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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Colombia

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Colombia --

1. Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

1.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

1. In Colombia, mergers and acquisitions are defined by law as "business integrations" which includes any act of concentration, merger or consolidation between two or more economic agents engaged in the same productive, distribution, supply or consumer activity. Any integration that exceeds a certain threshold must be notified to the authorities for a prior review.

2. After the Law 1340 of 2009, the "*Superintendencia de Industria y Comercio (hereinafter SIC)*" was established as the single competition authority for prior review of integrations in all sectors, except for mergers in the financial and aeronautical sectors, where SIC must provide a concept about the competition effects of the merger and may suggest remedies or conditions.

3. Since 2006, the SIC established that integrations between firms with combined annual operating revenues or total assets of more than 100.000 legal minimum monthly wages (US \$26 million) have to be notified to the SIC, in order to perform an analysis and decide whether to grant an authorization for the integration in case it does not reach concentration levels that would restrict competition in the markets. However, taking into account that markets are dynamic, the SIC updates such thresholds annually in order to have an objective and current criteria for reviewing business integrations that indeed deserve to be reported according with their impact on the national markets.

4. For that reason, with Resolution 69901 of 2009, the SIC established a new threshold for prior review of integrations during 2010, of f 150.000 legal minimum monthly wages (US \$ 42 million).

1.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

5. In Colombia, cross-border mergers are understood as integration processes in which a foreign undertaking, who operates directly or indirectly (through distributors) in Colombian territory, merges or acquires a Colombian company. It is also considered a cross-border merger when two firms that merge outside the country sell their products in the Colombian market, and have presence in Colombia (through subsidiaries or controlled companies). Therefore, if the SIC requires information from the parties involved in a concentration process, will obtain it from the Colombian controlled or subsidiaries companies, since they are located within the Colombian territory. Thus, no attempts to obtain information from parties

located outside Colombia have been made, because the information has always been obtained from the location in Colombia of the parties.

1.3 To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

6. All SIC's integration decisions are taken based on internal analyses and the decisions are reached independently. However, SIC does study extensively the decisions taken by foreign authorities regarding particular mergers, but views them as doctrinal developments that have no binding power.

7. Recently, regarding the merger between Coltabaco, a cigarette producer company owned by Phillip Morris International and Protabaco, a locally owned cigarette producer, SIC reviewed decisions undertaken by the EC commission regarding mergers of cigarette producers that could be somehow similar to the studied merger, as well as decisions taken by other Latin American authorities. Although the SIC's final decision took into account the different arguments presented in the reviewed decisions, it has also been conscious that the definitions of relevant markets and other consideration vary greatly among contexts. The SIC rejected the merger in the terms it was originally proposed, and after a special petition (allowed by administrative law), determined that the proposed merger could only proceed if very demanding conditions were met.

8. Moreover, private practitioners generally invoke decisions of foreign authorities that support the outcome that best suits the interests of the merging parties. In this sense, it has become a common practice to use comparative competition law as part of the arguments presented during merger and other competition law proceedings.

1.4 Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

9. Political intervention is not possible at any merger control process in Colombia. The SIC is autonomous and bases its decisions only on economic and legal assessments made within the institution.

1.5 Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

10. The SIC has proceeded under the understanding that, although some mergers may produce effects that can be undesirable from different perspectives, its sole concern has been maintaining competition in the relevant markets. Law 1340 of 2009 states in its article 3 that the administrative proceedings it undergoes have to be guided by consumer welfare, efficiency, and maintaining free market participation. These three purposes determine how competition analysis proceeds in merger review, as well as in monopolization, abuse of dominance and other restrictive practices that are considered illegal.

11. In the aforementioned proceeding of the merger between Coltabaco and Protabaco, the SIC studied the likely effects that the merger would have on the tobacco – growing community, since the merging parties were the only buyers of tobacco leaf in the country. This was not done because competition laws orders it to be so explicitly, but because it was realized that the eventual merger would produce undesirable effects in upstream and downstream markets, which also fell under the scope of the analysis. In particular, the study of the market of tobacco leaf was done in order to determine the effects of this merger on the welfare of tobacco growers.

