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**Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE**

## **Annual Report on Competition Policy Developments in Colombia**

**-- 2017 --**

**6-8 June 2018**

This report is submitted by Colombia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 6-8 June 2018.

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

### 1.1. Summary of new legal provisions of competition law related legislation

1. In the year 2017, no competition laws were passed.

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

2. In 2017, the Superintendence of Industry and Commerce did not issue any guidelines or relevant measure.

### 1.3. Government proposals for new legislation

3. Regarding legislative issues, in the 2017 the Government of Colombia presented the Bill 109/17C "*By means of which rules are issued in matters of probity and prevention of corruption*". This initiative is accompanied by others bills related to corruption, whose general objective is the strengthening of the normative and institutional framework in terms of transparency, probity and the fight against corruption

4. The Superintendence of Industry and Commerce, in order to strengthen the fight against corruption, has proposed a series of modifications to be included in the presentation for the first debate in the Congress of Colombia, which will be discussed and approved during the development of the entire legislative process.

5. It should be noted that two major proposals will be presented so far, regarding: Benefits for collaboration for those facilitators that reveal a restrictive commercial practice other than an anti-competitive agreement. Likewise, it is proposed to extend the expiration period of the sanctioning faculty of the Superintendence of Industry and Commerce, currently the sanctioning action expires five (5) years after the violating action took place or, in those cases of successive tract behaviours, five (5) years after the last constitutive act that was not notified to the sanctioning administrative act. The proposal is to increase it to ten (10) years.

6. Additionally, in 2017 the National Government, through the Ministry of Commerce, Industry and Tourism, presented the Draft Decree "*By which modifies Chapter 30 of Title 2 of part 2 of Book 2 of Decree 1074 of 2015, Sole Regulatory Decree of the Trade, Industry and Tourism Sector, and regulates article 7 of Law 1340 of 2009, integrating and developing the function of the Competition Advocacy*", which main purpose is to strengthen the preventive and corrective functions that involves the Superintendence of Industry and Commerce regarding free economic competition, as well as complement and clarify issues related to the application of article 7 of Law 1340 of 2017. It should be noted that this Draft Decree has not been issued.

## 2. Enforcement of competition laws and policies

### 2.1. Action against anticompetitive practices, including agreements and abuses of dominance

#### 2.1.1. Summary of activities of the Competition Authority

7. In 2017, the number of complaints decreased in 81 compared to the ones received in 2016. In percentage, this represents a decrease of 16%.

**Table 1. Complaints received and resolved 2016-2017**

	2016	2017	Total
Complaints pending at beginning of period	620	728	N/A
New complaints received during period	516	435	951
Complaints resolved by dismissal	396	616	1012
Complaints resolved by opening a preliminary inquiry	12	0	12
Complaints pending at end of period	728	547	N/A

8. Table No. 2 contains information regarding the preliminary inquiries that were conducted since 2016 to 2017.

**Table 2. Preliminary inquiries commenced and resolved 2016-2017  
(ex officio and complaints)**

	2016	2017	Total
Preliminary inquiries pending at the beginning of the period	68	67	N/A
New preliminary inquiries opened during period	12	9	21
Preliminary inquiries resolved by dismissal	4	4	8
Preliminary inquiries resolved by opening a formal investigation	9	10	19
Preliminary inquiries pending at end of period	67	43	N/A

9. The disposition of formal investigations since 2016 is shown in the following table:

**Table 3. Competition cases resolved 2016-2017**

	2016	2017	Total
Formal investigations pending at the beginning of the period	19	16	N/A
New formal investigations opened during period	9	10	19
Formal investigations resolved by dismissal	4	3	7
Formal investigations resolved by orders/sanctions	8	14	22
Formal investigations resolved by settlement	0	0	N/A
Formal investigations pending at the end of period	16	23	39

### 2.1.2. Description of significant cases

10. In 2017, the most significant cases were sanctioned were: Cement cartel and Private Security Services.

11. The imposed sanctions in the two cases went up to COP \$228.836.124.815 (USD 80.273.942, 38)<sup>1</sup>.

#### *Cement*

12. In this case, the statement of objections was issued on August 2013 against five companies: (i) **CEMENTOS ARGOS S.A.**; (ii) **CEMEX COLOMBIA S.A.**; (iii) **HOLCIM (COLOMBIA) S.A.**; (iv) **CEMENTOS TEQUENDAMA S.A.S.** and; (v) **CEMENTOS SAN MARCOS S.A.** The investigation also addressed 14 individuals who may have collaborated, authorised, tolerated and/or executed the anticompetitive conducts.

