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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Colombia

-- Session III --

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-- Colombia --

1. Formal location of SIC in the Colombian administration

1. The Superintendence of Industry and Commerce (*Superintendencia de Industria y Comercio*) - SIC is the Colombian Competition Authority. It is an administrative entity which makes part of the executive branch. It is a technical entity with administrative autonomy, with its own legal personality and administrative, financial and budgetary independence (Decree 2153/1992 and Law 1157/2007). Although the SIC is formally attached to the Ministry of Commerce, Industry and Tourism, in practice, it has *de facto* independence.

2. Autonomy of the Entity

2. The SIC is not under any supervision of the Ministry of Commerce, Industry and Tourism or the government. Neither the Ministry nor the government instructs the SIC or gets involved with its functioning. The functions of SIC regarding Competition¹ (substantially and procedurally) are set by the legislator, this is, the Congress of the Republic.

3. The SIC is organised into six principal Divisions, each headed by a Deputy Superintendent². This internal organization is set by Decrees issued by the President of Colombia, which makes difficult its modification. The Competition Protection Division, in charge of the Deputy Superintendent for Competition, is organised into five groups: (1) Competition Protection, (2) Restrictive Practices, (3) Bid Rigging, (4) Mergers and (5) Competition Advocacy. Different from the general structure of the SIC, these groups can be modified by the Deputy Superintendent without interference of the government or any other entity.

4. According to Decree 1817/2015, the term of the Superintendent of Industry and Commerce is equivalent to the term of Colombia's President (which represents a fix term of four years). The Deputy Superintendent for Competition, on the other hand, is appointed and can be removed at any time by the Superintendent. A significant part of the employees of the SIC are public servants, so they only can be removed for reasons set in Law.

5. The Superintendent, the Deputy Superintendent and the employees of the SIC are subject to the general regime of conflict of interests. Therefore, when such conflicts arise, in the exercise of their functions, they must declare it, in order to avoid subjective decisions and separate themselves of the case. Also, they may be removed from a particular case by the request of investigated or third parties, when the conflict has not been disclosed.

¹ The SIC investigates and sanctions violations of Competition Law (cartels, abuses of dominant position and bid rigging), approves or objects petitions of mergers and acquisitions, advises government on competition policy and issues opinions on government regulations projects (advocacy).

² The Divisions are (1) Competition Protection, (2) Consumer Protection, (3) Personal Data Protection, (4) Intellectual Property, (5) Technical Regulation and Metrology, and (6) Judicial Affairs.

6. The SIC is autonomous to decide which cases should or should not investigate. This decision is made based, principally, on the criteria established in the Colombian competition regime (market efficiency, competition protection and consumer wellbeing).

7. Finally, it needs to be mentioned that the SIC also has budgetary autonomy. So, the SIC plans and proposes its own budget, which is studied by the Government and incorporated afterwards in the National General Budget.

3. Accountability and Transparency

8. The Colombian competition regime also considers measures to make the competition authority accountable before market agents and the domestic public opinion.

9. The SIC must present an annual report before both the government and the Colombian Congress. Besides, every SIC decision can be judicially reviewed. All public servants in the SIC, including the Superintendent and the Deputies Superintendents, can be subject of disciplinary control by an autonomous state entity – the Public Ministry. Also, the SIC can be subject of budgetary control by the autonomous entity in charge of verifying that public resources are used according to law – the Comptroller General of the Republic (*Contraloría General de la República*). Finally, decision-makers in the SIC are individually accountable. Therefore, when a judge declares that a decision caused damages on a market agent and the decision-maker acted intentionally to produce that effect or acted negligently, the public servant who took the illegal decision is obliged to participate on the payment of the legal compensation.

10. In order to make the competition authority transparent, the SIC informs to the public opinion about its decisions through both the authority's web page and general and specialized media (newspapers, radio, television and social networks). In addition, SIC participates in several international organizations regarding Competition Law, where it reports its activities and accomplishments in protecting and promoting competition in the Colombian market. The SIC has also published guidelines for market agents to make explicit its procedures and interpretations of Colombian competition law: *Trade Association Guidelines, Collaboration Agreements Guidelines, Bid rigging in public procurements Guidelines, Beginners Guidelines and Mergers Guidelines*.

