

#### 6.1.2.2 Competition assessment under Decree 4886: Non-regulatory Executive branch proposals

403. Examples of SIC advocacy with respect to proposed national government acts falling outside the scope of Article 7 include the participation of SIC representatives in Colombia's trade remedy committees.<sup>275</sup> Other examples have involved:

- A plan developed jointly by the Ministry of Information and Communications Technology and the National Spectrum Agency to auction additional spectrum for use in 4G (LTE) mobile telephony. In consultations on this matter, the SIC emphasised the importance of promoting competition in both the spectrum auction process and in the mobile data market, and urged that the auction be designed to attract proposals from new entrants. The SIC's recommendations were accepted and, as a result of the ensuing auction (held in October 2013), two new operators were able to enter to Colombia's mobile communications market.
- A proposed notice by the National Federation of Coffee Growers (a quasi-governmental organisation) soliciting candidates for appointment as contract administrators for the Coffee Grower Income Protection Programme. The SIC concluded that the notice did not pose substantial competitive risks but offered several suggestions for improving the terms of the notice to attract more candidates.

#### 6.1.2.3 Competition assessment under Decree 4886: Executive branch acts already in effect

404. In investigating bid rigging cases, the SIC may identify features of the procurement procedure employed in the particular case that could have facilitated the creation and operation of a bid rigging conspiracy. The SIC reports such findings to the procurement office involved and recommends corrective action. For example, in 2012, the SIC noted that the procurement process employed by the national penitentiary institute to obtain food services for prison inmates facilitated bid rigging. The SIC advised against including the contract's budget as a part of the formula for determining how to award the contract. That practice facilitated tacit collusion, since it allowed participants to predict the price offered by others. Similar recommendations have been made to procurement officials at other agencies during training courses conducted by the SIC and through

<sup>273</sup> Prior to the establishment of the Competition Advocacy Group in March 2014, the Mergers Group was responsible for the SIC's competition advocacy functions and conducted market studies in support of that function.

<sup>274</sup> Primary responsibility for conducting SIC market studies is assigned to the Economic Studies Group.

<sup>275</sup> These activities are described in section 4.3 of this report.

informal advice. Government agencies are not, however, obliged to accept the SIC's suggestions and may employ any procurement selection formulas that comply with the procurement law (Article 26, Decree 1510 of 2013) and is intended to elicit "the most favourable bid for the government."

#### 6.1.2.4 Competition assessment under Decree 4886: Acts proposed or adopted by local governments

405. The SIC has not engaged in competition advocacy activities with respect to proposed and existing regulations issued by departmental and municipal governments.

#### 6.1.3 *The Recommendation of the Council on Competition Assessment [C(2009)130]*<sup>276</sup>

406. The Council's 2009 Recommendation on Competition Assessment has three principal parts, in sections IA, IB, and IC. Section IA urges the introduction of an appropriate process to identify existing or proposed "public policies" (defined as including "regulations, rules, and legislation") that unduly restrict competition. Section IB recommends implementation of a process to revise proposed or existing public policies that unduly restrict competition and to develop specific and transparent criteria for evaluating suitable regulatory alternatives. Governments are advised to adopt the more pro-competitive alternative consistent with the public interest objectives pursued, taking into account the benefits and costs of implementation. Section IC urges that competition assessment be incorporated in the review of public policies in the most efficient and effective manner consistent with institutional and resource constraints, and that assessment of proposed public policies occur "at an early stage"<sup>277</sup> of the policy making process. Further, competition bodies or officials with expertise in competition should be involved in the assessment process. The Recommendation is applicable to regulation at "all levels of government."<sup>278</sup>

407. Measuring Colombia's competition advocacy system against the standards in the 2009 Recommendation yields the following results:

- *Section IA: Identification of existing or proposed public policies that unduly restrict competition.* The SIC "checklist" that originating agencies are directed to employ for identifying proposed regulations for assessment under Article 7 is based on the OECD Recommendation and associated toolkit. The checklist entails specific and transparent criteria and acts as an effective screening device. The SIC also employs the same checklist criteria in identifying legislative proposals and other government acts not covered by Article 7 for assessment under Decree 4886. There is, however, no system (i) for enforcing the obligation of originating agencies under Article 7 to notify potentially anticompetitive

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<sup>276</sup> The Council's 1979 Recommendation on Competition Policy and Exempted or Regulated Sectors C(79)155 also has several elements dealing with competition assessment, in paragraphs (1), (2), (3) and (6). Those elements are not discussed separately because they are effectively incorporated in the 2009 Competition Assessment Recommendation.

<sup>277</sup> Assessment should occur "before a determination has been made about how to approach a given policy challenge" so that options entailing no government intervention can be considered. OECD, Competition Assessment Toolkit, vol. I, Principles, p. 27 (version 2.0).

<sup>278</sup> The Recommendation, which observes that "the OECD and a number of OECD Member countries" have developed competition assessment toolkits to provide guidance in performing the recommended assessments, does not incorporate a particular toolkit. The SIC states that it relies on the OECD toolkit for guidance in undertaking its competition advocacy activities.

regulations to the SIC, or (ii) for identifying existing legislation or regulations, at either the national or local government levels, that warrant assessment.<sup>279</sup>

- *Section IB: Revision of existing and proposed public policies the objectives of which could be accomplished with less anticompetitive effect.* Colombia's assessment procedures do not entail a process assuring the revision of proposed or existing legislation or regulations that unduly restrict competition. SIC opinions under both Article 7 and Decree 4886 are non-binding and there is no "gatekeeper" office in the government authorised either to enforce agency compliance with Section 7's requirements or to determine whether agency decisions rejecting SIC opinions are well-founded. Nor is there a Congressional office with similar gatekeeper authority over proposed legislation.
- *Section IC: Efficient and effective integration of competition assessment in the review of public policies, and at an early stage in the development of proposed public policies, including involvement of competition bodies or officials with expertise in competition policy.* The SIC's competition assessments are undertaken by officials with expertise in competition policy but the integration of competition assessment in the development of public policies is not fully efficient or effective. With particular reference to the phase of the policy process at which SIC advocacy occurs, all of the SIC's reviews under Article 7, and most of its reviews under Decree 4886, occur after a decision to regulate has already been taken and a specific regulatory proposal drafted.

408. The primary means by which Colombia expects to close the gaps in its competition advocacy system is through implementation of the Council's 2012 Recommendation on Regulatory Policy and Governance [C(2012)37]. Under that Recommendation, governments are urged to (i) commit at the highest political level to an explicit "whole-of-government" policy for regulatory quality,<sup>280</sup> (ii) establish mechanisms and institutions to provide oversight and enforcement of regulatory policy, procedures, and goals, (iii) integrate Regulatory Impact Assessment (RIA) into the early stages of the process for formulating new regulatory proposals, (iv) conduct systematic programme reviews of the stock of significant regulations, and (iv) foster the development of regulatory management capacity and performance at sub-national levels of government.

409. The RIA element of the 2012 Recommendation requires clear identification of policy goals, an evaluation of whether regulation is necessary, and an analysis of alternative forms of intervention to determine which will be most effective and efficient in achieving the stated goals. Of particular note is section 4.6 of the Recommendation, which deals with evaluating alternatives and states that preference should be accorded to approaches that

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<sup>279</sup> Section IA2(b) of the Council's Hard Core Cartel Recommendation provides that the hard core cartel category does not include agreements that are excluded directly or indirectly from the coverage of a Member country's own laws, or are authorised in accordance with those laws. The Recommendation adds that "all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives." The SIC has not analysed whether exclusions or authorisations of this kind exist in Colombia or the extent to which they may be unnecessary or overbroad.

