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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN COLOMBIA**

-- 2011 --

*This report is submitted by Colombia to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 13-14 June 2012.*

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## **1. Changes to competition laws and policies, proposed or adopted**

### ***1.1 Summary of new legal provisions of competition law and related legislation***

1. On January 10, 2012 the Colombian Government enacted Decree 19 of 2012, which eliminated various formalities and procedures in order to improve the efficiency of different Governmental entities. The Decree introduced some changes to administrative procedures conducted by the Superintendence of Industry and Commerce (hereinafter SIC) in cases of alleged violations to the Competition Regime. The rules also made variations to the procedure regarding mergers review.

2. This Law presents changes in three cardinal issues, which are: (i) the general structure of the administrative procedure enacted by Article 52 of Decree 2153 of 1992; (ii) the notification and publication of certain administrative acts and; (iii) the opportunity for third parties' intervention.

3. Firstly, in relation to the administrative procedures enacted by Article 52 of Decree 2153 of 1992, the Decree 019 of 2012 has implemented the following changes:

- During the initial stage of an administrative procedure for investigating anticompetitive practices, and in the cases where the Authority acknowledges an alleged conduct through a third party's complaint, the Superintendence shall carry out a previous analysis in order to determine the complaint's eligibility and priority.
- Once the opening of formal proceedings has been notified, Decree 019 established a term of twenty (20) working days in which the investigated parties can request or provide evidence to the investigation. Previously, this term was determined independently by the Deputy Superintendent.
- The Deputy Superintendent was explicitly designated as the official entitled to decree ex officio procedures for evidence gathering.
- Once all proceedings of an investigation have been finalized, and prior to the submission of the evaluation report (indictment) to the Superintendent of Industry and Commerce, Decree 019 established an Audience of Discharges in which the investigated and third parties may verbally present arguments about the investigation. The citation to this Audience must be made by the Deputy Superintendent. Failure to attend the Audience should never be considered as indication of responsibility.
- Decree 019 also established a twenty (20) working days period for the investigated and third parties to submit disclaimers and comments on the evaluation report (indictment).
- Through an administrative act, summarily substantiated, the Superintendent of Industry and Commerce may adopt the arguments displayed in the evaluation report, when considering that no infringement was committed.
- The Superintendence of Industry and Commerce, prior to ruling on the acceptance or rejection of the guarantees offered, may request clarification on the terms of the offer.
- The Superintendence of Industry and Commerce no longer has the obligation to issue guidelines establishing the criteria for determining the adequacy of the guarantees offered by an investigated.

4. Secondly, Decree 019 imposed the Superintendence of Industry and Commerce, the obligation to publish on its website certain administrative actions by which the SIC initiates a merger review, imposes remedies or conditions to a merger operation, opens a formal investigation, imposes fines or accepts guarantees for the violation of the Competition Regime.

5. As for notifications, Decree 019 stated that administrative acts deciding actions by governmental channels that cannot be personally notified are no longer required to be done so by edict. In such cases, a prompt notification procedure must be followed.

6. Finally, with regard to third parties, Decree 019 introduced two modifications. On the one hand, it stated that the term of fifteen (15) days granted to those who seek to be recognized as interested third parties in anticompetitive administrative procedures, shall be counted from the publication of the opening of formal proceedings in the SIC's web page, and not from the physical publication of the notice in a regional or national newspaper. On the other hand, the Decree added the adjective of "recognized" to the appellation of third parties, eliminating any interpretation of the quality of third parties for the exercise of rights enshrined by the provision.

### **1.2 Other relevant measures, including new guidelines**

7. In order to promote a competition culture, in 2011, SIC developed four new draft Guidance Documents: [Draft Guidance Document on the Application of Antitrust Law to Business and Professional Associations](#), [Draft Guidance Document on Antitrust Law and Collaboration among Competitor](#), [Draft Guidance Document on Mergers Assessments](#) and [Draft Guidance Document on the Exercise of Competition Advocacy](#). In particular, the Guidance Document on Competition Advocacy was recently published, while the other documents are posted at SIC's website for comments.