11. As a final measure of transparency, the Colombian legal regime has established the participation of an Advisory Council on competition decisions taken by SIC. Members of the council are civil society members, such as professors or highly reputed economists and lawyers, and are pointed by the President. The Superintendent must hear the Advisory Council's opinion before imposing a monetary sanction. The advice of the Council is not mandatory for the Superintendent, yet none sanctionatory decision of the Superintendent has been opposed to the council advice so far.

4. Specific cases that demonstrate the independence of SIC

4.1 Competition advocacy

12. The SIC has produced several concepts on regulatory projects presented by both government and autonomous regulatory agencies. The concept is not mandatory, but most of the times agencies adopt SIC's recommendations in their regulations, even though the concept could be opposed to the government policies. If the agency does not accept the recommendations, the agency has to improve the argumentative framework of it and explicitly explain the reasons why it refuses to adopt the concept emitted by SIC.

13. So far, between 2014 and 2016, the SIC has issued 147 advocacy opinions. From those 147 opinions, 58 of them included recommendations to modify the regulatory drafts submitted. Regulatory agencies have adopted SIC's recommendations in 21 times and have rejected them in 19 times. As to the other 18 regulatory drafts, they have not yet been issued.

4.2 Public companies subject to SIC proceedings, regarding competition protection

- ECOPETROL

14. By means of the Resolution No. 53015 of 2016, the SIC initiated a formal investigation against ECOPETROL, MINERS ASSOCIATION OF GUAMAL, ACACIAS AND CASTILLA LA NUEVA – ASOMGUACA-, its members, and other producer companies of construction materials in Acacias, Castilla la Nueva and Guamal.

15. ECOPETROL, the Colombian petroleum company, apparently promoted an anticompetitive agreements by which the miners fixed the prices of the construction materials³ and allocated sales quotas of such material in the country⁴. ASOMGUACA was involved because, possible, facilitates the logistic operation and the control of the anticompetitive agreements. Also, the SIC found that ASOMGUACA allegedly influenced its members (even other companies that were not part of the association) to maintain the agreed prices.

16. The miners - producers of the construction materials in the mentioned communities - were involved because they apparently fixed prices and established an outline to allocate sales quotas of the construction materials. In this case, the miners agreed that the supply of the material to the ECOPETROL contractors would be made in 60% by the members of ASOMGUACA and 40% by other two companies (not members of the association) involved with the alleged cartel.

17. The investigation is still going.

- ISAGEN

18. In 2014 there were filed three major transactions in the SIC, related with the bid to acquire the shareholding interests of ISAGEN, a Colombian Government company. ISAGEN participates in energy generation and commercialization markets in Colombia. Initially, the three companies interested in the acquisition of ISAGEN were ARGOS, EEB and EPM. In the three cases, the SIC found possible effects that could affect competition with the perfection of the transaction and in that regard proposed structural and behavioral remedies in order to approve the acquisition. None of these three companies acquired ISAGEN.

19. Finally in 2015, after finishing its economic study, the SIC approved the acquisition of ISAGEN by a different company, BROOKFIELD ASSET MANAGEMENT BARBADOS INC, because it did not find possible restrictions to competition or an increase of prices of the electric energy for Colombian consumers.

³ (numeral 1, article 47 of Decree 2153, 1992).

⁴ (numeral 4, article 47 of Decree 2153, 1992).

5. Main existing challenges for the Independence of the competition authority

20. Despite the great advances on the legal framework for the independence of the SIC, there is still one challenge remaining. In the “*Colombia - Peer Review of Competition and Policy*” (OECD, 2009) were identified two main challenges regarding the independence of the competition authority: a) the fact that the President appoints the Superintendent, and; b) the fact that the Deputy Superintendent for the Protection of Competition is also appointed and removable at will by the Superintendent.

21. As explained in this document, the first challenge identified has been successfully overcome, thanks to the enactment of the Decree 1817/2015 (which established a fixed term for the Superintendent, equivalent to the tenure of the President). However, the second one still remains without solution. Improving the organizational independence of the Deputy Superintendent for Competition would require a similar regulation to that of the procedure of appointment of the Superintendent.