<sup>280</sup> Section 1.2 of the Recommendation, elaborating on the language urging a "whole-of-government" policy for regulatory quality, specifies that governments should "adopt an integrated approach, which considers policies, institutions and tools as a whole, at all levels of government and across sectors, including the role of the legislature in ensuring the quality of laws."

*enhance, not deter, competition and consumer welfare, and that to the extent that regulations dictated by public interest benefits may affect the competitive process, authorities should explore ways to limit adverse effects and carefully evaluate them against the claimed benefits of the regulation. This includes exploring whether the objectives of the regulation cannot be achieved by other less restrictive means.*

410. The Government of Colombia (GOC) approved in October 2014 a formal and explicit “whole-of-government regulatory policy” and launched a three-year implementation project designed to embed RIA in Colombia’s policy making process.<sup>281</sup> The OECD Secretariat and the SIC<sup>282</sup> are participating in the implementation project, which includes such elements as training programmes for government personnel, pilot RIAs in certain agencies<sup>283</sup>, and a RIA guidance manual tailored to Colombia’s institutional context.

411. The project to implement the 2012 Recommendation will make Colombia’s policies and procedures consistent with the elements of the 2009 Competition Assessment Recommendation respecting (i) laws proposed by the Executive, (ii) existing laws, and (iii) proposed and existing national regulations. The SIC’s legislative proposal includes an amendment to Article 7 that would also advance implementation of the 2009 Recommendation by authorizing regional and local governments, at their discretion, to request a non-binding SIC opinion on regulatory proposals, and expressly enabling the SIC, even absent an invitation, to issue non-binding comments on proposed regional and local regulations. Because these SIC opinions would be non-binding, however, closing the remaining gaps in Colombia’s competition assessment system would require extending the “whole-of-government” programme for regulatory quality to cover proposed and existing regional and local regulations, as well as laws proposed by members of the legislature, as neither of those two categories of regulatory action are expressly covered by the 2012 RIA Recommendation.

412. The Secretariat’s initial report recommended that, in conjunction with implementation of the 2009 Competition Assessment Recommendation, the SIC should also consider entering into a memorandum of understanding with each government agency that issues or maintains regulations affecting market competition. The memorandum would cover the mechanisms for notices by the agency to the SIC of proposed regulatory measures falling under the competition advocacy programme in Article 7 and Decree 2897 of 2010, as well as notices by the SIC to the agency of the initiation of a law enforcement investigation or merger review falling within the agency’s jurisdiction. The SIC has adopted this recommendation, subscribing Memorandums of Understanding (MOU) with various governmental agencies, including the Ministry of Commerce, Industry, and Tourism; the Ministry of Mines and Energy; the Commission of Electricity and Gas (CREG); the Commission for Water and Sanitation (CRA); the National Agency of Hydrocarbons; and the NPPA, among others. The memoranda also designate a Competition Policy Officer at each agency and a corresponding liaison officer at the SIC, to promote frequent, informal contact between the SIC and the agency involved. The agreements facilitate improvement of the SIC’s familiarity with the current and

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<sup>281</sup> The Government’s policy and plan are embodied in CONPES 3816: *Better Regulation Policy: Impact Assessment*. The National Council on Economic and Social Policy (CONPES) is the highest national planning authority in Colombia and serves as the prime advisory body to the government on all policy related to the economic and social development.

<sup>282</sup> CONPES 3816 includes a provision expressly specifying that the SIC should be involved in RIA implementation activities related to competition policy.

<sup>283</sup> The SIC is currently participating in pilot programs with the Ministry of Commerce Industry and Tourism, The Superintendence of Public Utilities, the Commission of Electricity and GAS (CREG), the Commission for Water and Sanitation (CRA), and the Ministry of Environment.

emerging regulatory issues in each sector and increase the prospect that the SIC can affect regulatory initiatives in their formative stage, before a formal proposal is presented for the SIC's review under Article 7.

#### 6.1.4 *Competition assessment of government subsidy programmes*

413. Article 7 of Law 1340 does not apply to government subsidy payments and programmes. Nor are these topics specifically addressed in either the Council's 2009 Recommendation on Competition Assessment or the 2012 Recommendation on Regulatory Policy and Governance. Section 7.3 of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance, however, recommends action to "review non-regulatory policies, including subsidies (both direct and indirect) . . . and adjust them where they unnecessarily distort competition and market openness." Subsidy programmes in Colombia are constrained by the terms of the WTO Agreement on Subsidies and Countervailing Duties, to which Colombia is a party. Colombia's programmes, which are concentrated in the agricultural sector, have not triggered WTO complaints from other WTO members. The WTO agreement, however, focuses on the competitive effects of subsidy programmes in foreign markets and not on distortions affecting markets in the country of origin. The SIC has not employed its Decree 4886 authority to examine subsidy programmes, but agrees that they are a worthwhile target for analysis. The Secretariat's initial report recommended that competition assessment of subsidy programmes be integrated into Colombia's whole-of-government system for regulatory quality. The SIC's legislative proposal partially addresses this recommendation by expanding Article 7 to cover subsidies. This change, while desirable, would not apply to existing subsidies and would subject proposed subsidies to only a non-binding SIC opinion.

#### 6.1.5 *Recommendation of the Council on Fighting Bid Rigging in Public Procurement: competition assessments elements*

##### **Box 14. The OECD Recommendation on Fighting Bid Rigging: Procurement Design Issues**

This portion of the report discusses Sections I and IV of the Council's 2012 Recommendation on Fighting Bid Rigging in Public Procurement, C(2012)115 and CORR1 ("BR Recommendation"). The recommendations in these two Sections deal with procurement procedure design to promote competition and minimise collusion and with assessment of procurement procedures to identify indicators of adverse competitive impact.<sup>284</sup>

##### **Implementation of Sections I and IV of the BR Recommendation**

The SIC is engaged in a long-term effort to promote procurement reform. As noted previously, in March 2015, the SIC subscribed to a Memorandum of Understanding with the National Public Procurement Agency (NPPA), expanding and expediting co-operative efforts to (i) detect and prosecute bid rigging in public procurement processes, (ii) devise procurement procedures and bid evaluation methods that encourage participation by more bidders and otherwise enhance competition, (iii) share information, analysis, and studies regarding competition indicators in procurement proceedings, and (iv) conduct joint training courses regarding the capacities and functions of both agencies. Focused effort is required, because existing procurement procedures in Colombia typically do not entail the following elements of the Recommendation:

- conducting market studies in advance of procurement to understand the general features of the market in question, the range of products and/or services available in the market, and the potential suppliers of these products and/or services (Recommendation I.1)
- structuring procurement to maximize transparency and participation by potential bidders (Recommendation I.2). Attaining compliance with this element is hindered by the fact that government procurement offices employ public tender procedures infrequently, doing so in only 18% of procurements by value in 2014.

<sup>284</sup>

The elements in Sections II and III of the BR Recommendation, relating to detection of collusion in procurement proceedings, are treated in Box 3 of this report.



