

Unclassified

DAF/COMP/GF/WD(2011)39



Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

15-Feb-2011

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2011)39  
Unclassified

## Global Forum on Competition

### CRISIS CARTELS

#### Contribution from Colombia

-- Session III --

*This contribution is submitted by Colombia under session III of the Global Forum on Competition to be held on 17 and 18 February 2011.*

JT03296466

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## SUGAR MARKET AND AGRICULTURAL CARTEL INVESTIGATIONS IN COLOMBIA

-- Colombia --

### 1. Colombian Competition Law Framework

1. Competition Law was implemented in Colombia with the issuance of Law 155 of 1959, which set the first legal basis for conducts referring to restrictive business practices, as well as a system of prior review of mergers and acquisitions.

2. In 1991, the issuance of the Political Constitution established competition as a constitutional right by determining private initiative, economic activity and competition liberties as collective rights. In fact, article 333 states the principles of free enterprise, free competition and economic freedom as residing at the top right of all citizens and subject to the limits established by law:

*“Article 333. Economic activity and private initiative are free, within the limits of the common good. No one has the right to demand prior authorization or requirements to exercise them, without the authorization of the law.*

*Free competition is the right of all who assume its responsibilities.*

*Business, as a basis for development, has a social function that implies obligations. The State will strengthen those organizations in solidarity with business, and will stimulate business development.*

*The State, under mandate of the law, will prevent the obstruction or restriction of economic liberty and will prevent or control any form of abuse that persons or businesses make of their dominant market position.*

*The law will restrict the scope of economic freedom when the Nation’s social interest, state of affairs, and cultural patrimony demands it.”*

3. Subsequent to the Constitution, a specific competition protection Decree was issued by the Colombian Government (Decree 2153 of 1992), which established a structured antitrust system and reorganized the competition authority, the Superintendence of Industry and Commerce (SIC)<sup>1</sup>, by giving it broad powers to investigate anticompetitive behaviors at its own initiative or at the request of third parties, to impose fines and to oblige firms to notify mergers and acquisitions.

4. The Decree 2153 elaborated on the types of conduct subject to the competition law and refined the legal standards that applied to that conduct featuring a list of punishable acts, including Acts, Agreements and Abuse of Dominant Position.

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<sup>1</sup>. The SIC is part of the executive branch of the Colombian State, under the supervision of the Ministry of Commerce, Industry and Tourism but with administrative, financial and budgetary autonomy

5. In 2009, Law 1340 was promulgated as the national competition law, making significant amendments to the competition regime on substantial and procedural topics, and having as principal effect the concession of the Superintendence of Industry and Trade as the sole authority to enforce competition rules.

6. SIC's proceedings start based on information that comes to its knowledge, through a third party complain, or when receives a reference from another authority. Then, the information is analyzed in order to determine if the case will be closed or if there is sufficient merit to advance to a preliminary inquiry. From the outcome of the preliminary inquiry its determined the necessity to initiate a formal investigation which will be personally notified to the investigated who will then have the right to request or provide proof means for the case.

7. After the proof stage, the Deputy Superintendent for antitrust presents the results of the investigation to the Superintendent of Industry and Commerce, who issues the resolution that decides the final outcome of the proceeding. Against this decision, the parties may present an appeal for reconsideration that the Superintendent decides. The SIC's decision may be challenged before the courts by filing a request for the annulment of the administrative act before a first instance administrative court, the Administrative Tribunal (AT). Furthermore, the parties may appeal the AT's decision before a second instance court, the State Council.

## **2. Competition Law Goals**

8. After the Constitution of 1991, the goals of competition legislation are explicitly spelled out as a constitutional norm: The protection of free economic competition, which has been enshrined as a collective right (article 333), in fact, the cited article mandates that the State must "*impede the obstruction and restriction of economic liberty and prevent or control any abuse by persons or firms of their dominant position in the national market.*"

9. It follows that Colombian Competition Law will ensure the achievement of a state of real, free and undistorted competition, which will allow entrepreneurs to earn profits while generating benefits for the consumer with goods and services of better quality, greater guarantees, and a real and fair prices.

10. Moreover, the Decree 2153 of 1992 (amended by Law 1340) orders that the SIC must proceed against deeds that are significant to attain the following goals: i) free participation of firms in the market, ii) consumers' welfare, and iii) economic efficiency.