### **1.3 Government proposals for new legislation**

8. Besides the procedure changes established by Decree 019, no other last year's proposals affected Competition Law in Colombia.

## **2. Enforcement of competition laws and policies**

### **2.1 Abuse of dominant positions and cartels**

9. In 2011, the Superintendence of Industry and Commerce imposed average fines for more than UD\$17 millions for infringements to the Competition Regime. This figure represents a sharp increase of 224% in comparison to the fines imposed in 2010, and 361% to the ones imposed during 2009 and 2008.

10. The Superintendence investigated 217 undertakings who allegedly contravened Competition Law. Similarly, during 2011, the number of investigations increased by a 151% with respect to 2010 and 255% compared to 2009. What is more, when fighting against cartels, 139 dawn raids were conducted.

11. In comparison with previous years, during 2011 a record was set regarding the number of complaints filed by consumers and the time in which they were solved: the Deputy Superintendent evacuated 577 complaints – 440 more than in 2010 – demonstrating a raise of 4200% in efficiency indicators. Furthermore, the number of investigations opened increased by 41.8% regarding anticompetitive behaviour.

12. The abovementioned figures correspond to a more efficient system which nowadays takes, on average, seven (7) months and fifteen (15) days to finalise an opened procedure, resulting in a 4 to 10 month decrease in response-time compared to previous years.

13. It is worth to highlight that, during the last year, SIC has shown significant results in the fight against cartels. Twenty three (23) new investigations were opened, showing an increase of approximately 150% compared to 2010 and more than 250% compared to 2009. Additionally, sanctions were imposed to parties in sixteen (16) investigations and average fines have increased by 909% compared to 2009. Furthermore, in 2011, fourteen (14) health insurance companies received the largest fine ever imposed by SIC, which ascended up to approximately USD\$ 9 million.

### 2.1.1 Significant cases

14. 2011's most relevant cases on anticompetitive conducts will be described as follows:

- SIC v ACEMI et. al.

On August 30, 2011, by Resolution No. 46111<sup>1</sup> the Superintendence of Industry and Commerce imposed a fine to ACEMI and 14 health insurance companies<sup>2</sup>, members of the trade association ACEMI for an anticompetitive agreement that affected Colombia's healthcare market. The Superintendence's investigation concluded that these fourteen (14) health insurance companies agreed in a concerted manner, using ACEMI as hub, backdrop and active instigator, who helped health insurers exchanging information to: (i) affect the supplied levels of healthcare services by defining a list of procedures that should be excluded from coverage (ACEMI exchanged a list of medical implements associated to medical procedures that were collectively excluded from the health insurance coverage in order to collect their cost from the State)<sup>3</sup>; (ii) alter the transparency of information required by the regulator to determine the insurance premiums UPC<sup>4</sup> (As it was verified by the Superintendence, ACEMI actively instructed its members regarding the content of the information to be submitted and, in addition, exchanges of sensitive information between competitors were performed within the Association) and; (iii) Create a mechanism to influence regulators in order to miss-inform the Health Regulator and set a larger UPC. This decision has reduced the number of payments made by the State to insurers and has saved the government a figure equivalent to 1% GDP.

- SIC v Fendipetroleo.

Sanction imposed on the National Gas Stations Trade Association - FENDIPETRÓLEO (National Division), FENDIPETRÓLEO (Boyacá Division), FENDIPETRÓLEO (Casanare Division), and six (6) Gas Stations in Duitama.

The Superintendence of Industry and Commerce in Resolution 71794 de 2011<sup>5</sup> stated that FENDIPETRÓLEO (National Division), FENDIPETRÓLEO (Boyacá Division) and FENDIPETRÓLEO (Casanare Division) transgressed the provisions of Article 1 of Law 155 of 1959 and paragraph 2 of Article 48 of Decree 2153 of 1992, by influencing six (6) gas stations to

<sup>1</sup> Superintendence of Industry and Commerce, Resolution No. 46111 of April 30, 2011

<sup>2</sup> Colombia's Healthcare System is divided into two schemes: Contributory and Subsidized. People who are capable of paying for their medical care are part of the Contributory Scheme. In addition, poor and vulnerable populations pertain to the Subsidized Scheme where medical services are funded by the State.

