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FIGHTING CORRUPTION AND PROMOTING COMPETITION

Contribution from Colombia

-- Session I --

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FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- Colombia --

- 1. According to entrepreneurial surveys, ¹ 84.4% of Colombian companies refrain from participating in public procurement processes as they consider that competition is flawed due to bribery (illegal payments) or political influence. It is therefore no surprise that, according to the *2012-2013 Global Competitiveness Report*, ² corruption is the most problematic factor for doing business in Colombia.
- 2. With regards to public procurement processes, the Superintendence of Industry and Commerce (SIC)³ had traditionally focused its efforts on fighting horizontal bid rigging (agreements between private competitors to allocate public contracts between them), and not on fighting vertical bid rigging (agreements between one company participating in the bid and a public officer to illegally allocate a contract). Two reasons explain this circumstance:
 - First, the SIC was the only authority in Colombia with the power to prevent or sanction horizontal bid rigging. In contrast, vertical bid rigging (corruption through payments by one company to a public officer) could also be tackled by the Attorney General's Office (Criminally), and the General Prosecutor's Office (Disciplinarily). Accordingly, these two authorities have traditionally assumed the task of fighting corruption in public procurement.
 - Second, it was believed that although corruption could affect competition and efficiency, it was
 not the primary task of a competition authority to prevent such practice, but only to attack cartels
 between competitors in a public procurement process (collusion). Considering the need of every
 competition agency to prioritize certain enforcement strategies, the SIC thought that tackling
 horizontal bid rigging would render more effective results for the economy and would be closer
 to the essential function of a competition agency.
- 3. It is for this reason that before 2013 the SIC did not take any role on fighting corruption directly by investigating conducts involving irregular payments or bribes between one company and one public officer.
- 4. Few months ago the SIC decided to pursue both horizontal agreements and vertical agreements (corruption) in public procurement, taking into account that both conducts harm competition and consumers. In fact, some vertical agreements in public procurement may be as or even more harmful than horizontal agreements, depending on the circumstances (value of the contract, object, duration, etc.). This means that a conduct between one single competitor and a public officer to alter the competitive environment of a public procurement process should and will be subject to prosecution in Colombia.

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Reported by the Colombian General Prosecutor's Office, *see* http://www.procuraduria.gov.co/html/noticias 2009/noticias 502.htm

² 2012-2013 Global Competitiveness Report, World Economic Forum.

³ Colombia's Antitrust Agency.

- 5. What prompted this *policy* change was the detection of corruption scandals (irregular payments to obtain contracts) in millionaire public procurement contracts to develop key infrastructure in the country. This conduct impeded that those competitors that had the most efficient offers where granted important public contracts that directly impact the competitiveness of the country, resulting in welfare loss and inefficiencies.
- 6. As per this policy change, the decision on whether to pursue a public procurement case nowadays will depend not on the type of conduct itself (horizontal or vertical), but on the likely harmful effects that the conduct will have on the market, competition and consumers.
- 7. It is worth noting that this policy change did not require legal amendments. Indeed, Article 1 of Law 155 of 1959 establishes that "[a]greements and covenants that either directly or indirectly have the purpose of limiting the production, supply, distribution or consumption of raw materials, products, goods, or national or foreign services, and in general, all type of practices, procedures or systems that tend to limit free competition in order to determine or maintain inequitable prices to the detriment of consumers and raw materials' producers shall be prohibited." Since corrupt practices between one competitor and one public official designed to illegally grant the contract to the former tend to limit free competition, those conducts have always been covered by Colombia's antitrust laws.
- 8. Vertical agreements may be subject to the same sanctions as horizontal agreements (up to 30 million USD, or 150% of the profit obtained with the conduct if higher), and, most important, the signing or execution of the public contract may be suspended with precautionary measures if there is sufficient evidence that an alleged anticompetitive practice has occurred.
- 9. As of today, no formal case involving exclusively a vertical arrangement between one competitor and a public official has been prosecuted. However, some public procurement cases involving vertical agreements are being preliminarily investigated, but are still in a confidential stage.