## **3. Exceptions**

11. Articles 2 and 4 of the law 1340 of 2009 establish that competition laws are applicable to every person that develops an economic activity or that may affect its performance (independent of its juridical nature) and to every sector and economic activity, without prejudice of sector-specific regulation.

12. However, the Colombian competition regime exempts specific conducts from the application of competition law and are not considered anticompetitive:

- Cooperation for research and development of new technology;
- Agreements on norms, standards and non-binding measures that don't limit market entry for competitors;
- Procedures, methods, systems and utilization forms of common facilities;
- Efficiency justifications in mergers cases.

13. Furthermore, exceptions which are aimed specifically for the agricultural sector are included in the Colombian competition legislation. Certainly, article 31 of Law 1340 of 2009 explicitly mandates that specific forms of State intervention aren't covered by the scope of the competition regime: i) price stabilization funds; ii) parafiscal funds for the promotion of agriculture; iii) the establishment of minimum guaranteed prices; iv) the regulation of internal agricultural and livestock markets; v) the "value-chain" agreements; vi) the safe guards regime; and vii) in general all the intervention mechanisms established by the law 101 of 1993 (General Law of Agricultural, Livestock and Fishery Development) and by the law 81 of 1981 (e.g. price control).

14. Thus, article 32 of law 1340 of 2009 mandates that the State may intervene under the occurrence of external situations or due to situations alien to the national producers that "affect or distort the competition conditions in the national product markets."

#### **4. Competition in Agricultural Markets**

15. In the period 2000-2010 the SIC adjudicated or settled ten antitrust conduct cases that took place in agricultural markets, which amounted to 7,5% of the overall antitrust conduct cases.

16. Seven of the studied cases involved investigations on collusive agreements while the remaining three were abuse of dominance cases. Only three cases involved investigations on producers' behavior while the remaining consisted on investigation on upstream economic agents (processors and retailers).

17. Despite the fact that Colombia presents explicit and informal agricultural exceptions from antitrust law the competition authority has been very active in this sector.

##### **4.1 Agricultural Cartels in Colombia**

###### *4.1.1 Green Onion Cartel: Price Fixing in the Supply Price of Green Onion*

18. Farmers sought to control the over-supply of the product and thus make the market purchase price go up.

19. All participants in the cartel were clear that the supply reduction would lead to increased prices, therefore, there was a logical correspondence between the type of action taken by the farmers and the objective. That is sufficient to describe the agreement as anticompetitive.

20. SIC considered that when a group of people meets to agree to reduce supply and thus alter the market outcome in their favor, they are breaching competition rules.

###### *4.1.2 Milk Cartel: Price fixing Agreements in the Pasteurized Milk Market*

21. In January 1997, the president of the Association of Independent Milk Processors gave a press declaration stating that starting that day (January 25<sup>th</sup>) the price of the one liter milk bag would be COLP\$600 in the Bogota market.

22. In view that by February of the same year, a set of 11 milk processor and distributors had indeed fixed a sale price of COLP\$600, the SIC decided to open an investigation for price fixing against these processors and plant owners.

23. The SIC established that there was price fixing behavior on the part of at least two processing plants. It ordered them to cease the price fixing and fined the firms.

*4.1.3 Rice Cartel: Price fixing agreements in the rice sector*

24. In 2000 two rice producers associations complained to the SIC of price fixing by five rice milling companies in their purchasing.

25. The SIC concluded that the purchase price by the millers was similar across a 591 days period and that occasional price variations were graduated in such a way that average prices were identical between millers. The millers offered guarantees.

26. In 2004 a complaint signed by about 1,000 farmers alleging an agreement of the purchase price of paddy rice by the mills; a new investigation was opened and the five companies were charged with fines of about USD 1,3 million.