(Rates in earlier years were even lower, although they have been increasing over time, ranging from 7.85% in 2011 to 16% in 2013.) . Various other elements of Recommendation I that focus on structuring public tenders to enhance competition (e.g., allowing foreign bidders to participate) are, at present, largely moot in Colombia because such tenders are so uncommon. Colombia has taken certain actions to increase the frequency of public tenders and to facilitate participation by foreign bidders by (i) requiring the publication of an Annual Procurement Plan, identifying with standard international classification codes the goods and services that will be procured during the year, (ii) establishing “framework agreements” according to which each participating agency aggregates its supply needs and agrees to use public tenders for acquiring the specified items, and (iii) implementing an e-procurement system under which all public procurements in Colombia will eventually be processed.

- minimizing opportunities for communication among bidders before and during the tender process (Recommendation I.3). Colombia currently requires (i) that, at the request of any bidder, a public clarification meeting will be convened, open to all bidders, and (ii) that government procurement bodies must publicize certain information (such as the budget for the procurement, the identities of bidders, and the amounts they bid) that could facilitate collusion. There are also no existing safeguards that constrain the use of joint bids, sub-contracting, and split awards to reduce competition and implement bid-rigging agreements. The SIC notes that a legislative proposal is needed to modify these provisions.
- requiring bidders to sign a Certificate of Independent Bid Determination (CIBD) attesting that bids submitted are genuine, non-collusive, and made with the intention to accept the contract if awarded (Recommendation I.6). A related Recommendation (I.7.) suggests additionally that invitations to tender should include a warning regarding the sanctions for bid rigging and for signing an untruthful CIBD, including references to maximum imprisonment terms, civil and criminal fines, civil damages, and suspension from participation in public tenders. At present, neither CIBDs nor such warnings are routinely used in government tender proceedings, although some agencies (such as the Colombian Institute of Family Welfare (Instituto Colombiano de Bienestar Familiar or “ICBF”), and the National Penitentiary and Prison Institute (Instituto Nacional Penitenciario y Carcelario or “INPEC”) have begun requiring a CIBD.

Recommendation IV, which calls for the development of tools to assess, measure and monitor the impact of public procurement laws and regulations on competition, is slated for future attention. The SIC’s competition advocacy functions under Article 7 of Law 1340 provide a basis for addressing implementation of this recommendation.

#### 6.1.6 *SIC resources for competition assessment*

414. Although the 2009 Recommendation on Competition Assessment does not include an element explicitly requiring the provision of adequate resources to competition agencies for competition assessment, Section 4.3 of the OECD’s 2005 Guiding Principles for Regulatory Quality and Performance include a recommendation on that topic, urging that appropriate resources be provided. The Mergers Group in the Competition Protection Division of SIC, which at the time of the Secretariat’s initial report, was responsible for the agency’s competition advocacy activities, did not have a separate budget for that function, but estimated that it had devoted 2.4 employee-year equivalents to competition advocacy in 2012, and expected to expend 3.6 in 2013. Two former SIC superintendents recommended specifically that consideration be given to providing substantially increased resources for competition advocacy. As noted above, the SIC created the Competition Advocacy Group in 2014 with exclusive responsibility for issuing advocacy opinions and monitoring agency responses to such opinions. In 2014 and 2015, the agency allocated 8.0 employee-year equivalents to that Group.

#### 6.1.7 *Assessments under Decree 2696 of 2004*

415. A separate provision of law, Decree 2696 of 2004, requires regulatory commissions to undertake a form of *ex post* assessment. Each commission must prepare an annual report evaluating the effects of the commission’s regulatory actions during the previous year. Every three years, the report must be expanded to include an assessment of the commission’s full regulatory programme,

including the programme's impact on the economic "sustainability, viability and dynamism" of the affected sector. There are, however, no regulations implementing the Decree, and each commission is responsible for determining how to conduct the required analysis. The three-year studies that have been issued thus far focus principally on cost-benefit analysis and do not purport to entail a competition assessment.<sup>285</sup>

## **6.2 Promoting a culture of competition**

416. An important dimension of competition advocacy involves promoting public understanding of and appreciation for the benefits of competition. Article 1.65 of Decree 4886 authorises the SIC to carry out "outreach, promotion, and training" activities in conjunction with its functions.

417. The 2009 LACF Report (¶ 166) noted that the SIC had not devoted emphasis to promoting a competition culture, describing the agency's activities as being "limited to a few local and international workshops and seminars." Since then, the SIC has overhauled its communication strategy to create greater public awareness of competition policy. For this purpose, the SIC emphasises issuing detailed but user-friendly press releases to announce every competition investigation initiated and sanction imposed, and also holds press conferences as the situation requires. Additionally, the SIC has an office responsible solely for responding to inquiries and requests from citizens. SIC representatives appear at least monthly at meetings and conferences sponsored by Colombia's principal trade associations, such as ANDI (Asociación Nacional de Industriales, the National Business Association), and FENALCO (Federación Nacional de Comerciantes, the National Retail Federation).

418. In 2014, the SIC launched a programme to promote competition culture at the regional level called "SIC Móvil." Under this programme, the SIC's senior officials, including the Superintendent and Deputy Superintendents, travel to various cities in Colombia (14 to date) and meet with regional government officials, businessmen, and community members to explain the competition law and other aspects of the SIC's jurisdiction. There are also meetings at least twice monthly with Colombia's competition law practitioners<sup>286</sup> and with faculty and students in the law, economics, and business management programmes at universities in Bogotá and other major cities. Some SIC officers also serve as part-time faculty in university programmes, and the SIC regularly hosts undergraduate students as office interns.

419. In addition to personal appearances before groups by SIC representatives, the SIC also promotes public awareness through a television programme called SIC TV, which airs on the government's national television channel, and through its relations with the news media. Media representatives praise SIC for the utility of its news releases and its responsiveness to media inquiries. The SIC's nationwide communications strategy is designed to reach common citizens and create greater public awareness of the SIC's functions, especially including those relating to the protection and promotion of competition. In 2013, the SIC successfully produced and released a short film to promote awareness among potential whistle-blowers of the SIC's leniency programme. The film was broadcast on national television and shown in movie theatres across the country, as well as in airports, transportation hubs, business forums, academic events, and other locations. Another element of the SIC's communication strategy is a complete re-design of the agency's website. There are currently three full-time employees dedicated to updating and modifying the webpage and working on social

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<sup>285</sup> OECD Review of Regulatory Reform in Colombia (Regulatory Policy Committee, June 30, 2013 version) at p. 145.

<sup>286</sup> Colombia's bar association is constituted as one of the sector chambers of ANDI. The competition bar is small and ANDI's legal chamber does not have a competition law committee.

networks. One of the most significant changes has been to upload to the webpage summaries of all SIC competition decisions since 2006. In addition, all newly-issued decisions in competition cases, including mergers, are posted on the website, along with all competition advocacy opinions. With respect to written literature, besides issuing guidelines for technical subjects like merger review and leniency procedures, the SIC also publishes a user-friendly pamphlet explaining its competition protection functions to consumers and small business proprietors.