<sup>3</sup> The *collections* or "recobros" are resources by which the State pays to healthcare insurance companies for the performance of medical services that are not included in the Obligatory Healthcare Plan (POS Spanish acronym) and, therefore, not covered by the per capita payment of healthcare services, UPC.

<sup>4</sup> *Per capita payment for healthcare services* (Unidad de Pago por Capitación, UPC Spanish acronym): fixed premium per person, which entitles the payer to receive medical services for a predetermined period.

<sup>5</sup> Superintendence of Industry and Commerce, Resolution No. 71794 of December 12, 2011.

raise their prices for regular gasoline and diesel. Furthermore, the gas stations were also influenced to desist from their intention of decreasing the prices of the mentioned products. Moreover, the Superintendence found that the retail prices of the investigated gas stations identically matched the prices suggested by monthly circulars from FENDIPETROLEO's Boyacá and Casanare Divisions.

The Association acted as a hub for pricing information exchange and for discussions regarding prices and pricing strategies for unleaded fuel and diesel fuel.<sup>6</sup> SIC found that consumers paid an excess of COP \$2,500 million during 2009 for oil prices.

- SIC v Consorcio Vial Colombiano and Consorcio Oriente

The Superintendence of Industry and Commerce found that two joint ventures agreed to determine which of them would be the winner of a public tender for the construction of a number of national roads. FONADE - the National Agency for Planning Procurement Contracts - found evidence suggesting that two of the agents participating in the tender colluded in order to exclude a third participant: CONCRETO. The SIC, while investigating, also found that two of the submitted proposals evidenced coincidences which suggested the existence of bid rigging.

While conducting the investigation, it was found out that the parties had an agreement with the purpose and the effect of winning the tender, regardless of other members' participation. This was possible through cover pricing and joint assessment of different variables such as costs of other participants and the knowledge of the tender's terms of reference. Firstly, the Superintendence, through circumstantial evidence, encountered multiple coincidences between the parties' proposals. These were only possible under a collusive scenario: similar spelling mistakes and payments for insurance made at a same date and time. Secondly, mathematical methods were applied to demonstrate the cartel's existence.

- SIC v. Ibope Colombia, et al.

On April 20, 2011, the Superintendency of Industry and Commerce, by Resolution 23890, decided to fine Ibope Colombia – a company specialized in audience share (ratings) measurement and statistics, UCEP – the Colombian Publishing Companies Association<sup>7</sup> – and the two Colombian private television broadcasting companies - RCN and CARACOL – for an anticompetitive vertical agreement among them that affected the television advertising market in Colombia. The Superintendence's investigation concluded that the *audience share statistics reports* are the main input considered in order to determine strategies and prices in the television advertising market were the defendants had a joint dominant position. According to the agreement entered into by the defendants, RCN and CARACOL became the sole owner of the reports prepared by Ibope, which meant that they would not have to compete with other broadcasting companies to sale their advertising spaces and the companies associated in UCEP would not have to compete to buy those advertising spaces with other media shops and advertising agencies. Additionally, the Superintendence found that this agreement had an exclusionary effect due to (i) a significant and unjustified rise in the price of the *audience share statistics reports*, which created an artificial entry barrier, and (ii) the refusal to sell the reports to international broadcasting companies.