1.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

12. It's been realized of lately that it is necessary to enhance SIC's capacity to deal with cross-border mergers. In this sense, it has become important to take into account the effects on competition of current negotiations of competition chapters in free-trade treaties with different countries and the project to implement a supranational regime within the Andean Community. For those reasons, efforts in this direction should be pursued by, for example developing, bilateral co-operation agreements with other competition authorities.

2. Remedies (types, consultation, monitoring and enforcement)

2.1 Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

13. The SIC, in order to offset any possible harmful effects on competition brought by a merger, conducts an economic analysis and if necessary imposes remedies or conditions (structural and behavioral) that must be fulfilled to authorize the transaction. These conditions may include transfer of assets, maintaining separate business units, providing competitors with open access to logistics and production facilities, terminating customer loyalty schemes, transferring technology, price and cost surveillance, maintenance of separate trademarks, and disclosure of commercial information.

14. There have been many cases in which the SIC has imposed conditions (structural and behavioral) in order to grant an authorization for a merger. For example, very recently, both structural and behavioral conditions took place in the merger between the two major tobacco companies in Colombia, Coltabaco (Philip Morris) and Protabaco. Here, the SIC imposed the condition of selling to a third party one of Protabaco's assets (the brand *Premier*) and behavioral obligations concerning mainly the relationship with the tobacco leaf growers. Other examples include the merger between the companies *Televisa* and *Editora Cinco*, where the parties were obliged to sell to a third party one of their assets, the magazine "*Tu hijo y tu*", and the merger between two of the largest retailers chains (*Exito* and *Cafam*), where likewise, the parties had to sell seven outlets.

15. At this point, it is important to recall some of the merger decisions involving foreign undertakings that had the most significant impact in Colombian economy.

- In 2007, even though it was approved in the rest of the world, the SIC objected the merger between the two Colombian subsidiaries of *Linde AG* and *The Boc Group PLC* (*Aga Fano* and *Cryogas S.A.*), world leaders gas companies which turned into the "*The Linde Group*".
- The SIC objected the sale of the *Fab* detergent owned by Colgate Palmolive to Procter and Gamble (P&G), because P&G owned already the *Ariel* detergent, one of the most powerful on the market, because of the risks it represented regarding unilateral effects
- The SIC approved the acquisition of Bavaria (Colombian company which controlled the beer business in Colombia, Peru, Ecuador and Panama), by the British-South African multinational SabMiller, which agreed to pay \$7.8bn for the whole Bavaria Group.

16. Data about mergers procedures in Colombia is presented in Table 1, which sets out the statistics of business integrations notified to the Superintendencia de Industria y Comercio between 1998 and 2010. It can be seen from this table that between 1998 and 2010 in only 29 cases the SIC imposed conditions in order to grant the authorization.

Business Integrations Notified to the Superintendencia de Industria y Comercio between 1998 and 2010

Decision	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Objected	----	----	----	----	1 ¹	----	3 ²	1 ³	1 ⁴	2 ⁵	----	----	1
Breach of a condition or obligations	----	----	2 ⁶	3 ⁷	9 ⁸	3 ⁹	2 ¹⁰	3 ¹¹	4 ¹²	2 ¹³	2 ¹⁴	----	1
Not objected	132	118	123	93	72	58	89	97	91	64	74	78	78
Jurisdiction of other Colombian authority	----	----	----	1	----	1	----	1	----	---	----	----	----
Filed	----	----	----	----	----	----	----	1	1	----	----	----	----
Not a merger	----	----	1	20	21	----	----	----	8	11	3	----	----
No duty to inform	----	----	----	3	1	----	1	----	----	1	2	----	----
Total number of notified cases	132	118	126	120	104	62	95	103	105	80	81	78	80

Table 1. SIC merger Information since 1998.

2.2 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioral remedies be applied? Please provide examples where appropriate.*

17. As stated before, the SIC can impose structural remedies. Historically, these have been the divestiture of important assets, ranging from brands to production facilities to third parties in order to carry through the proposed merger. The recent decision regarding the merger between Coltabaco and Protabaco is an example of such remedies.