13. The investigation was focused on determine if such cement producers were in a conscious parallel agreement to fix cement's prices and to distribute among them cement market shares. The Superintendence analysed different circumstantial evidence -known as "plus factors"- that indicated the market was prone to collusion and that there was a distortion of the competition as result from an anticompetitive agreement.

14. Once the investigation stage finished, the Deputy Superintendent for the Protection of Competition recommended imposing fines to **CEMENTOS ARGOS S.A.**, **CEMEX COLOMBIA S.A.** and **HOLCIM (COLOMBIA) S.A.** because there were enough circumstantial evidence that confirmed the existence of the mentioned anticompetitive agreements. In the other hand, recommended to close the investigation to **CEMENTOS TEQUENDAMA S.A.S.** and **CEMENTOS SAN MARCOS S.A.** for the same charges, because found out that these two companies held special market conditions which inhibited their participation in anticompetitive agreements.

15. Based on Deputy Superintendent for the Protection of Competition recommendation and the evidence found in the case, the Superintendent of Industry and Commerce issued Resolution No. 81391 of 2017, through which fined **CEMENTOS ARGOS S.A.**, **CEMEX COLOMBIA S.A.** and **HOLCIM (COLOMBIA) S.A.** only for price fixing conduct.

16. The imposed fines went up to USD \$71.142.440,16, approximately, among the companies and the individuals involved in the anticompetitive conducts.

17. Some of the evidence used by the Superintendent of Industry and Commerce to demonstrate the conscious parallel behaviour of cement producers were: economic evidence related with the structure and characteristics of the market, communication evidence and conduct evidence that probed there were behaviours of the firms not consistent with a competitive environment and contrary to the parties' unilateral self-interest.

18. Cement producers filed legal remedies against Resolution No. 81391 of 2017. It is still pending for a decision of the Superintendent of Industry and Commerce.

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<sup>1</sup> All the conversions of this document were made using an exchange rate of COP \$2.850.69 per dollar.

*Private Security Services*

19. The Superintendence of Industry and Commerce, after analysing the recommendation of the Deputy Superintendent for the Protection of Competition and following the unanimous concept of the Advisory Council of Competition, decided to sanction seven private security and surveillance companies and fourteen natural persons related to them for violating the free market competition regime. The sanctions imposed were up to \$9.131.502,22 US Dollars.

20. The punitive administrative procedure began in 2011 with a complaint submitted before the Superintendence by the Colombian Institute of Family Welfare<sup>2</sup>. The complaint alleged that during a public procurement procedure two of the competing companies, **STARCOOP** and **GUARDIANES**, submitted bids as individual competitors, however there were evidences suggesting that those companies were actually co-ordinated for one of them to win the tender.

21. Based on the complaint the Colombian Antitrust Authority pursued an investigation by which the conduct of the denounced companies in several competitive bidding processes was analysed. During the investigation the Superintendence discovered that these companies had strong commercial relations with other enterprises (i.e. **COBASEC**, **CENTINEL**, **EXPERTOS**, **INSEVIG** and **SECURITY MANAGEMENT GROUP**).

22. In order to find out the purpose of these commercial relations among the companies, between April of 2012 and February of 2013, the Superintendence carried out inspection of various private security and surveillance companies. In the course of the inspections a considerable amount of documents and e-mails containing information about several procurement processes conducted by different public entities were found. The documents exhibit the anticompetitive strategies the companies built aiming to win contracts.

23. By the end of the administrative procedure, the Superintendence established the existence of a system, created and executed by the companies and several natural persons which purpose was to impede free competition inside public selection and contracting processes. The strategy behind the system was to appear as if the companies were competing in normal conditions, while in reality they were not individual competitors but a co-ordinated group acting in behalf of just one person, **JORGE ARTURO MORENO OJEDA**, who directed and controlled the companies.

24. The strategy involved the presentation of co-ordinated bids by the companies – either as a plural structure or individually–, the formulation of the same requests to modify the terms of reference of the processes in benefit of the companies, as well as the execution of certain behaviours directed to increase the probability of winning the bid.