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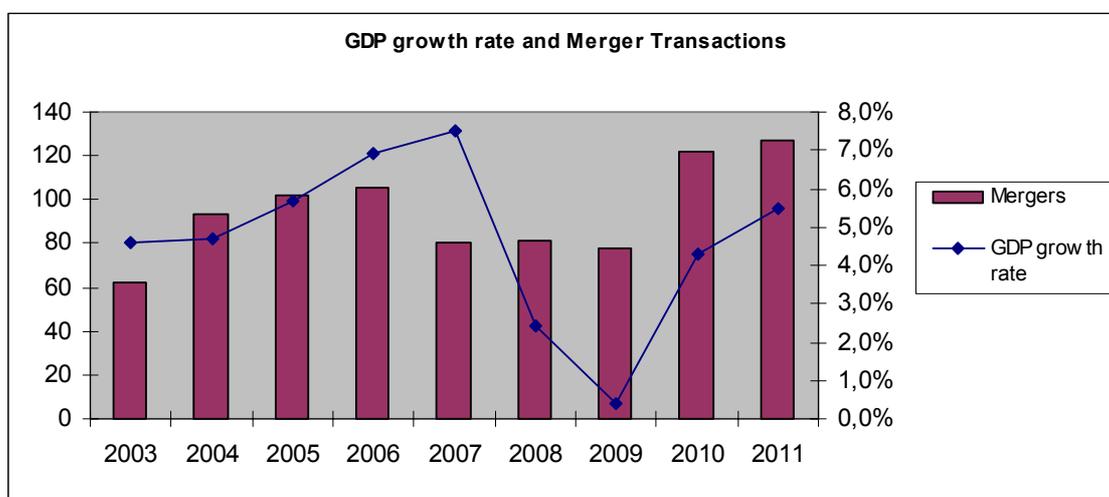
<sup>6</sup> Prices of fuel and diesel fuel are regulated on a particular manner. Fuel prices are defined by the Minister of Mines and Energy.

<sup>7</sup> The UCEP associates Colombian media shops and advertising agencies.

### 2.1.2 Mergers and acquisitions

15. The Superintendence of Industry and Commerce authorized 127 mergers and acquisitions during 2011, these include notifications, pre-evaluations and legal opinions addressed to the Financial Superintendence.

16. The Superintendent of Industry and Commerce, Mr. José Miguel De La Calle, said "It was a record that surpassed the number of mergers processed in 2010. This figure is correlated with Colombia's current economic growth and high levels of foreign investment." The Official also stressed that this issue reflects the SIC's commitment to promptly resolve mergers requests: nowadays, a merger procedure takes 33% less time to be resolved than in 2009. The following graph shows the relation between Colombia's GDP growth rate and the number of merger transactions solved by the SIC.