2.3 *Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?*

18. Although the SIC tries not to negotiate its decisions with the merging parties, when imposing structural remedies there has always been certain reluctance regarding the adequate scope of the divested assets. As can be expected, the merging parties dislike these structural remedies because it implies a diminishment of their capital and is viewed as increasing the price of the merger itself. However, in the end, the SIC has prevailed and has been able to ensure that, if the merger is to take place, the divestiture of the assets considered necessary in order to guarantee that competition continues to take place has taken place.

2.4 *What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?*

19. In the event that an integration operation is approved under conditions, the SIC has the obligation to regularly monitor the compliance of such conditions. Any default will give rise to the sanctions provided by the law, including penalties and order to divest. However, no assistance with other countries has taken place.

2.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

20. Until now, there has not been any co-ordination with other national competition authorities on this specific matter.

¹ (i) **ETERNIT – COLOMBIT** (By Decision number 14002 of 2002 the SIC prohibited the merger. It was confirmed by Decision number 28828 of 2002 and by Decision number 34712 of 2003, the SIC revoked and imposed conditions in order to grant the authorization).

² (i) **EXXON MOBIL – CARBOQUÍMICA** (By Decision number 4933 of 2004 the SIC prohibited the merger. (ii) **POSTOBÓN – QUÁKER** (By Decision number 16453 of 2004 the SIC prohibited the merger and by Decision number 27920 of 2004 it was confirmed). (iii) **PROCTER & GAMBLE – COLGATE** (By Decision number 28037 of 2004 the SIC prohibited the merger. It was confirmed by Decision number 29807 of 2004).

³ (i) **COCRETOS DE OCCIDENTE – HOLCIM** (By Decision number 35516 of 2005 the SIC prohibited the merger. It was confirmed by Decision number 14493 of 2006).

⁴ (i) **DUPONT DE COLOMBIA – PLASTILINE S.A.** (By Decision number 923 of 2006 the SIC prohibited the merger. By Decision number 14493 of 2006 it was confirmed).

⁵ (i) **CLOROX COMPANY – COLGATE PALMOLIVE** (By Decision number 24374 of 2007 the SIC prohibited the merger. (ii) **AGA-FANO – FÁBRICA NACIONAL DE OXIGNEO – CRYOGAS** (By Decision number 7805 of 2007 the SIC prohibited the merger and by Decision number 14811 of 2007 it was confirmed).

⁶ (i) **PELDAR – CONALVIDRIOS** (Decision number 99077445 of 2000). (ii) **BAVARIA – LEONA** (Decision number 0038295 0023 of 2000 and Decision number 25583 of 2003).

⁷ (i) **GUINNESS UDV – ATLAS COMERCIAL SEAGRAM** (Decision number 1046179 of 2001). (ii) **IBM- INFORMIX SOFTWARE** (Decision number 1043208 of 2001). (iii) **MÓNOMEROS – CARGILL** (By Decision number 43636 of 2001 the SIC prohibited the merger and by Decision number 13076 of 2002 the SIC revoked and imposed conditions in order to grant the authorization).

⁸ (i) **LADRILLERAS SANTA FE** (Decision number 2009661 of 2002). (ii) **HEWLETT PACKARD – COMPAQ** (Decision number 2015377 of 2002). (iii) **INDUSTRIAS ESTRA – CAJAS PLÁSTICAS** (Decision number 2022479 of 2002); (iv) **QUAKER – PROMASA** (Decision number 2049509 of 2002); (v) **AVIATUR S.A. – VIAJES DELTA** (Decision number 2064738 of 2002); (vi) **AVIATUR S.A. – KOREAN WORLD** (Decision number 2066483 of 2002); (vii) **PINTUCO – INDUSTRIAS PERMAPINT** (By Decision number 02002439-06 of 2002 the SIC imposed conditions in order to grant the authorization and by decision number 17723 of 2002 the SIC changed the conditions). (viii) **NOEL – SUIZO** (By decision number 1110475 of 2002 the SIC imposed conditions in order to grant the authorization and by decision number 19313 of 2002 the SIC changed the conditions). (ix) **ROBIN HOOD S.A - MEALS MERCADEO DE ALIMENTOS DE COLOMBIA S.A** (By decision number 2061593 of 2002 the SIC imposed conditions in order to grant the authorization).