25. The sanctioned conducts in this case led to the first criminal investigation regarding anticompetitive agreements. This crime was included in the Colombian Criminal Code in 2011, and ever since this behaviour is punishable by imprisonment.

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<sup>2</sup> Instituto Colombiano de Bienestar Familiar –ICBF

## 2.2. Mergers and acquisitions

26. It is important to take into account that, in Colombia, when the parties to the transaction are engaged in (i) the same economic activities (horizontal overlap); or (ii) the same value chain of a relevant market (vertical effect), they may be subject to merger control.

27. The SIC establishes a threshold to review these mergers depending on the interested parties' assets and/or operational income for the previous year. This threshold varies each year, being based in the minimum wage rate for the country. For example, this year the threshold is set at 60,000 monthly salaries at the minimum wage, which amounts to \$46,874,520,000 Colombian pesos (approximately \$16.4 million USD). In the case that the assets or operational income held by the companies, individually or jointly, equals or exceeds this amount, the transaction must be reviewed.

28. There are two kinds of merger applications the SIC reviews, namely:

- Notifications: Mergers in which the interested parties jointly hold less than 20% of market share. In this case the transaction is considered authorised and the parties need only to provide notice of the transaction to SIC prior to the closing. The SIC issues a letter normally within ten (10) business days that “acknowledges receipt” of the notice. In the letter the SIC states that it reserves the right to review the information presented.
- Pre-evaluations: Mergers in which the interested parties jointly hold 20% or more of market share. This procedure is divided in two stages: ‘phase 1’ and ‘phase 2’ (in depth analysis), and may take between 2 – 9 months depending on the complexity of the transaction. Additionally, the parties are subject to a standstill obligation, which means the transaction may not close before the SIC issues authorisation.

### 2.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws.

29. In 2017 the SIC reviewed and resolved 151 merger procedures, between notifications, phase 1 and phase 2 pre-evaluations. Whenever there is a merge that affects the financial market, the SIC releases a non-binding concept to the Colombian Superintendence of Finance. However, in 2017 there were no financial concepts released by the SIC.

30. Table No. 4 summarises the merger reviews approved, conditioned, objected or dismissed for the year 2017.

**Table 4. Merger applications reviewed by the SIC during 2017**

Type of procedure	Authorised without remedies or conditions	Authorised with remedies or conditions	Objected (prohibition to merge)	Dismissed (by the interested parties)	Total
Notifications	113	0	0	0	113
Pre-evaluation Phase 1	20	0	0	0	20
Pre-evaluation Phase 2	10	7	0	1	18
Total	143	7	0	1	151

31. Table No. 5 shows the information related to the volume of merger applications received, processed, and resolved for the year 2017.

**Table 5. Merger applications and phase 1 resolved pre-evaluations 2017**

Year	Pre-evaluations pending at beginning of period	Pre-evaluations received in period	Pre-evaluations resolved in phase 1	Pre-evaluations resolved in phase 2	Pre-evaluations pending at end of period
2017	11	37	20	18	10

32. Table 6 shows a slight reduction in the average duration of phase 1 merger review processes, keeping an average of 1.3 months from 2016 to 2017.

**Table 6. Average duration of phase 1 merger review process 2016-2017**

Year	Days	Months
2016	40	1,33
2017	38,8	1,29

33. Table No. 7 shows the volume of mergers initiated, processed, and resolved under Phase 2 for the year 2017.

**Table 7. Phase 2 Merger Reviews 2017**

Year	Phase 2 pre-evaluations pending at beginning of period	Phase 2 pre-evaluations initiated in period	Phase 2 pre-evaluations resolved in period	Phase 2 pre-evaluations pending at end of period
2017	3	19	18	4