420. According to ANDI and other prominent business community representatives, the SIC is held in high esteem for its performance as a government agency. Most (although not all) large business enterprises in Colombia recognise the value of competition in motivating Colombian enterprises to become more efficient, an important consideration given the Colombian government's programme to negotiate additional free trade agreements. Firms that were victimised by high cartel input prices until the SIC initiated a cartel prosecution have experienced a practical lesson in the benefits, such as lower prices, associated with competitive markets.

421. FENALCO likewise views the SIC favourably, but notes that many small businesses have a limited understanding of competition's importance and recognise the SIC primarily because of its function as a consumer protection agency. FENALCO partnered with the SIC to disseminate information to retail enterprises about the wide-ranging 2011 overhaul of Colombia's consumer protection law, and the retail sector is consequently well informed about that aspect of the SIC's authority. The 2011 consumer protection law amendments were also heavily publicised to the public, which led to a substantial increase in both the SIC's visibility and the volume of consumer complaints filed with the agency. As with small businesses, however, it is unclear how much of the SIC's recently increased visibility to the general public relates to its competition protection functions.

422. The Secretariat's initial report included a number of suggestions for additional actions the SIC could take to promote a competition culture in Colombia. The SIC has adopted many of them, enhancing its relationship with competition law practitioners, participating frequently in chamber meetings of ANDI and other associations interested in market sectors in which the SIC has recently filed important law enforcement actions or competition advocacy opinions, and actively partnering with the Colombian Confederation of Consumers to use the Confederation's communication facilities for informing the public about the SIC's competition protection functions.<sup>287</sup> The SIC has slated for future action the Secretariat's suggestions to develop a model competition law compliance package for use by legal counsel in corporate risk reduction programmes, conduct a survey to obtain a baseline measure of public awareness and understanding of the SIC's competition protection functions and of how competition works and the economic benefits it generates, and encourage the Private Council on Competitiveness and other appropriate NGOs to award annual prizes for the best papers on competition policy topics written by law and economics students.

#### *6.2.1 Agency resources for promoting a competition culture*

423. Section 4.3 of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance recommends that competition authorities be provided with appropriate resources to promote public awareness of the role and benefits of competition. The SIC does not have a separate budget for such promotional activities, but estimates that the employee-year equivalents devoted to that function increased from 2 in 2012 to 4 in 2014. The SIC considers that this allocation of resources is sufficient at present.

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<sup>287</sup> SIC representatives appear frequently on the "Consumer's Bulletin" show, a short television program produced by the Confederation.

## 7. Conclusions

424. This section of the report summarises the current strengths and weaknesses of competition law and policy in Colombia, and discusses areas in which Colombia could improve its compliance with OECD legal instruments in the field of competition policy.

425. The strengths of the competition regime in Colombia include a well-respected enforcement agency that has a full arsenal of investigative and remedial powers to enforce the competition law. The agency is focussed on developing transparent interpretations of the law and associated enforcement policies, addressing activity that significantly impairs competition, and communicating its policies effectively to members of the business community and the competition law practitioners who represent them. There has been a general trend in conduct cases away from *per se* concepts and toward market effects analysis, and in merger cases away from reliance on concentration measures and toward a fuller assessment of a transaction's likely competitive impact.

426. Other strengths arise from the 2009 amendments to the competition law, which dramatically increased sanctions for competition law violations, established a leniency program, and clarified that the law is fully applicable to trade associations. The impact of the increased sanctions authority has begun to appear, as the SIC has imposed record-setting fines while this report was being drafted. The 2009 amendments further instructed the SIC to employ its prosecutorial resources to pursue only those claims that are "significant" for the purposes of maintaining competitive markets or promoting efficiency and consumer welfare, leading to an increased focus on cases with genuine anticompetitive effect. Further, the statutory provision providing for an efficiency defence in merger cases was amended in 2009 to focus on consumer welfare, permitting the defence only where the beneficial effects of the transaction for consumers outweigh the negative impact on competition. Even more recently, in 2011, bid rigging was made a criminal offence, providing additional deterrence for that offence. Amendments to Colombia's general procedural laws have introduced into the SIC's litigation processes additional due process elements, such as oral hearings and expanded rights for third parties.

427. The stature of the SIC as one of Colombia's most effective government agencies is reflected in the accretion of duties and powers that the government has assigned to it in recent years and in such events as the nomination of the SIC in 2012 as a candidate for the Global Competition Review's award as best competition law agency in the Americas. There is common agreement in the competition law community that SIC personnel are dedicated, diligent, and honest in their work, and professional in their dealings with outside parties. Most large business enterprises in Colombia recognize the value of competition in motivating Colombian enterprises to become more efficient, an important consideration given the Colombian government's program to negotiate additional free trade agreements.

428. The most notable weaknesses of Colombia's competition law regime has been the SIC's lack of independence from political influence. A September 2015 Presidential Decree resolved this issue, providing for the Superintendent to be appointed for a fixed term and subject to removal only for cause. Other areas of weakness that warrant improvement include reducing the high turnover rate for employees; modifying the competition advocacy system to assure effective competition assessment; and focussing the merger notification system more narrowly on transactions that have a close nexus with Colombia.

429. The following sub-sections of the report provide recommendations that, if implemented by Colombia, would achieve greater conformity with OECD best practices relating to competition policy and otherwise improve Colombia's competition law regime. Recommendations that are addressed by

a provision in the SIC's legislative proposal are accompanied by a reference to the section of the report in which the relevant provision is discussed.

## **7.1 Cartels, bid rigging, and restrictive agreements**

### **7.1.1 The Council's 1998 Recommendation concerning Effective Action against Hard Core Cartels [C(98)35]**

430. The law enforcement elements of the 1998 Recommendation specify that competition laws should (i) provide for sanctions effective to deter cartel operations (Sec. IA 1(a)) and (ii) establish enforcement procedures and institutions with authority adequate to detect and remedy cartels, including authority to impose penalties for non-compliance with investigative demands (Sec. IA 1(b)). The co-operation elements of the 1998 Recommendation are addressed in section 7.4 below.

431. The maximum fines available for assessment by the SIC were notably increased in 2009, to approximately USD 27.1 million for business enterprises and USD 542,000 for corporate officers. An optional provision was also added permitting fines equivalent to 150% of the profits derived from the anticompetitive conduct. Further, with respect to bid rigging offenses, the 2011 amendment to Colombia's Penal Code made bid rigging a criminal offense punishable by imprisonment (to 12 years), fines (to USD 313,000) and disqualification (for up to eight years) from future procurement proceedings. These penalties provide effective remediation and deterrence in most circumstances. For some very large firms that engage in harmful activity, however, the SIC observes that the option permitting fines of up to 150% of the illicit profits is unavailable because the profits cannot effectively be calculated.

- Colombia should provide a broader range of options for use in calculating maximum fines (including, for example, an option keyed to a percentage of the company's sales), and permit the SIC to elect whichever option yields the highest maximum.<sup>288</sup>
- Colombia should also consider (i) modifying Law 1340 to clarifying both that individuals can be treated as "market agents" subject to the higher fine limits in Article 25, and that the fines under Article 26, which apply in the usual case to corporate officers, can also apply to enterprises (such as law or accounting firms) that assist or facilitate unlawful conduct by another enterprise; and (ii) repealing Article 101 of Law 1437 of 2011 (the Administrative Procedural and Contentious Administrative Code), which permits a fine collection proceeding to be suspended during judicial review of the underlying agency order imposing the fine.<sup>289</sup>

432. The SIC considers that the imposition of heavy penalties on cartel participants is a critical means for encouraging applicants to invoke its leniency program. The SIC recognizes, however, that, in addition to expanding options for calculating maximum fines, other adjustments to the leniency program's operation or benefits could make it more attractive and effective.

