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LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

Contribution from Colombia

3-4 September 2013, Lima, Peru

The attached document from Colombia is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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1. Introduction

- 1. Based on the secret nature of anti-trust infringements, unannounced inspections at the business premises of companies suspected of having engaged on anticompetitive behaviours are one of the most effective and powerful investigatory tools available to competition authorities in order to gather the necessary evidence during an investigation.
- 2. Down raids give the competition authorities the opportunity to examine and copy without notice substantial information and to have a direct knowledge of the companies' operations. Also it is possible to obtain directly from representatives, directors and in general, employees, relevant data for the case.
- 3. Colombian situation on this matter is *sui generis* due to the fact that the Superintendence of Industry and Commerce (SIC) in general is empowered to search the premises, copy relevant documents (whether hardcopy or electronic); ask for explanations for facts or documents and conduct depositions, without judicial order. The Deputy Superintendent for the Protection of Competition is entitled to plan at any time surprise inspections and does not have to obtain any authorization for this purpose.
- 4. Under this scheme it is not possible for the investigators of the SIC to get into the premises of the companies without permission. However, if such permission is not given, the authority is able to impose the same sanctions that are provided for antitrust infringements.
- 5. Recent SIC's experiences on down raids have not only involved judicial revisions of its faculties by Colombian Tribunals, but also an interesting dispute with the Water Utility Company of Bogotá. Both issues are going to be approached on this document in the following order. Item number 2 will describe the legal frame for the SIC's powers, item number 3 the scope of inspections powers, item 4 relates to the Water Utility Company of Bogotá Case and item number 5 contains the conclusions resulting from the contribution.

2. SIC's legal authority to conduct unannounced inspections

- 6. In Colombia, the SIC's power to conduct inspections is granted by section 62, article 1 of the Decree 4886 of 2011 which states as a general function of the SIC to "Perform inspections, order and examine evidence and collect all information leading, in order to verify compliance with the laws whose control is responsible and take appropriate action according to law".
- 7. The power to conduct inspections does not make the inspected company automatically guilty for anti-competitive behaviour nor does it affect the right of defence, in particular the right of the company to be heard during the proceedings, a right which is completely granted during both, the preliminary and formal investigation stages.
- 8. When inspected companies adopt measures to avoid the authority actions and refuse the inspection, the SIC does not have the power to compel investigated companies to allow their officers to get access to the business premises without consent. However, the SIC is empowered to consider such behavior as a failure to comply with an instruction issued by the authority.
- 9. Currently the SIC's sanctioning power regarding this kind of conduct is regulated by the section 4 of article 1 of the Decree 4886 of 2011, which establishes as a function of the SIC the following:

"Imposing, based on the law and in accordance with the procedure, penalties for violation of any of the provisions on protection of competition and unfair competition, and by the <u>failure of the instructions</u> issued in performance of their duties".

- 10. In practical terms, it is possible that during a down raid the representative of the inspected company does not give permission to enter the premises or refuses to provide any information to the officers. In this case, the SIC does not have any legal tool to force neither the entrance nor the provision of data, but the entity has the power to initiate a failure of instructions proceeding that can finalize with the imposition of fines.
- 11. In this regard, it has to be said that the SIC can sanction both companies and individuals when they¹:
 - Do not allow officers to conduct the inspection up to the end, and obstruct the collection and examination of the evidence required by the SIC.
 - Do not facilitate the information and/or documents required by the SIC's officers during the inspection:
 - Within the period established by the SIC.
 - When additional information is needed.
 - To the extent required by the SIC in order to clarify directly the facts.
 - Do not facilitate the information required by the SIC based on its confidential nature.

Current fines for this conduct are up to 58.950.000.000 COP, USD \$30.700.000 approx, for companies and \$1.179.000.000 COP, USD \$620.500 approx for individuals. (as mentioned, these are the same sanctions provided for antitrust behaviours).

