

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS**

-- Colombia --

**25 February 2014**

*This note is submitted by Colombia to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.*

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## **UNINFORMED MERGERS IN COLOMBIA ANTECEDENTS AND REVIEW OF RECENT EXPERIENCES**

### **1. A general view and antecedents of Colombian mergers regime**

1. In the field of mergers, the origins of control regime in Colombia date back to the 1950s, particularly the Article 4 of Law 155 of 1959 determined the general aspects on this issue. Several changes were included since the first mention on the topic, but probably the most important of it was the promulgation of the Law 1340 of 2009. The title II (Article 9 to 13) of the mentioned Law defines the merger control regime (MCR), which is directed by different procedures, the most important is the Resolution 12193 of 2013, issued by the Superintendence of Industry and Commerce (SIC), the national competition authority.

2. The Colombian MCR considers both vertical and horizontal mergers, and distinguishes between two possible scenarios: notification of the operation, and the information in order to request approval to the national competition authority

3. The first case occurs if the parties, either individually or in sum when the operation is celebrated, have less than 20% of the relevant market in all segments of the value chain in which they participate. Likewise, the parties must satisfy any of the conditions presented in Article 9 of Law 1340 of 2009, which defines the objective criterions as follow:

- a. The merging parties, either individually or in sum, had (i) operational income during the previous fiscal year that exceeded the amount of minimum legal monthly wages set by the SIC.
- b. Total assets at the end of the previous fiscal year that exceeded the amount of minimum legal monthly wages set by the SIC.<sup>1</sup>

4. In the second case, the merging parties must satisfy any of the conditions contemplated in Article 9 of Law 1340 of 2009 and jointly hold more than 20% of the relevant market in the segments of the value chain. The authorization includes two phases: pre-application assessment and evaluation of the proposed transaction.

5. The SIC may order the reversal of a merger if (i) it was not informed; (ii) the operation was done before the SIC's pronouncing, if it is determined that the operation affects free competition, or it had been objected; (iii) the conditions under the merger was authorized were not satisfied.

6. Regarding the merger stats, we can see an increase of studied mergers from 2009. In this year, the SIC studied 78 operations. In 2010, the number increased to 123, in 2011 the procedures were 125 and in 2012 were 166. In this last year, 116 operations corresponded to notifications, 40 to informed mergers, 8 to concepts issued and 2 to waivers. Between January and December of 2013, 145 applications had been

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<sup>1</sup> In 2014 the amount in legal monthly minimum wage corresponded to 100,000, i.e., COP 61.600.000.000 (USD 31,8 millions at the exchange rate of January 15th, 2014).

processed, of which 101 notifications, 37 were approvals at the pre-assessment phase, 4 concepts submitted to the Superintendence of Finance and 3 waivers.

## 2. Mergers not informed to the Superintendence of Industry and Commerce

7. Currently, there are still 8 investigations in course for uninformed mergers occurred between 2011 and 2013 (Table 1). Those administrative procedures include 18 investigated enterprises and 22 individuals (Table 2). The distribution of the enterprises organized by sectors are presented in Table 3. Telecommunications and Gas Transportations are the sectors with the largest number of firms (3).

**Table 1. Uninformed mergers\***

Process Status	2011	2012	2013	Total
Motivated report submitted to the Superintendent's office	2			2
Practice evidence in progress		2	4	6
<b>Total</b>	2	2	4	8

\*The year presented corresponds to the opening of the investigation

Source: SIC

**Table 2. Number of enterprises and individuals investigated in cases of uninformed mergers**

Year	Number of Enterprises	Number of Individuals	Total
2011	5	5	10
2012	4	6	10
2013	9	11	20
<b>Total</b>	18	22	40

Source: SIC.

**Table 3. Distribution of enterprises of uninformed mergers by economic sector**

Sector	Enterprises
Architectural and engineering Activities	2
Construction	2
Pharmaceutical	2
Real estate	3
Health	2
Information technology	2
Telecommunications	3
Gas transportation	2
<b>Total</b>	<b>18</b>

Source: SIC

8. Concerning to sanctions imposed by the SIC, after the enactment of Law 1340 of 2009, there are 2 cases.<sup>2</sup>

9. The first case is related to the steel industry, was opened in 2009 (for 4 companies and 3 individuals) and was sanctioned in 2010. The fine for the firms (2) corresponded to COP 356.25 million (USD 184,156.11) and for individuals (2) the fine was COP 35,642,813 (USD 18,424.82).

- By Resolution 30238 of June 2010, the SIC decided to sanction the companies under investigation because it was proved that the firms, in spite of meeting the assumptions specified by the law, had not informed the SIC about the merger that took place in June 2007. The operation was configured by means of the partial sale of all tangible and intangible productive assets destined to production of steel pipes and profiles by SIDEANDES S.A. a CONSORCIO METALÚRGICO NACIONAL COLMENA LTDA.

10. The second case belongs to the agricultural sector, was opened in 2011 (for 3 companies and 4 individuals) and was sanctioned in 2013. The penalty for the 3 firms corresponded to COP 470 million (USD 242,956.84) and for individuals (2) the fine was COP 30 million (USD 15,507.88).

- By Resolution 3703 of February 2013, the SIC resolved to sanction the companies under investigation because it was proved that the firms, in spite of meeting the assumptions specified in the law, had not informed the SIC about the merger that took place in December 2009. The operation was defined by buying the 52% stake of ALIENERGY SA by MOLINOS ROA S.A. and MOLINO FLOR HUILA S.A., whereby they acquired control of the company.

11. In summary, the SIC shows a continuous effort for the enforcement of the competition regime in order to ensure the effectiveness and efficiency in the procedures. The MCR imposes responsibilities, mainly related to economic analysis, thus not only the parties but also the national competition authority must to articulate the law and economic analysis, to understand the nature of the merger and identify the objective and subjective assumptions to define when an operation must be evaluated by the SIC. In particular, in the case of uninformed mergers, the Colombian experience shows the importance to detect and impose fines to the enterprises that violates the competition regime as an incentive to promote good practices in the markets.

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<sup>2</sup> Before the application of Law 1340 of 2009 and after 2000, the SIC sanctioned 8 cases of unreported notifications, 1 in 2000 (services sector and 1 sanctioned firm), 2 in 2002 (agricultural sector, 5 firms and 6 individuals sanctioned), 1 in 2003 (agricultural sector, 8 firms and 3 individuals penalized), 2 in 2004 (manufacturing and telecommunications sectors, 4 companies and 4 individuals sanctioned) and 1 in 2005 (agricultural sector, 2 firms and 2 individuals sanctioned) and the last one in 2010 (telecommunication sector and 2 sanctioned firm and 3 individuals).