- Colombia should modify the leniency program by (i) deleting the statutory requirement that a leniency recipient not have been "the instigator or promoter" of the conspiracy, (ii) extending leniency benefits to individuals who reveal that they facilitated anticompetitive

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<sup>288</sup> See paragraph 63 for a description of the SIC's legislative proposal relating to this recommendation.

<sup>289</sup> See footnote 38 and paragraph 197, respectively, for descriptions of the SIC's legislative proposals relating to these two recommendations.

unilateral conduct by an associated enterprise; (iii) according permanent statutory protection against disclosure to adverse third parties of the identities of leniency applicants and the evidence submitted by them during the course of the investigation, and (iv) providing that the SIC may not charge an individual as the facilitator of a competition law violation with respect to which the individual is the first leniency applicant.<sup>290</sup>

- For cartels that involve bid rigging agreements, Colombia should modify the criminal leniency program to provide complete amnesty to the first party to co-operate and significant reductions in imprisonment terms for later leniency applicants.<sup>291</sup>
- Colombia should adopt legislation providing that, in a civil suit for damages caused by cartel, a leniency recipient will be liable only for its own share of the damages, and not (as is now the case) jointly and severally liable for all the damages attributable to the conspiracy.<sup>292</sup>

433. The SIC, with its wide-ranging investigative powers, enforcement procedures, and authority to impose penalties for non-compliance with investigative demands, is well positioned to meet the elements of the 1998 Recommendation relating to institutional and procedural adequacy.

#### 7.1.2 *The Council's 2012 Recommendation on Fighting Bid Rigging in Public Procurement [C(2012)115 and CORR1]*

434. Colombia's efforts to implement the Council's Recommendation on Fighting Bid Rigging in Public Procurement are well underway.

- Colombia should continue with procurement reform, using the suggestions in the OECD's *Report on Fighting Bid Rigging in Colombia* as a primary guide. In particular, Colombia's procurement laws and procedures should be modified to increase substantially the use of public tenders, eliminate mandatory public clarification meetings and mandatory disclosure of contract budgets, increase the use of electronic bidding systems, require bidders to file Certificates of Independent Bid Determination, expedite information sharing among procurement officials, facilitate reporting of bid rigging and other procurement issues by government procurement personnel, and consider adopting a reward program encouraging procurement officials to identify and report suspicious or unusual behaviour by bidders.
- The SIC should continue supporting procurement training and bid-rigging education activities across the Colombian government at national and local levels and develop a close partnership with the National Public Procurement Agency to advance compliance with the Recommendation and to encourage better, more pro-competitive procurement practices generally.
- Colombia should (i) vest the SIC with criminal enforcement authority for bid rigging offenses, and (ii) provide that, in imposing sanctions for bid rigging in a government

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<sup>290</sup> See paragraph 195 for a description of the SIC's legislative proposal relating to this recommendation.

<sup>291</sup> See paragraph 193 for a description of the SIC's legislative proposal relating to this recommendation.

<sup>292</sup> See paragraph 194 for a description of the SIC's legislative proposal relating to this recommendation.

procurement proceeding, the SIC may bar the sanctioned bidder from contracting with any government agency for a period ranging from 2 months up to five years.<sup>293</sup>

435. On the basis of reasons more fully described in previous sections of this report, Colombia is well positioned respecting compliance with the following OECD Recommendations:

*7.1.3 The Council's 1989 Recommendation on Know-How Licensing Agreements [C(89)32] and 1978 Recommendation on Trademark Licences [C(78)40]*

436. The SIC's enforcement policies for horizontal and vertical licensing provisions are consistent with the relevant elements of the Council's 1989 and 1978 Recommendation on those topics, taking account of the Competition Committee's 1989 Report on Competition Policy and Intellectual Property Rights [CLP(89)3] and recognizing the potential risks of licensing agreements between competitors and the likely benefits of most vertical licensing agreements.

*7.1.4 The Council's 1971 Recommendation on Action against Inflation in the Field of Competition Policy C(71)205*

437. Colombia's recent overhaul of its consumer protection regime aligns with subsection II(iv) of the 1971 Recommendation, urging Members to "strengthen their policies respecting consumer protection, education, and information, where those policies can assist competition to function more effectively."

## **7.2 Mergers**

*7.2.1 The Council's 2005 Recommendation concerning Merger Review [C(2005)34]*

438. The 2005 Recommendation provides guidance about multiple aspects of merger control, including effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and powers. The enforcement co-operation elements of the Recommendation are addressed separately in section 6.4 below.

439. Colombia conforms to many elements of the Merger Recommendation, but there are some notable deviations relating to the merger notification system. The notification system should be modified to assert control over only those mergers that have an appropriate local nexus with Colombia (Recommendation section A1(2)). Specifically, the present system should be adjusted so that:

- in calculating whether merger notification thresholds are met (a) the assets or revenues attributable to firms in the acquired company's control group are not included, and (b) the assets and revenues of all the firms in the acquiring firm's control group are included (and not merely those attributable to control group firms that have a horizontal or vertical market relationship with the merging party), and
- merger notification thresholds are established that require significant local activity by each of the merging parties.<sup>294</sup>

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<sup>293</sup> See paragraphs 246 and 63, respectively, for descriptions of the SIC's legislative proposals relating to these two recommendations.

<sup>294</sup> See paragraph 100 for a description of the SIC's legislative proposal relating to this recommendation.

440. Another feature of Colombia's merger notification system is a provision under which a transaction that meets the notification standards but involves merging parties that jointly hold less than 20% of the relevant market may be consummated immediately after filing a simple notification with the SIC. This feature, although not strictly in conflict with the Recommendation's provision in section A1(2) concerning objective notification criteria, nonetheless diverges from best practice in this area. Similarly to a market share notification criterion, the 20% provision induces merging parties to fabricate a market definition that yields a small share for the merged entity, but then puts the merged parties at risk for substantial penalties and possible divestiture if their market definition is subsequently challenged by the SIC.

- Colombia should amend the merger notification system to delete the 20% market share option from the law's merger notification provisions.<sup>295</sup>

441. Colombia's merger notification system excludes conglomerate mergers, which effectively shields them from effective control because the merger law applies only to transactions that must be notified.

- Colombia should amend the merger law to bring conglomerate transactions within the scope of the merger notification system, thus enabling the interdiction of anti-competitive mergers regardless of form (Recommendation section A1(1)).<sup>296</sup>

442. There are also several other aspects of the SIC's merger review system that could be modified to achieve better alignment with Council's Recommendation or related International Competition Network (ICN) recommendations or that otherwise present opportunities for improvement. Colombia should:

- modify the merger review system so that the SIC will be able to extend the waiting period applicable to pending transactions once, for an additional three month period, but only in the event that the merging parties and the SIC are engaged in negotiating conditions to be imposed on the transaction in conjunction with SIC approval of the merger.<sup>297</sup>
- assure the availability to merging parties of judicial review proceedings that will reach resolution within a reasonable time, recognizing that the viability of proposed merger transactions is typically limited.<sup>298</sup>

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<sup>295</sup> See paragraph 106 for a description of the SIC's legislative proposal relating to this recommendation.