3. Scope of inspection powers

- 12. In those cases in which the SIC can infer or suspect that the organising body, officers or advisers within a company, allowed or facilitated an anti-competitive conduct, and there are reasonable reasons to consider that there is a high risk of losing information which could be useful and necessary to investigate anti-competitive practices, it is appropriate to conduct an unannounced inspection. For example, in a bid rigging case, unannounced inspections are fundamental as nothing makes mandatory to the proponents participating in a selection process to keep copies of the technical studies or economic and financial information in which their proposal was based.
- 13. Hence, the SIC's officers must be aware of the importance of collecting as much evidence as possible in the preliminary inquiry stage before the information is concealed or destroyed by the proponents in order to spoil the SIC's investigation.
- 14. However, it is important to make clear that the SIC's power to conduct unannounced inspections can only be exercised during the preliminary investigation stage. Once initiated the formal investigation the SIC officers lack of authority to conduct searches without notifying their decision to the investigated company in order to grant the company's right of defence. Therefore, the inspections' surprise factor will be vanished in the formal investigation stage, as once the SIC communicates the inspection to the company, it will be able to adopt measures to conceal or destroy compromising information.
- 15. As unannounced inspections involve a surprise factor which seeks to avoid any manoeuvre of the investigated companies aiming to affect the investigation, most of times they are not very welcome. The most common arguments to refuse the power of performing unannounced inspections are related to the scope of that power and the way in which the inspection procedure is conducted by the SIC. Evaluating some cases in which companies have refused inspections, or suddenly have suspended the inspection proceedings without justification, the SIC held that the duty of following the instructions imparted by their officers covers any organisation under their control, inspection, and surveillance, and not only those organisations being directly investigated for infringement of competition rules.
- 16. Besides, in order to accomplish with the instructions imparted by the SIC, it has been considered that the inspected companies should facilitate anything relevant during the procedure performed by the SIC within the inspection. As a consequence, the inspected companies cannot state that they have carried out such duty merely for the fact of having disclosed the documents expressly required by the authorities.
- 17. Moreover, it has been held that not only the legal representative but any person designed by the company, or any employee present at the company when the inspection is carried out, should follow the instructions imparted by the SIC's inspectors. The SIC considered that the conduct of such person during the inspection procedure compromises the liability of the whole company because otherwise the inspected company would be able to spoil the inspection by arguing that the legal representative was not present when the visit was conducted.

4. Water Utility Company of Bogotá Case

18. Concerning the documents which the SIC would require during the inspection, it has been held that they can require trade documents to any person as such prerogative arises from the law². According to section 63 article 1 of Decree 4886 of 2011, it is a SIC's legal faculty to: "Order to natural and legal

SIC. Resolution No. 5010 of 1999 Retrieved from: http://avancejuridico.sic.gov.co/sic/docs/fr_siyc_5010_1999.htm (5/7/13)

persons providing data, reports, trade books and papers required for the proper exercise of their functions".

- 19. However, despite the mentioned section establishing the power of the SIC to request documentary evidence, the most difficult aspect handled by SIC's officers when performing unannounced visits is that related to the documentary evidence contained in electronic devices.
- 20. On this point it is important to mention that even when our procedure does not include a conventional action to be submitted before a judicial authority in order to challenge dawn raids decisions, it is possible to seek a constitutional action to protect fundamental rights, whenever such rights are considered affected. Recently, the Superior Tribunal of Bogotá issued two decisions regarding two different actions, both submitted by the Water Utility Company of Bogotá and based on the possible breaching of fundamental rights when the SIC during two visits in two different investigations, asked for emails from several members of the company's staff.
- 21. In the first case, the Superior Tribunal of Bogotá considered that there was an infringement of the mentioned article based on the fact that the inspection carried out by the SIC was conducted without a judicial order being issued ³. In this case the SIC's inspection was focused on the waste collection service provided by the EAAB. However, in spite of being the legal issue the same than in the first case, two weeks later, the same Tribunal adopted a different approach and confirmed the SIC's faculty of getting access to e-mails during the inspection when such access is given by the person whose email is being inspected.
- According to the Tribunal's approach in the second judgment, such procedure does not breach the rights of due process or privacy because the Constitution itself allows all the inspection, surveillance, and control entities to request for any private document when it is required to clarify relevant facts⁴. The inspection conducted by the SIC in this second case was focused on identifying if there was an anti-competitive conduct in the way in which water was provided by the EAAB.
- 23. In order to avoid confusions and have a final judicial decision establishing a uniform approach on that issue, the SIC requested for clarification from the Constitutional Court. However, the SIC is confident about the scope of its power when conducting inspections as there is a widely recognised doctrine supporting the SIC's view on the matter.

5. Conclusions

- 24. The main advantage of unannounced inspections is that it compromises a broad set of faculties related to collecting and examining evidence. It makes unannounced inspections one of the most employed and valuable tools of the SIC when carrying out antitrust investigations. For that reason, the SIC makes available considerable financial and human resources for improving the methods and techniques employed when conducting inspections.
- 25. As it was shown, the SIC's power to perform unannounced visits is quite broad as the Colombian law does not give a different legal treatment to unannounced inspections to that one given to inspections in general. However, it is important to highlight that unannounced visits can only be conducted during the

Superior Tribunal of Bogotá (Civil Division Specializing in Land Restitution, Superior Court of the Judicial District of Bogotá), Judgment of April 15, 2013.

Superior Tribunal of Bogotá (Civil Chamber of the Superior Court of the Judicial District of Bogotá), Judgment of April 30, 2013.

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preliminary stage because during the formal investigation stage, inspections should be notified in order to allow the investigated party to exercise its right of defence.

26. The SIC does not have powers to enter premises without permission of the possible offenders that are visited. However, according to our law, if such permission is not granted, or even if we enter but all or part of the information requested is not given, we can initiate an investigation based on the refusal to comply with SIC's instructions, which can give rise to the same sanctions stated for antitrust infringements. Therefore, the main incentive that enterprises have to comply and collaborate during dawn raids is to avoid the consequences of a "fast track" fine. This taking into account that procedures of refusal to comply instructions normally last around 6 to 8 months.