⁹ (i) **COMCEL – OCCEL Y CELCARIBE** (Decision number 2114190 of 2003). (ii) **ETERNIT - COLOMBIA** (By Decision number 7390 of 2003 the SIC prohibited the merger and by Decision number 19110 of 2003 the SIC imposed conditions in order to grant the authorization. (iii) **DSM N.V. – ROCHE VITAMINAS** (By Decision number 22866 of 2003 the SIC imposed conditions in order to grant the authorization and by decision number 25550 of 2003 the SIC changed the conditions).

¹⁰ (i) **AMANCO (PAVCO) - AMERO (RALCO)** (By decision number 4861 of 2004 the SIC imposed conditions in order to grant the authorization and by decision number 5013 of 2004 changed the conditions). (ii) **CARVAJAL S.A - PROPAL S.A.** (By Decision number 25012 of 2004 the SIC imposed conditions in order to grant the authorization).

- 11 **(i) ROBIN HOOD – MEALS** (By decision number 5487 of 2005 the SIC imposed conditions in order to grant the authorization and by decision number 11665 of 23 of 2005 it was conformed). **(ii) VALORES SIMESA Y OTROS** (Decision number 29661 of 2005); y **(iii) TELEVISIA – EDITORA CINCO** (Decision number 33268 of 2005).
- 12 **(i) FENOCO S.A. VS CARBONES OFCARIBE S.A., CONSORCIO MINERO UNIDO S.A., CARBONES DE LOS ANDES S.A., COMPAÑÍA CARBONES OFCESAR S.A., DRUMMOND COAL MINING LLC., C.I. PRODECO S.A. - CARBONES DE THEJAGUA S.A.** (By decision Lumber 6027462 of 2006 the SIC imposed conditions in order to grant the authorization). **(ii) CEMENTOS OFCARIBE S.A., METROCONCRETO S.A., CONCRETOS DE OCCIDENTE S.A., AGRECÓN, LOGITRANS S.A. EMPRESAS INTEGRANTES OFGRUPO ARGOS - CEMENTOS ANDINO S.A. - CONCRECEM S.A.** (By decision number 13544 of 2006 the SIC imposed conditions in order to grant the authorization); **(iii) EXITO – CARULLA** (By decision number 34904 of 2006 the SIC imposed conditions in order to grant the authorization). **(iv) GRUPO GERDAU – ACERIAS PAZ OFRIÓ S.A.** (By decision number 5379 of 2006 the SIC prohibited the merger and by decision number 2489 of 2007 the SIC revoked and imposed conditions in order to grant the authorization).
- 13 **(I) MEXICHEM COLOMBIA S.A. - PAVCO S.A.** (By decision number 21345 of 2007 the SIC prohibited the merger and by decision number 29154 of 2007 the SIC revoked and imposed conditions in order to grant the authorization). **(ii) BAVARIA, LATIN DEVELOPMENT CORPORATION, CERVECERÍA UNIÓN, MALTERÍA TROPICAL, CERVECERÍA LEONA - GASEOSAS POSADA TOBÓN** (By decision number 9192 of 2007 the SIC imposed conditions in order to grant the authorization and by decision number 25489 of 2007 the SIC changed the conditions).
- 14 **(I) INDUSTRIAS ARFEL S.A. - ALUMINIO REYNOLDS SANTO DOMINGO S.A.** (By decision number 5886 of 2008 the SIC prohibited the merger and By decision number 19729 of 2008 the SIC revoked and imposed conditions in order to grant the authorization). **(II) MEXICHEM - PRODESAL** (By decision number 23541 of 2008 the SIC prohibited the merger and by decision number 34452 of 2008 the SIC revoked and imposed conditions in order to grant the authorization).
- 15 **(I) COLTABACO – PROTABACO** (By decision number 29937 of 2010 the SIC prohibited the merger and by decision number 54253 of 2010 imposed conditions in order to grant the authorization).
- 16 **(I) CAFAM – ÉXITO** (By decision number 38171 of 2010 the SIC imposed conditions in order to grant the authorization).