<sup>296</sup> See paragraph 96 for a description of the SIC's legislative proposal relating to this recommendation.

<sup>297</sup> See paragraph 114 for a description of the SIC's legislative proposal relating to this recommendation.

<sup>298</sup> See paragraph 219 for a description of the SIC's legislative proposal relating to this recommendation. The Secretariat's original recommendation on this point was merely that Colombia should take appropriate steps to facilitate timely judicial review, such as by co-operating in available procedures for expedited review or expedited evidence gathering. The Secretariat did not specifically recommend, as the SIC's legislative proposal provides, that Colombia eliminate judicial review of the SIC's merger decisions before the Administrative Tribunal and lodge appeals directly with the Council of State. Nor did the Secretariat suggest (as the SIC's legislative proposal also provides) that the elimination of Administrative Tribunal review be applied to SIC decisions in law enforcement cases involving anticompetitive conduct. The SIC notes that Colombia's judicial review system is so organised that elimination of Administrative Tribunal review is a more practical alternative than creating a special procedure for expediting SIC cases in preference to other cases. Indeed, the



### 7.3 *Competition assessment, structural separation, and related issues*

#### 7.3.1 *The Council's 2009 Recommendation on Competition Assessment [C(2009)130]<sup>299</sup>*

443. The Council's 2009 Recommendation on Competition Assessment, applicable to regulation at "all levels of government," has three principal parts. Section IA urges the introduction of a process to identify existing or proposed "public policies" (defined as including "regulations, rules, and legislation") that unduly restrict competition. Section IB recommends a process to revise public policies that unduly restrict competition, culminating in the adoption of the more pro-competitive alternative. Section IC urges that competition assessment be incorporated in the review of public policies in the most efficient and effective manner, that assessment occur at an early stage of policy formulation, and that assessment be conducted by competition bodies or officials with expertise in competition.

444. Colombia recognizes that the SIC's current advocacy program under Article 7 of Law 1340 is deficient and contemplates an overhaul of the system in the context of achieving compliance with the OECD Council's 2012 Recommendation on Regulatory Policy and Governance. The objective is to establish a whole-of-government system for regulatory quality, with mechanisms and institutions that provide effective oversight and enforcement of regulatory policy.

- Colombia should continue the project to implement the Council's 2012 Recommendation on Regulatory Policy and Governance by establishing a "whole-of-government" program for regulatory quality that accords with the elements of the 2009 Competition Assessment Recommendation and applies to laws proposed by the Executive branch, existing laws, and proposed and existing national regulations.
- The regulatory quality program should integrate a competition assessment function and include features that respond to the deficiencies in Colombia's current competition assessment program, including the establishment of a gatekeeper with authority to assure that assessment functions are efficient and effective, and the initiation of competition assessment at the beginning of the policy formulation process before a regulatory approach is selected.
- Once the "whole-of-government" programme for regulatory quality is operational, Colombia should expand its scope to include laws proposed by members of the legislature, and proposed and existing regional and local regulations.
- Colombia should also expand the SIC's competition advocacy authority under Article 7 of Law 1340 to cover proposed regulatory proposals initiated by regional and local governments. In addition, Colombia should add to Article 31 of Law 1340 a savings clause clarifying that Article 31 does not trump the SIC's Article 7 regulatory review program, thus foreclosing the Agriculture Ministry's argument that Article 7's requirements have no application to the ministry's regulatory initiatives.

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Administrative Procedure Code (Law 1437/11, Article 149) already contemplates single review by the Council of State for specified administrative agency determinations.

<sup>299</sup> The Council's 1979 Recommendation on Competition Policy and Exempted or Regulated Sectors C(79)155 also has several elements dealing with competition assessment, in paragraphs (1), (2), (3) and (6). Those elements are not discussed separately because they are effectively incorporated in the 2009 Competition Assessment Recommendation.

7.3.2 *The Council's 1998 Recommendation concerning Effective Action against Hard Core Cartels [C(98)35]*

445. Section IA2(b) of the Council's Hard Core Cartel Recommendation provides that "all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives." The SIC has not analysed whether exclusions or authorisations of this kind exist in Colombia or the extent to which they may be unnecessary or overbroad.

- The SIC should employ its competition advocacy authority to review any existing exclusions and authorisations in Colombia of what would otherwise be hard core cartels and determine whether they are both necessary and no broader than necessary to achieve their policy objectives.

7.3.2 *The OECD's 2005 Guiding Principles for Regulatory Quality and Performance – subsidy program assessment*

446. Section 7.3 of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance recommends action to "review non-regulatory policies, including subsidies (both direct and indirect) . . . and adjust them where they unnecessarily distort competition and market openness." The SIC's competition advocacy program under Article 7 of Law 1340 does not presently apply to government subsidy payments and programs, and the SIC has not employed its Decree 4886 authority to examine such programs, although it agrees that they are a worthwhile target for analysis.

- Colombia should integrate assessment of proposed and existing subsidy programs into its whole-of-government system for regulatory quality, and expand the SIC's competition advocacy authority under Article 7 of Law 1340 to cover proposed subsidies.

7.3.4 *Allocation of merger review authority – financial institutions*

447. Article 9 of Law 1340 vests the Superintendence of Finance ("SFC") with exclusive prior approval authority for mergers between entities subject to the SFC's control. The Superintendent's jurisdiction covers banks, insurance and reinsurance companies, securities brokers, financial co-operatives, bonded warehouses, foreign exchange houses, trust companies, pension funds, and similar financial institutions. The procedures and substantive standards applicable to merger reviews conducted by the SFC are provided in Decree 663 of 1993.

448. The SFC asserts that allocating merger control authority to it is necessary to protect and preserve the financial system's stability. Reliance on prudential grounds in evaluating financial institution mergers, however, poses competition policy issues only when the financial authority wishes to approve an anti-competitive merger.<sup>300</sup> Decree 663 does not enable the SFC to approve an anti-competitive merger on prudential grounds. Article 28 of Law 1340, which provides an exemption from the competition law for financial emergencies, must be invoked to accomplish that result.

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<sup>300</sup> If the financial authority and the competition authority either both approve or both reject the merger, no issue arises. If the financial authority wishes to disapprove a merger that the competition authority has cleared, there is likewise no issue, because failure to consummate a cleared merger does not violate the competition law.

- Colombia should amend Article 9 of Law 1340 to provide that the SIC's opinion on proposed mergers involving financial institutions shall be binding on the Superintendent of Finance, such that mergers of financial institutions (other than those addressed in financial emergencies under Article 28 of Law 1340) will be evaluated jointly by both the SIC and the SFC. Each agency would examine a proposed merger with respect to the issues arising under that agency's jurisdiction, and a proposed merger would be disapproved if either agency objected.

449. The SFC's exclusive authority under Article 28 of Law 1340 to control bank mergers in financial emergencies does not provide the SIC with any opportunity to render a non-binding opinion on proposed transactions, so as to ensure that the less anti-competitive alternatives for government intervention are considered.

- Colombia should consider whether there are practicable means by which the SIC could be accorded an opportunity to render a non-binding opinion to the SFC on financial institution mergers proposed during financial emergencies.