*4.1.4 Cocoa Cartel: Price-fixing in the purchase of cocoa*

27. Against two producers of chocolate products.

28. Price-fixing in the purchase of cocoa and the sale of finished chocolate and cocoa products.

29. Combined market share in the purchase of cocoa, 86,7 % (54,8% and 31,9% respectively).

30. The SIC concluded that the price parallelism had no explanation, taking into account that the purchase price was not affected by seasons and that volume of cocoa purchased by the firms was significantly different

**5. Sugar Cane Cartel**

**5.1 Sugar Market in Colombia**

31. The Colombian sugar industry plays an important role in the world market. According to data from the International Sugar Organization (OIA), the 2.28 million tons of sugar production of 2007 ranked Colombia as the thirteenth producer, and with an export of 716 thousand tons the country was ranked on the tenth position of the list of main exporters of this product in the world.

32. The sugar cane production is concentrated mainly in the Valle del Cauca region. This region encloses 26 towns of sugarcane growers, whose urban and rural areas account for 48% of the total area of the region. In Colombia there are thirteen mills (Ingenios) which purchase the product in the Valle del Cauca region.

33. The main product of the cane agro-industry is the sugar, which along with other products of the production process, such as honey, bagasse, and molasses are used as inputs for various industries, including food and beverages for humans, animal feed, fertilizers, energy, paper, chemistry, biofuels, among others.

34. The sugar cane transformation process is carried out by the sugar mills, which have integrated their traditional industrial activity of producing sugar, to the ethanol production. (There are 13 main sugar mills in Colombia)

## **5.2 *Anticompetitive Agreement Investigation against 13 Sugar Mills***

### **5.2.1 *Agreement on the purchase price of the sugar cane***

35. Investigation opening due to the similarity on sugar cane purchase contracts and the fact that the mills had agreed on a fixed amount of 58 kilos per ton of sugar or on a variable amount depending on the cane yield.

36. Proven Facts:

- No technical support that explains an average yield of 116 kg of sugar per ton of cane.
- The yield of sugarcane has a growing trend.
- There is no economically reasonable explanation for the mills not offering more than 50% to the supplier (distribution "50-50")
- If the (50-50) distribution between mills and suppliers is maintained, the "fixed amount of reference" should vary according with the variation of the cane yield.
- The databases of suppliers were analyzed, finding that the reference values of 58 kg or 50% yield (on sale) and 25 kg (participation) operate as maximum levels.
- Admitting that 25 kg of sugar per ton of cane is a reference value would mean to assume that the costs of "adjustment, preparation, planting and cultivation, as well as infrastructure investments are identical for each of the mills.
- It was found an "Agreement Act" of November 5/1992 that established:
- In sales contracts, participation cap of 50% of yield and, in case of paying a fixed amount, a cap of 58 kg / t cane.
- A cap of 25kg/t in contracts for accounts in participation. It also established guidelines as the term of the contracts and the participation in the costs of adaptation works of the property.
- Evidence of interaction between competitors (meetings).

### **5.2.2 *Agreement on the purchase price of the sugar cane intended for alcohol fuel production.***

37. Investigation opening because it was found that the contracts used by the mills contained clauses indicating a distribution of sources of supply (terms between 5 and 10 years, penalty clauses and exclusive sale clauses).

38. Proven Facts:

- The proposals made by the alcohol mills seem to be the result of meetings between representatives of the mills.
- It is unlikely that all the mills have arrived from the manufacturer's information of the distilleries (75 lt / t) to the same three or two modes of settlement of the cane intended to alcohol.

- There is evidence of exchange of sensitive information between competitors, including production costs of each of the mills.

### **5.3 *Agreement to share sugar cane sources of supply.***

39. Investigation opening because it was found that the contracts used by the mills contained clauses indicating a distribution of sources of supply (terms between 5 and 10 years, penalty clauses and exclusive sale clauses), and that it was required from the provider a letter certifying the termination of his previous contract.

40. Proven Facts:

- Many communications between CEOs and managers of sugar supply show how they avoid competition through the exchange of information on negotiations with their suppliers.
- In a competitive market the mills would be willing to improve the offers per ton of cane if this is at a shorter distance from the mill.
- Cane exchanges motivated by distance allow the mills to limit competition for nearby properties, reduce transportation costs incurred when harvesting distant canes and agree with the suppliers of a distant land, lower prices justified on higher costs that ultimately are avoided.

## **6. Emerging Economies Competition Policy in Times of Crisis**

- Competition may be breached by direct specific State intervention.
- May favor certain undertakings or the production of certain goods (selectivity).
- Advantage it would not have obtained under normal market conditions.