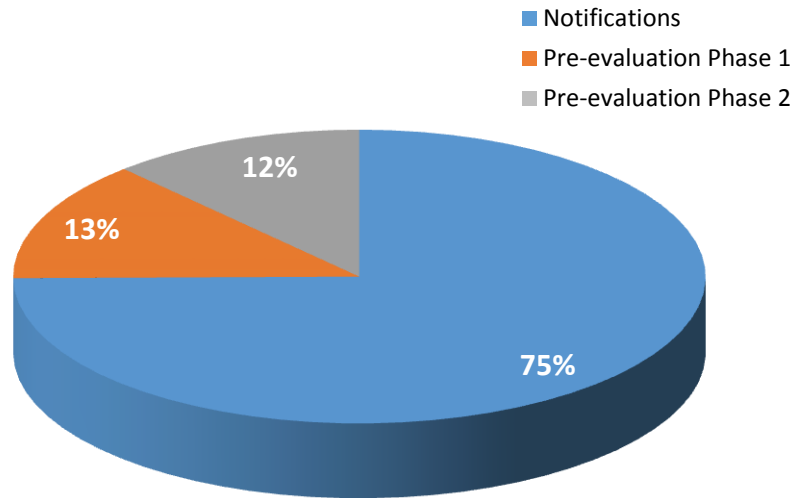
34. The average duration of phase 2 merger review processes in 2017 was 168 days, which represents 55 days more than the average duration in 2016. The complexity of some cases (like MAERSK – HAMBURG SÜD which lasted 259 days or TERPEL – EXXONMOBIL, which lasted 331 days) contributed to the increase of the average duration of pre-evaluation processes during 2017.

**Table 8. Average duration of phase 2 merger review process 2016-2017**

Year	Days	Months
2016	113	3,8
2017	168	5,6

35. The following chart shows the types of assessment that were conducted by the Mergers Working Group during 2017, with their respective participation:



**Figure 1. Types of assessment conducted by the Mergers Group-2017**

\*There were no financial market concepts during 2017

36. The highest number of applications received by the SIC were abbreviated notifications. Only 25% of applications referred to merger review notifications.

### 2.2.2. Summary of significant cases

37. The following are the significant cases reviewed in 2017:

#### *Maersk – Hamburg Süd*

38. Market: Freight shipping.

39. Proposed transaction: MAERSK would acquire the exclusive control of HAMBURG SÜD, including all rights and mercantile obligations, as well as any trademark property of HAMBURG SÜD. This transaction would have effect worldwide.

40. Decision: Conditioned.

41. Some of the conditions and/or remedies to clear this merger application were:

- The parties must withdraw from current partnerships that are relevant in the Colombian market, namely: i) Eurosal 1 and 2; ii) MED Andes and iii) UCLA.
- The parties should not celebrate new partnerships for the shared use of infrastructure that may affect the market, without notifying the SIC about the intended operation.

42. The parties should not restrict, block, oppose, interfere or obstruct the access to the port operation services or charter space in vessels that MAERSK offers to the competitors, nor any other agent that requires such services.

#### *Terpel – Exxonmobil*

43. Market: Liquid fuels and lubricants.

44. Proposed transaction: TERPEL would acquire the exclusive control of EXXONMOBIL COLOMBIA.

45. Decision: Conditioned.

46. Due to the fact that TERPEL and EXXONMOBIL are the two biggest companies in the Colombian liquid fuel market, a merge between them would mean that their market share would be at least 48% more than their following competitor. In regards of the vehicle lubricants market, a merge would mean an outstanding 87% of the market share. Therefore, the SIC considers that the proposed transaction might impact negatively consumers and emerging competitors alike.

47. In order to prevent any possible damage to competition, the SIC determined the following conditions and remedies:

- The SIC objects the acquisition of control of EXXONMOBIL's liquid fuel business by TERPEL. TERPEL must find a third party buyer agent that assumes exclusive and independent control of the fuel business object of this transaction. This agent must keep the business in an effective and productive way. TERPEL must withdraw from any behaviour or practice that restricts the liquid fuels national market, and allow the buyer agent to conduct business according to the free competition spirit.
- The SIC authorises the acquisition of control of EXXONMOBIL's vehicle lubricants business by TERPEL, as long as the parties agree to:
  - Eliminate the exclusivity or preference clauses in the distribution and/or exhibition of own-branded lubricants in all the gas stations owned by or affiliated to TERPEL.
  - TERPEL must sell one of its lubricant plants to a third party agent.
  - TERPEL must relinquish two of its lubricant brands either by selling them to a third party agent or stop producing them altogether

### 3. The role of competition authorities in the formulation and implementation of other policies

48. The Competition Advocacy Group of the SIC is focusing its advocacy strategy on two main goals: (i) to promote a competition culture by educating society on the benefits of economic competition; and (ii) to reach more regulators by explaining them the importance of informing to the SIC all regulatory drafts with potential anticompetitive effects on the markets, so the SIC can issue advocacy legal opinions to prevent anticompetitive regulations.

