



INTER-AMERICAN DEVELOPMENT BANK



**LATIN AMERICAN COMPETITIVENESS FORUM**  
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**-- Session III: The role of economic analysis in judicial decisions --**

**Note by Colombia**

**1. What is the role of the courts in your country, i.e. do the courts make enforcement decisions on cases brought by the competition agency, or do they only review the legitimacy of administrative decisions taken by the competition agency?**

In promoting competition, the role of the courts focuses on reviewing the legitimacy of decisions of the competition authority. As established in the Administrative Disputes Code, it is the Administrative Tribunals and the Council of State that must review the legitimacy of decisions issued by the Superintendent of Industry and Commerce in performance of his duties as the competition authority, pursuant to articles 2 and 4 of Decree 2153 of 1992.

**2. Is your judicial system inquisitorial or adversarial?**

The Colombian judicial system is in general inquisitorial. There are however some proceedings of the adversarial type. In promoting competition, the procedure is administrative and inquisitorial, and is conducted in the office of the Superintendent of Industry and Commerce up to the sanctioning stage. Once the decision is issued, the procedure continues in the courts, where the legality of the Superintendent's act can be challenged.

**3. Are your courts able to build economic arguments independently from the submissions made by the parties—e.g. by using court appointed-consultants? If so, how do the courts define the mandate of such consultants?**

Our system allows for review only of the legitimacy of decisions of the Superintendent as an administrative authority, and it is only in exceptional circumstances that the tribunals or the Council of State will pursue economic arguments. Some of these are based on the opinion of experts hired to perform technical studies that go beyond the expertise of the Superintendency, or on arguments developed by consultants contracted by the defendants, or on arguments developed by the institution's own economists.

For example, in the COLANTA case, the Council of State, following the line established by the Superintendency in its sanctions decision, declared:

“Recognising that the price of that product is determined by factors such as the costs of production—which in turn depend on the price of inputs and the efficiency of each firm as well as the local socioeconomic conditions under which it is produced—[as well as] by the producer's profit expectations, distribution costs, the distributor's mark-up, the positioning or acceptance of the product and its quality, among other factors, which as we know will necessarily vary from one firm to the next, even in the case of the same product, it is unlikely that all these factors will be the same in two firms, and even less likely that they will be the same for the length of time involved in the case at hand.

“In light of these objective conditions for any economic activity, particularly when it is conducted under free competition, i.e. not under a monopoly and not subject to government-regulated prices, it is not admissible, for practical reasons, that as an outcome of such conditions or factors two different firms should be setting identical prices for the same product, with increases or changes over the same periods of time and in equal proportion, and even less admissible during a period of time as long as three years. Consequently, such coincidence is sufficient proof that there was an agreement that had the effect of indirectly fixing prices for the product already specified”.<sup>1</sup>

Despite the foregoing, in recent years the Administrative Tribunals have rejected technical evidence submitted by plaintiff firms under the argument that those elements of evidence should have been produced during the administrative investigation by the competition authority.

**4. What are your actual experiences as a competition authority with presenting complex economic theories or sophisticated economic evidence to courts? Which techniques proved most effective: use of external economic consultants or internal staff? Written or oral pleadings?**

Experience before our tribunals suggests that to date, judges in administrative disputes have based their decisions on studies performed by the competition authority during the investigations that led to imposition of sanctions.

**5. In your country, are the issues different when a case is brought before an appellate judge (higher court) as opposed to a judge who is responsible for making factual findings (lower court)?**

In Colombia, decisions of the competition authority are examined by the administrative disputes jurisdiction, in which there is a distinction between the procedure applicable by the court of first instance (Administrative Disputes Tribunals) and the authority of last instance (Council of State).

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<sup>1</sup> See Council of State

**6. Should economic experts be sitting in higher/lower courts with judges dealing with antitrust cases?**

Yes they should, but bearing in mind that such testimony must not be taken as the only pertinent evidence.

**7. Is it practical to have specialised courts reviewing antitrust cases which can build up the necessary economic experience to deal with this area of law?**

The Superintendency of Industry and Commerce in Colombia is a specialised authority (non-judicial) responsible for antitrust issues in those sectors of the economy for which the law provides no other authority. The Congress of the Republic is currently debating a bill to give the Superintendency power over all markets, regardless of the status of their participants (e.g. financial sector, public services).

The competition authority should certainly be a technical authority. Our model incorporates judicial review by the administrative disputes tribunals over the decisions of the competition authority, and this feature is maintained in the draft bill.