1. Coordination between agencies for prosecuting public procurement offenses in Colombia

- 10. There are three ways in which the SIC initiates investigations involving either vertical or horizontal agreements in public procurement processes: i) *ex officio* (for example because a procurement process that has been screened by the SIC shows apparent irregularities), or as a result of a *claim* by a private party (either a company or a citizen); ii) through the referral of the case to the SIC by the General Attorney's Office, which works in collaboration with the competition agency; and iii) through the referral of the case to the SIC by the General Prosecutor's Office.
- 11. Although there is no formal agreements or memorandum of understanding between the SIC, the General Attorney's Office and the General Prosecutor's Office, in practice these three agencies cooperate in the investigation and prosecution of anticompetitive conducts.

2. Relevant policy changes for fighting horizontal and vertical anticompetitive agreements in public procurement

2.1 Creation of the National Public Procurement Agency

12. Through Decree 4170 of 2011 Colombia created the National Public Procurement Agency (NPPA) in order to perform certain functions of implementation, advice, and assistance during the public procurement processes. For example, this entity is in charge of the creation of policies, plans and programs aiming to optimize the demand and offer factors in the market. Also, under its jurisdiction is the development and communication of policies, laws and instruments that promote efficiency and expedite the transactions during the bidding. The NPPA is in charge of supporting the government in international

public procurement negotiations, either bilateral or multilateral. Coordination with other public entities for the compliance of objectives, support to other territorial entities in the acquisition process, and the development of online purchases during a bidding process, fall under the scope of the NPPA. The NPPA closely cooperates with the SIC in the design and implementation of policies to increase competition in public procurement processes.

2.2 Anti-corruption Statute

- 13. Law 1474 of 2011, generally known as the Anti-corruption Statute, was created to regulate more strictly certain corruption issues that were not properly addressed by previous legislation.
- 14. The anticorruption statute introduced criminal penalties for bid rigging, being this conduct the only anticompetitive practice that is criminalized in Colombia. Article 27 of Law 1474 states that any agreement to alter competition in a public procurement process is penalized with prison from six (6) to twelve (12) years, a fine of two hundred (200) to one thousand (1,000) legal monthly salaries, and disqualification for contracting with state entities for eight (8) years.
- 15. Corruption has been considered so detrimental for competition in Colombia that this last qualification of bid rigging as a criminal offense was established to create more severe punishments and aim for lower levels of corruption in our country.

2.3 Training Officials

- 16. During 2013, the Superintendence of Industry and Commerce organized and led training sessions for public officers and other administrative personnel, which educated them in matters such as the importance of competition in procurement processes, the initial patterns that indicate a possible anti-competitive agreement during a public procurement, the suspicious behavior and unusual bidding arrangements, among others.
- 17. Also, for this former year and in compliance with the necessity of strengthening communication between the competition authorities and public procurement groups, the SIC organized two-day trainings for central government procurement officials regarding the ways to detect and fight collusion and the ways to improve the process of public procurement. During these sessions the SIC Guidelines for Fighting Bid Rigging in Public Procurement were distributed in order to collaborate with a broader and more technical knowledge of this matter among the central government officials.

2.4 Collusion Sub – division

18. The SIC created a specific group inside the Deputy Superintendent for the Protection of Competition Office which is in charge of enforcing processes against bid rigging. The creation of this special division has augmented significantly the cases resolved and sanctioned for bid rigging during the last two years.

2.5 Revolving Door Phenomenon

- 19. The anti-corruption statute or Law 1474 of 2011 is the national legislation regulating the revolving door phenomenon in Colombia.
- 20. The articles dealing with the revolving door concept have been object of contradiction before the Constitutional Court of Colombia on several occasions. The latest decision dated May the 7th of 2013; declared both of the articles were constitutional contrary to what the petitioner claimed.

21. The Anti-corruption Statute prevents any former public worker from offering assistance, representation, advising or consulting services in matters related with the functions of their former position for two (2) years after they have left their job. The measure has been disputed because some people consider it violates the rights to labor, equality and freedom of profession, by not allowing professionals to apply and perform technical skills they have acquired for making a living.

BIBLIOGRAPHY

Constitutional Court, Decision C 257 of 2013.

Decree 2153 of 1992.

National Competiveness Report 2011 -2012.

National Competiveness Report 2012 -2013.

National Competiveness Report 2013 -2014.

Law 155 of 1959.

Law 1340 of 2009.

Law 1474 of 2011 – Anti-corruption Statute.

OECD Secretariat Report on Fighting Bid Rigging in Colombia, 10 October 2013.