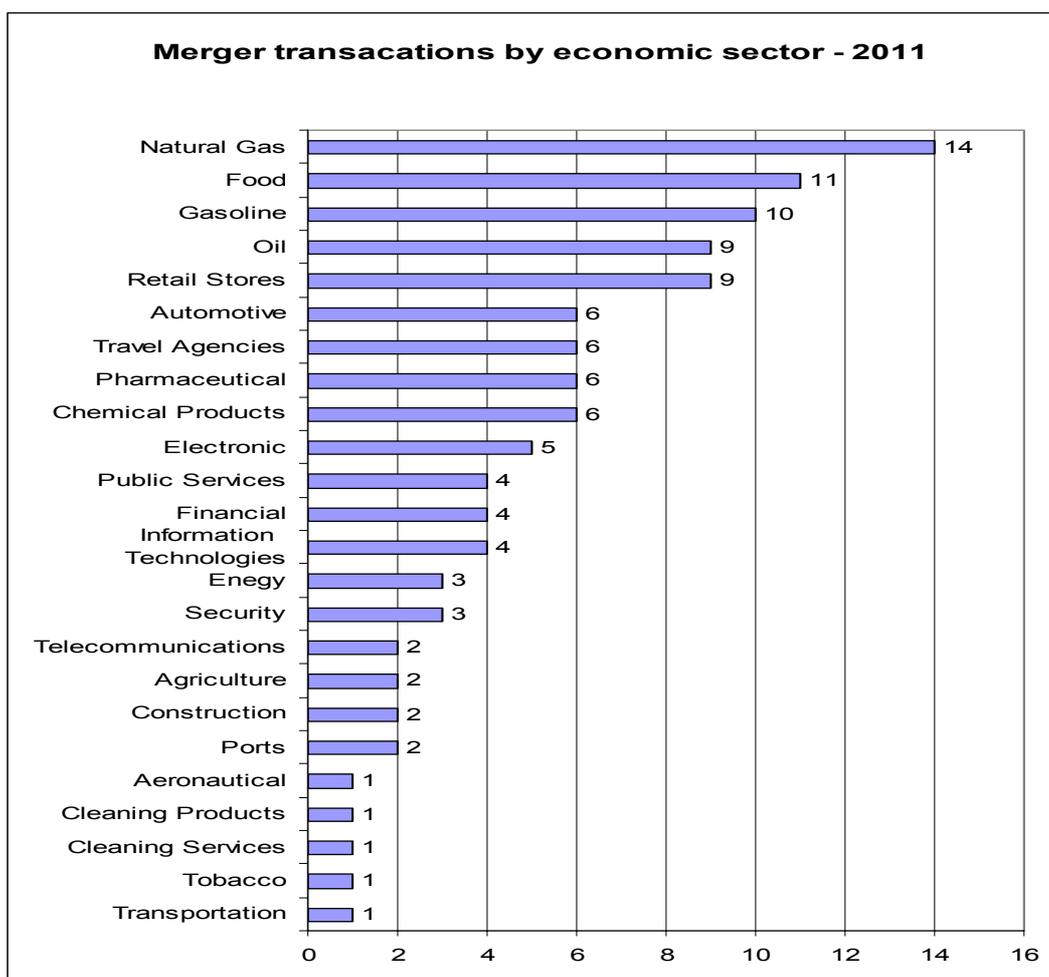


Source: Superintendence of Industry and Commerce

17. In 2011 SIC authorized merger operations for up to USD\$ 452 million. Among international undertakings that asked for SIC's approval we can mention: CATERPILLAR INC. and BUCYRUS INTERNATIONAL INC, SCHINDLER ELEVATORS, MEXICHEM and POLICYD, 3M and ALPHA BETA ENTERPRISE, BRITISH AMERICAN TOBACCO, JOHNSONS CONTROLS, UNILEVER and COLGATE PALMOLIVE, and MORPHO CARDS DO BRAZIL.

18. The most representative transactions within Colombia were: the acquisition of control of TRANSORIENTE's by PROMIGÁS, the transaction between TERPEL and CORPORACIÓN FINANCIERA COLOMBIANA; the purchase of assets by TIENDAS OLÍMPICA from SUPERTIENDAS ÉXITO and CAFAM and; the acquisition of control of PROTABACO's shares by BRITISH AMERICAN TOBACCO (SOUTH AMERICA).

19. Economic sectors which presented a larger number of merger transactions during 2011 were: natural gas (14), food (11), gasoline (10), oil (9), retail stores (9), automotive (6) and travel agencies (6). The following graph shows the distribution of mergers requests among the different economic sectors:



Source: Superintendence of Industry and Commerce

20. Finally, it is worth noting that 2011 was the second year of implementation of the new legal procedures related to merger operations that were provided in Law 1340 of 2009. This Law established the obligation to previously inform mergers between undertakings engaged in the same economic activity or productive chain, when the companies' assets exceed a threshold of legal Colombian wages (annually set by SIC), or when the undertakings possess more than 20% of the relevant market(s) under study. Failure to inform will result in SIC's opening of an investigation for non-compliance of instructions. In 2011, five (5) formal proceedings were opened to non-informed merger transactions.

### 3. Competition Advocacy: The role of SIC in the formulation and implementation of other policies

21. The Competition Authority has taken special efforts in prioritizing investigations in the areas of healthcare, public utilities and State procurement. It is worth mentioning that there has been a joint effort with the regulatory agencies of these sectors to mitigate and correct their behaviors and policies that may negatively affect competition.