#### *7.3.5 Allocation of merger and other transaction review authority – airlines*

450. In the aeronautical sector, certain transactions, including mergers, are subject to prior approval exclusively by the Civil Aeronautics Special Administrative Unit ("Aerocivil"). The mere existence of specialized regulation in a sector is not a sufficient reason to displace the SIC's merger review authority.

- Colombia should modify Aerocivil's merger review authority to provide that the SIC's opinion on airline "merger transactions" shall be binding on Aerocivil, such that each agency would possess authority to disapprove a proposed transaction.

#### *7.3.6 Exclusion from the competition law – Article 5 of Law 1340*

451. Article 5 of Law 1340 provides that the Ministry of Agriculture and Rural Development may issue a reasoned opinion, binding on the SIC, with respect to prior authorization for agreements stabilizing the agricultural sector of the economy. The effect of the provision is to vest the Agriculture Ministry with power to immunize from the competition law any agreement or system that can be characterized as a stabilization device. There is no valid justification for permitting sector regulators to create exclusions at will from the competition law.

- Colombia should adopt the SIC's legislative proposal to eliminate the unilateral authority of the Agriculture Ministry under Article 5 of Law 1340 to immunise agricultural stabilisation agreements from prosecution under the competition law.

#### *7.3.8 Promoting a culture of competition*

452. The SIC fully recognizes the importance of promoting a culture of competition.

- The SIC should continue and expand its activities to promote a competition culture in Colombia by, for example, (i) developing a model competition law compliance package for use by legal counsel in corporate risk reduction programs; (ii) conducting a survey to obtain a baseline measure of public awareness and understanding of the SIC's competition protection functions and of how competition works and the economic benefits it generates; and (iii) suggesting to the Private Council on Competitiveness and other appropriate NGOs

the possibility of awarding prizes annually to the best papers on competition policy topics written by law and economics students.

7.3.9 *The Council's 2001 Recommendation on Structural Separation in Regulated Industries [C(2001)78, C(2011)135/CORR1]*

453. The market sectors to which the Recommendation applies, including the production, transportation and distribution of electricity and natural gas, and the production, transportation and refining of petroleum products, were previously re-structured to achieve structural separation. There are, however, regulations in these sectors that permit a certain degree of vertical integration through ownership stakes.

- The SIC should exercise its competition advocacy authority to examine these regulations and determine whether to recommend further restrictions on such ownership.

454. On the basis of reasons more fully described in previous sections of this report, Colombia is generally well positioned respecting compliance with the following OECD instruments:

7.3.10 *The OECD's 2005 Guiding Principles for Regulatory Quality and Performance (Section 5.3(i)) – essential facilities*

455. An unjustified refusal by the operator of an essential facility to grant access on reasonable terms constitutes a violation of the competition law. Under Article 50.6 of Decree 2153, “obstructing or impeding third parties’ access to markets or marketing channels” is rebuttably presumed to constitute an abuse of dominance.

7.3.11 *The OECD's 2005 Guiding Principles for Regulatory Quality and Performance (Section 5.3(ii)) – price regulation*

456. Regulatory regimes in Colombia are designed to employ price monitoring rules as the default method of regulation, followed by the imposition, where required, of price caps as the next step, and resorting to direct price setting only where no feasible alternative is available.

7.3.12 *The Council's 1979 Recommendation on Competition Policy for Exempted or Regulated Sectors [C(79)155] (Paragraphs 4 and 5) – competition law enforcement in regulated sectors*

457. The SIC has full authority to investigate and sanction abusive conduct, including abusive conduct by enterprises that hold a dominant position by virtue of law or government regulation (paragraph 4). The SIC asserts that it is committed to detecting and investigating anticompetitive agreements “which, although lawful if notified to or approved by the competent authorities, have not been so notified and approved” (paragraph 5).

7.3.13 *The Council's 1986 Recommendation for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies [C(86)6]*

458. Certain aspects of this Recommendation are covered by more detailed, legally binding provisions in the WTO agreements to which Colombia is a party. In these areas, Colombia's conformity with its obligations under the WTO agreements also fulfils the parallel requirements of the OECD Recommendation. Colombia's Ministry of Commerce, Industry and Tourism and the SIC have

provided statements confirming that Colombia complies with, or addresses the policy considerations specified in, the Recommendation's elements to which WTO rules do not apply.<sup>301</sup>

#### 7.4 Co-operation

*The Council's 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings*

*The Council's 1998 Council Recommendation concerning Effective Action against Hard Core Cartels*

*The Council's 2005 Recommendation on Merger Review*

*The Competition Committee's 2005 Statement of Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*

459. The 2014 Council Recommendation,<sup>302</sup> section IB of the 1998 Council Recommendation, sections IB and IC of the 2005 Council Recommendation, and the Competition Committee's 2005 Best Practices Statement all focus on urging co-operation and co-ordination among competition agencies. The 2014 Recommendation, which consolidates and elaborates the relevant elements of the previous recommendations concerning co-operation, urges (Sec. II) that adherents "commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions" in their laws or policies (such as blocking statutes prohibiting private parties from responding to investigative demands from foreign competition authorities) that hinder effective enforcement co-operation among competition authorities. The Recommendation continues with detailed provisions concerning (i) proactive alerts, consultations, and co-ordination among authorities when competition-related activities in one jurisdiction overlap with or affect important interests of another, (ii) the co-operative exchange among competition authorities of information in investigations and proceedings, and (iii) enhanced co-operation among authorities in the form of active investigative assistance, including the use of compulsory procedures.

460. The SIC's policies and practice are congruent with these instruments, subject to the caveat that, absent a waiver from the affected party, the SIC cannot provide confidential information to another competition law enforcement agency except when permitted under a treaty between Colombia and the receiving country. The SIC does not consider this constraint to be a significant impediment to effective co-operation. It notes in this respect that, according to the discussion at the Competition Committee's June 2013 Roundtable on the exchange of confidential information,<sup>303</sup> most of the information actually exchanged between competition agencies in the course of co-operative

<sup>301</sup> For example, Colombia does not encourage the formation of export cartels and does not exempt such cartels from the competition law.

<sup>302</sup> The Council's 2014 Recommendation expressly replaced the 1995 Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices. The Council's 1978 Recommendation concerning Action against Restrictive Business Practices affecting International Trade including those involving Multinational Enterprises C(78)133 also deals with co-operation, but is not discussed separately because its elements were effectively incorporated into the 1995 Recommendation on Co-operation.

<sup>303</sup> Working Party No. 3 on Enforcement & Co-operation, Roundtable on National and International Provisions for the Exchange of Confidential Information between Competition Agencies without Waivers (June 18, 2013). A SIC representative participated in that Roundtable.

consultations is either non-confidential or subject to a confidentiality waiver.<sup>304</sup> In the SIC's own experience, it has requested confidential information from another authority on only one occasion, and no foreign competition authority has asked the SIC to provide such information. The SIC also notes that, in any event, most of the information acquired in SIC investigations is public and can therefore be shared with competition authorities of other jurisdictions, adding that confidential information in SIC's investigations is predominantly information submitted by leniency applicants. Generally, among OECD Members and worldwide, leniency applications are closely controlled by competition agencies, and are not typically released, even to other competition agencies.

- The SIC should continue seeking opportunities to increase its engagement with other competition authorities and with institutions of the international competition community.