#### 3.1. Relevant cases

49. The following are three relevant advocacy opinions and one advisory opinion issued by the Colombian Competition Authority last year. These opinions are classified below by agencies and governmental bodies:

##### 3.1.1. Ministry of Commerce, Industry and Tourism

50. **Proposed regulatory draft**: Non-intrusive scanning technology payments – Maritime Ports

51. **Competition concerns:** Since the non-intrusive use of scanners is considered a public service, under the current law and contracts for exploitation and management of maritime infrastructure, the use of scanners should not be a revenue source for port concessions. In fact, due to the port companies' market power within their respective concessions and their role as scanner service administrators, users may find themselves in disadvantage when receiving incomplete information regarding costs of non-intrusive scanners use, making it very difficult to identify if they are being overcharged for revenues that they are not obliged to pay. This conduct could be eventually deemed as exclusionary.

52. **Recommendations:** The Colombian Competition Authority recommended reducing asymmetric information between port concessionary companies and users in order for them and authorities to be able to identify illegal payments that could limit competition and trade.

### 3.1.2. Ministry of Transport

53. **Proposed regulatory draft:** Vehicle registrations assignment in San Andrés, Providencia and Santa Catalina Islands

54. **Competition concerns:** According to the regulatory draft, the only users that could obtain a vehicle registration plate would be those owners that could effectively disintegrate a vehicle that already completed its time of use. After completing this step, this group of users would be allowed to obtain authorisation for entering a new vehicle to the islands. The advocacy opinion elaborated on how this measure would be potentially discriminatory against users that have not previously owned a vehicle for disintegration. Therefore, new buyers would be excluded from the possibility of buying new cars, which could undermine the proper functioning of the market.

55. **Recommendations:** The Colombian Competition Authority recommended reconsidering the proposed replenishment mechanism and suggested a public auction one or another less restrictive according to competitive markets and for the sake of consumers interested in buying a new vehicle for the first time.

### 3.1.3. Superintendence of Residential Public Services

56. **Proposed regulatory draft:** Open Data within the electrical energy and fuel gas industries

57. **Competition concerns:** Even though the Colombian Competition Authority recognised that open data related to electrical energy and gas providers may have pro-competitive effects, it may also imply some anticompetitive risks, depending on the scope and kind of commercial information made public. In this regard, the Authority analysed the benefits and the potential risks for the electrical energy and fuel gas markets, taking into account the necessary regulatory precautions required in concentrated markets. This in order to prevent cartels, co-ordinated effects or collusion between competitors.

58. **Recommendations:** Consider whether, in a greater presence of “*structural factors*” - so defined in the advisory opinion-, the regulator should identify what kind of information, when made publicly available, could potentially harm competition by facilitating conditions that might favour collusive or co-ordinated results or anticompetitive cartels.

59. In addition, the Colombian Competition Authority recommended identifying which information of the open data system defined as “*commercial*”, should not be published. Additionally, the Colombian Competition Authority recommended excluding from the open data source, information considered as “*business secrecy*” because of its potential for harming competition.

#### 3.1.4. Ministry of Transportation

60. Proposed regulatory draft: *Cargo Vehicles Control*

61. **Competition concerns:** The proposed regulation aimed to set gross weight parameters for two-axle vehicles, by establishing differentiated treatment for vehicles registered prior to the issuance of the regulation and subsequently.

62. **Recommendations:** The Colombian Competition Authority recommended eliminating the differentiation in terms of maximum gross vehicle weight between vehicles registered before and after the expedition of the regulation. It also recommended implementing criteria for all vehicles based on technical regulations issued or technical standards in harmony with the National Quality Subsystem. Finally, the Competition Authority recommended allowing a reasonable term for complying with the regulation in attention of the public interest and it recommended consulting with the Ministry of Commerce if the project was in harmony with the National Quality Subsystem and if it should be notified internationally.