22. Additionally, nine (9) national and international forums were held to raise awareness on the standards of competition protection. Among these events we can mention the Latin American Forum for the Celebration of Competition Day and the OECD's Latin American Competition Forum. In relation with Competition Advocacy, several guidance documents were published and various meetings took place for their discussion: business and professional associations, regulators and lawyers were invited to these events.

23. As aforementioned, in order to promote a competition culture, SIC has developed four draft Guidance Documents: [\*Draft Guidance Document on the Application of Antitrust Law to Business and Professional Associations\*](#), [\*Draft Guidance Document on Antitrust Law and Collaboration among Competitor\*](#), [\*Draft Guidance Document on Mergers Assessments\*](#) and [\*Draft Guidance Document on the Exercise of Competition Advocacy\*](#). In particular, the Guidance Document on Fighting Bid Rigging in Public Procurement was published and officially launched in the International Competition Forum at Los Andes University.

24. Moreover, several economic studies were conducted with the support of the European Union Program of Technical Assistance to Commerce and the UNCTAD. What is more, with the creation of the Competition Advocacy Group 28 previous opinions have been issued, assessing competitive effects that regulatory projects may have in their correspondent markets.

#### 4. Resources of the Competition Authority

25. In 2011 the Competition Authority's Deputy Division for Competition Protection had a total of 64 employees among lawyers, economists and other professionals devoted to the study of mergers review, anticompetitive practices enforcement (abuse and cartels) and advocacy. The employees have an average of 5 years of experience in the Competition Authority. Additionally, this Division increased its staff and improved the qualifications and professional experience of lawyers and economists, most of which now have master degrees and PhDs in these fields.

26. Until 2011, the Deputy Division's staff was organized in two teams: the merger review team and the anticompetitive practices investigation team<sup>8</sup>. During 2011 the merger review team had 10 people, which meant a 55% overall increase in respect to 2010. On the other hand, the anticompetitive practices team had 55 people. In relation to 2010, the Deputy Division had a 36% increase in its combined staff.

27. The following table presents the Annual Budget of the Superintendence and its Competition Division:

Year	Annual Budget (USD)	
	Superintendence of Industry and Commerce	Division for Competition Protection
2012	27.259.402	2.453.346
2011	14.959.122	1.346.321
2010	14.289.026	1.286.012
2009	12.187.600	1.096.884
2008	12.306.104	1.107.549
2007	10.802.800	972.252
2006	9.041.213	813.709
2005	8.801.820	792.164
2004	7.420.551	667.850
2003	6.314.509	568.306
2002	7.223.799	650.142
2001	7.345.517	661.097
2000	7.195.964	647.637

28. As it is shown above, since 2000, SIC's resources have raised in a 279%.

<sup>8</sup> In 2012, bid rigging team was established.

**5. Summaries of or references to new reports and studies on competition policy issues**

29. Finally, several economic studies were conducted in 2011. The SIC will be shortly submitting to the Minister of Mines and Electricity, the Commission for Energy and Gas Regulation and the Minister for Social Protection, two recently finalized studies on the Electricity and Healthcare sectors. These studies assess competition challenges that are currently present in those fields, which could be solved through regulation adjustments aimed at improving competition. In addition to the Healthcare and Energy studies, the Division for Competition Protection produced 17 economic studies (12 of them on agricultural markets) that will be published this year. Among those documents we can mention the following:

- Market structure of the retail sector
- Barriers for access to credit in financial markets
- Fuels pipeline transportation Markets

30. Furthermore, since the Superintendence is aware of the importance of sector studies not only as a competition advocacy tool, but also as theoretic and empirical support for antitrust investigations and M&A procedures, the Group for Economic Studies was created on April, 2012. This Group plans to conduct 18 economic studies; among we can mention the following sectors: Electricity, Natural Gas, Financial Markets, Tobacco, Coffee and Cocoa.