## **7.5 Institutions, process, and policy**

### **7.5.1 SIC independence**

461. At the time of the Secretariat's initial report, the Superintendent was subject to appointment and removal at will by the President and did not serve for a fixed term of office. Although none of the OECD Council's Recommendations dealing with competition policy include specific provisions on agency independence,<sup>305</sup> Section 7.3 of the 2012 Council Recommendation on Regulatory Policy and Governance<sup>306</sup> recommends that the establishment of "independent regulatory agencies" should be considered where the agency's decisions "can have significant economic impacts on regulated parties and there is a need to protect the agency's impartiality." This principle applies equally to an enforcement agency like the SIC, which issues decisions with at least as much economic impact as those of regulatory agencies. There is virtually unanimous agreement throughout the competition law community in Colombia that the SIC's decision-making authority should be vested in an independent entity, not an officer subject to removal at will by the President.

462. To address this issue, Colombia's President recently issued Decree 1817, effective September 15, 2015, which provides that the SIC's Superintendent shall be appointed for a fixed term coincident with the President's four year term, and be subject to removal by the President only for cause. In the Committee's view, Decree 1817 constitutes a practical solution to the problem of assuring political independence for a single-head agency.

### **7.5.2 Human resources**

463. The SIC faces serious issues with respect to the retention of experienced personnel and the maintenance of institutional memory. Staff turnover is excessively high. The SIC recognizes the issue and has developed a plan to address it that focuses on increasing compensation for mid-level personnel, who are the employees most likely to leave the agency.

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<sup>304</sup> This point is bolstered by the OECD Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation (2013) pp. 68, 71, 73, available at <http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf>.

<sup>305</sup> Section XII C, comment 1, of the ICN's Recommended Practices for Merger Notification Procedures states that "Enabling legislation and governmental policies and practices should ensure that competition agencies have sufficient independence to discharge their enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents."

<sup>306</sup> Available at <http://www.oecd.org/gov/regulatory-policy/49990817.pdf>.

- The SIC should implement as soon as possible its plan for addressing staff turnover.

#### 7.5.3 *Inter-agency co-ordination*

464. The Secretariat's initial report recommended that, in conjunction with implementation of the 2009 Competition Assessment Recommendation, the SIC should consider entering into a memorandum of understanding with each government agency that issues or maintains regulations affecting market competition. The memorandum would cover the mechanisms for notices by the agency to the SIC of proposed regulatory measures falling under the competition advocacy programme in Article 7 and Decree 2897 of 2010, as well as notices by the SIC to the agency of the initiation of a law enforcement investigation or merger review falling within the agency's jurisdiction. The SIC has adopted this recommendation, subscribing Memorandums of Understanding (MOU) with various governmental agencies. The memoranda also designate a Competition Policy Officer at each agency and a corresponding liaison officer at the SIC, to promote frequent, informal contact between the SIC and the agency involved.

- The SIC should continue developing MOUs with additional agencies. It should also complete expeditiously its ongoing negotiations to establish a memorandum of understanding with the Attorney General's office respecting joint bid rigging investigations.

#### 7.5.4 *Due process*

465. Certain procedural aspects of the SIC's operations warrant modification to promote due process principles.

- The SIC should adopt resolutions or propose decrees, as appropriate, to establish as binding procedural requirements (i) the current agency policy that establishes a strict "Chinese wall" barring communications between the Superintendent and the Deputy with respect to pending investigations from the time that a preliminary investigation is initiated; and (ii) the current agency policy under which the Superintendent does not invoke Article 9.7 of Decree 4886 to direct that the Deputy Superintendent prepare the Superintendent's opinion in a law enforcement proceeding.
- Colombia should adopt the SIC legislative proposals that (i) modify procedural rules to allow alleged cartel participants to cross-examine one another in a SIC law enforcement proceeding, and (ii) authorize the Advisory Council, in a law enforcement proceeding, to convene a hearing at which defendants charged with unlawful anticompetitive conduct may present their counter-arguments.

#### 7.5.5 *Transparency and predictability*

466. Transparency and predictability in making law enforcement decisions are important features of an effective competition law enforcement agency.

- The SIC should continue its program to increase transparency and predictability by issuing clear case opinions, guidelines, policy statements, advisory opinions, and other guidance and by posting those instruments on its website in a form conducive to efficient research.

#### 7.5.6 *Additional legislative changes*

467. The SIC's legislative proposal contains a number of provisions that are designed to strengthen its law enforcement powers, streamline agency procedures, or facilitate redress for victims of anticompetitive conduct. Colombia should adopt the SIC's legislative proposals that:

- expand the Superintendent's injunctive authority to cover instances in which an injunction is appropriate (i) to protect competition, prevent infractions or avoid their consequences, or prevent damages from occurring, (ii) to preclude evasion of a potential fine assessment by imposing on the investigated parties a security mechanism structured to assure payment, and (iii) to disqualify from an ongoing procurement proceeding investigated parties found to be engaged in rigging bids for that procurement.
- provide expressly for the applicability of sanctions to enforce information requests issued in the conduct of economic market studies.
- repeal Article 48.1 of Law 1340, which provides that conduct violating the rules on advertising contained in the Consumer Protection Law constitutes a violation of the competition law.
- amend Law 640 of 2001 to eliminate the applicability in a SIC completion law enforcement proceeding of the requirement that the SIC convene a "conciliation hearing" to facilitate settlement between the defendants and potential civil damages claimants.
- vest the SIC with authority to adjudicate claims in individual and class actions for damages arising from violations of the competition law.



## **ANNEX I: THE OECD'S COMPETITION POLICY ACQUIS**

The twelve Council Recommendations relating to competition law and policy presently in effect are listed below, in reverse chronological order, along with their associated appendices. They are available at [www.oecd.org/daf/competition/recommendations.htm](http://www.oecd.org/daf/competition/recommendations.htm).

1. Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings [C(2014)108]
2. Recommendation of the Council on Fighting Bid Rigging in Public Procurement [C(2012)115] (incorporating the Guidelines for Fighting Bid Rigging in Public Procurement)
3. Recommendation of the Council on Competition Assessment [C(2009)130] (referring to the OECD's Competition Assessment Toolkit, consisting of two volumes titled respectively Competition Assessment Principles and Competition Assessment Guidance)
4. Recommendation of the Council on Merger Review [C(2005)34]
5. Recommendation of the Council concerning Structural Separation in Regulated Industries [C(2001)78/FINAL], as amended on 13 December 2011[C(2011)135/CORR1]
6. Recommendation of the Council concerning Effective Action against Hard Core Cartels [C(98)35/FINAL]
7. Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements [C(89)32/FINAL] (incorporating the Conclusions [pp. 105-112] of the Competition Committee Report on Competition Policy and Intellectual Property Rights CLP(89)3 and CORR1)
8. Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies [C(86)65/FINAL] (incorporating the Indicative Checklist for the Assessment of Trade Policy Measures)
9. Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors [C(79)155/FINAL]
10. Recommendation of the Council concerning Action against Restrictive Business Practices Affecting International Trade including those Involving Multinational Enterprises [C(78)133/FINAL]
11. Recommendation of the Council concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences [C(78)40/FINAL]
12. Recommendation of the Council concerning Action against Inflation in the Field of Competition Policy [C(71)205/FINAL]

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