## 4. Resources of competition authorities

### 4.1. Resources overall (current numbers and change over previous year):

63. The following table presents the Annual Budget of the SIC and the SIC’s Competition Division in 2016 and 2017:

**Table 9. SIC’s Funds Available for Allocation: Amounts and Sources 2016 - 2017**

Year	SIC Total Funds		Competition-related budget	
	COP Thousands of millions	USD Million	COP Thousands of millions	USD Million
2016	133.833	46.8 (100%)	25.664	8.9 (19.17%)
2017	155.574	54.5 (100%)	29.675	10.4 (19%)

**Table 10. Competition Law Enforcement Cases by Violation Type and Outcome 2017**

Year	Formal Investigations	Case Types					Total
		Horizontal agreements	Vertical Agreements	Abuse of dominance	Unreported mergers	Other conduct	
2017	Opened	3	0	0	0	7	10
	Dismissed	0	0	0	0	2	2
	Settled	0	0	0	0	0	0
	Orders/sanctions	5	0	0	0	9	14
	Total monetary sanctions imposed	COP 210.980.422.547	0	0	0	COP 29.804.504.517	COP 240.784.927.064
		USD 74.010.300,15				USD 10.455.189,63	USD 84.465.489,78

*Note:* Among “Other conduct” that were sanctioned are the following: one unilateral conduct in public bidding, one administrative unfair competition case, one case related to the collaboration of individuals in an abuse of dominance case, and six sanctions for failures to comply with SIC’s instructions.

#### 4.1.1. Annual Budget (in your currency and USD)

64. The competition related budget is 10.4 million (COP\$ 29.675.692.637). However, the competition investment budget is approximately 3 million (COP \$ 8.813.678.590). The 64% of that investment budget is allocated to recruitment (approximately 1.9 million (COP\$ 5.649.893.927)). This budget is distributed in two main “costs centres”. The first one is the Deputy Superintendence for Competition Protection, which has an own investment budget of US\$ 1.8 million dollars, approximately (COP\$ 5.333.133.927). This budget includes a special budget for the Forensics Laboratory.

65. The second cost centre involves other areas different from the deputy superintendence, which also perform competition activities: the Office of the Superintendent of Industry and Commerce and the Economic Studies Working Group. The investment budget is estimated in US\$ 111.300 dollars (COP\$ 316.760.000), approximately.

#### 4.1.2. Number of employees (person-years)

66. The following charts show the number of employees and contractors who work on competition enforcement at the SIC:

**Table 11. Staff at the authority who worked on competition enforcement - 2017**

Office / Division	2017		
	Contractors	Employees	TOTAL
Deputy Superintendence for Competition Protection	70*	50	120
Superintendent’s Office	5	12	17
Economic Studies Working Group	2	4	6
IT Forensics Lab	12	1	13
<b>TOTAL</b>	<b>89</b>	<b>66</b>	<b>156</b>

*Note:* \*In 2017 the number of contractors increased in 33 compared to 2016. The above is due to the creation of an elite group against public procurement, which received a considerable budget. Such funds were used for: i) Acquiring forensic equipment, ii) Leasing new facilities for the group and iii) Hiring 55 new professionals.

**Table 12. Non-administrative staff who worked on competition enforcement - 2017**

Office / Division	2017		
	Contractors	Employees	TOTAL
Deputy Superintendence for Competition Protection	64	46	110
Superintendent's Office	4	8	12
Economic Studies Working Group	2	4	6
IT Forensics Lab	12	1	13
<b>TOTAL</b>	<b>82</b>	<b>59</b>	<b>141</b>

#### 4.2. Period covered by the above information:

67. January 2017 – December 2017

**Table 13. Roles of non-administrative competition (NAC) staff - 2017**

Staff of the Deputy Superintendence for Competition Protection, Superintendent's Office, Economic Studies Working Group and IT Forensics Laboratory, discriminated by roles		
Role	Contractors	Employees
Economists	11	21
Lawyers	50	34
Others (engineers, business managers, public counters)	21	4
<b>Total</b>	<b>82</b>	<b>59</b>

**Table 14. Roles of non-administrative competition (NAC) staff - 2017**

Dependency	Contractors	Employees
Mergers	0	8
Anti-cartel and dominance-related issues	52	33
Advocacy	3	4
<b>Total</b>	<b>55</b>	<b>45</b>

*Note:* The NAC staff of the Superintendent's Office, the Economic Studies Working Group and the IT Forensics Laboratory is not divided by areas. They work in all of them.

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

68. The Economic Studies Working Group produced the following academic studies in 2017: i) a study about Relationship between Competition and Innovation and ii) a study about Media Competition and Pluralism.