

**Unclassified****English - Or. English****20 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Global Forum on Competition****MERGER CONTROL IN DYNAMIC MARKETS – Contribution from  
Colombia****- Session III -****6 December 2019**

This contribution is submitted by Colombia under Session III of the Global Forum on Competition to be held on 5-6 December 2019.

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**JT03454951**

## *Merger Control in Dynamic Markets*

### *Merger control in dynamic context: Some relevant approaches of the Colombian Competition Authority*

#### **- Contribution from Colombia\* -**

#### **Introduction**

1. A large part of the challenges currently faced by competition authorities is the evaluation of the competitive dynamics present in the market in the short and long run. Usually the economic analysis carried out in a merger review begins by analyzing the changes in the static efficiency of the markets. This would not be ideal in scenarios where market structures change very fast by Schumpeterian processes of "creative destruction"<sup>1</sup>. If these structural changes are unforeseen, then the accuracy prediction of competition authorities is limited. This means that competition authorities must design screening mechanisms to obtain ex ante information on market dynamics. In this way, for the prospective evaluation of mergers, the authority must capture enough information to make quantitative and qualitative judgments that allow it to: (i) define and characterize the relevant markets and (ii) incorporate the evaluation of dynamic efficiencies.

2. In this regard, the SIC presents a summary of some mergers in which it has tackled this challenge. First, in relation to digital identity markets and financial markets. Second, in the media content industry. Third, in the retail market. Finally, relative to digital platforms and tourist services.

#### **1. Digital identity and financial market<sup>2</sup>**

3. During 2019, three of the most important banks in the Colombian financial system filled to the Financial Superintendence of Colombia (hereinafter "SFC")<sup>3</sup> the intention of settle a Joint Venture for a new company whose main economic activity would be carried out in the platform market for digital identity. In this context, the SFC requested advice of the SIC to evaluate the potential effects of this operation.

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\* This contribution was prepared by the Superintendence of Industry and Commerce.

<sup>1</sup> Schumpeter (1943).

<sup>2</sup> SIC (2019a).

<sup>3</sup> In Colombia, the entity responsible for the control and surveillance of financial markets is the SFC, including the evaluation and, if necessary, conditioning the improvement of business integrations between companies whose economic activity is developed in this sector. For more information, see Law 1340 of 2009 article 9 number 2.

4. In Colombia, no had been initiative for the consolidation of platforms for digital identity. Furthermore, it is the first time that a merge had the potential to affects the storage, use and exploitation of people's private data. For this reason, the SIC, who is also the authority for the personal data protection<sup>4</sup>, developed an advice for the SFC that articulated the enforcement objectives from competition and personal data regimes. The common issue for this coordination is the notion of digital identity, understood as “the set of attributes that links a personal entity with its online interactions”.<sup>5</sup> Therefore, the storage of personal data is an “intangible asset” that become a source of market power.

5. So, the evaluation process carried out jointly between these authorities, it focused on maximizes the benefits of the development of this technological innovation in terms of financial inclusion, reduction of transaction costs, fight against fraud and economic efficiency. Nevertheless get this benefit don't forget the enforcement of competition and personal data policies. For this, the SIC in its advice evaluated the potential impact over the financial services market and on the digital platform market for digital identity of this Joint Venture. The foregoing, with the objective of considering the vertical and horizontal implications that operation on the market.

6. Regarding to the financial services market, the SIC determined that, although the development of the operation would not directly modify the structure of the financial services market. The vertical stakeholder's control on Joint Venture would be a source of power market. This would affect the dynamic downstream competition. For the other hand, there are positive network externalities that affect the market for digital identity platforms. In general, the number of users in one side of the platform will have direct impact on the number of user in another side, then the volume of transactions between sides will increase and the total market welfare will be higher. This situation have the potential of concentrate the new market of platforms for digital identity. Such the incumbent that concentrate most users will always have a competitive advantage over the entrants. This constitute a potential market entry barrier.

7. Once evaluated the implications of the merge, the SIC advised the SFC approve it under the following conditions: (i) companies must guarantee the independence of the new company vis-à-vis the participating banks of the Joint Venture, (ii) companies must be obliged to give equal and non-discriminatory treatment to customers and users of the new platform, (iii) it must be ensured that the information of the users of the platform is stored, processed and exploited properly and is protected, (iv) automatic migration of customer information from banks must be prohibited without prior authorization from its customers and (v) allow the interoperability of the information for new competitors in the market of platforms for digital identity without implying the generation of additional costs.

8. These conditions are aimed of mitigate any distortion that the operation of the Joint Venture would generate in the future on free competition in the financial services markets and platforms for digital identity. As well as the protection of the personal data of citizens, ensuring that storage and exploitation use is in line with the innovation process in the market.

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<sup>4</sup> These two authorities are part of the same entity, the Superintendence of Industry and Commerce.

<sup>5</sup> Segovia y Martín (2018)

## 2. Media content industry<sup>6</sup>

9. In 2018, the Colombian Competition Authority authorized the merge operation between THE WALT DISNEY COMPANY COLOMBIA S.A. and FOX CHANNELS COLOMBIA LTDA. This operation was an agreement through THE WALT DISNEY COMPANY (matrix of DISNEY COLOMBIA) acquired TWENTY-FIRST CENTURY FOX, INC (matrix of FOX COLOMBIA). This merge include film and television studios, networks of cable entertainment and international television companies. The SIC identified that these companies participated jointly in the media content industry in Colombia.

10. To evaluate the merge operation effects, the SIC defined the following eight markets: (i) the market for the production and supply of films for theaters; (ii) the market for the production and supply of television content; (iii) the wholesale market for the operation and supply of television channels; (iv) the advertising space supply market; (v) the consumer products market; (vi) the market for books and magazines; (vii) the music rights licensing market; and (viii) the licensing market for video game developers.

11. The analysis of the market share and the definition of the relevant market constituted the main challenges. Particularly, the review of wholesale market for television channels disclose that the projected operation would generate competitive pressures on traditional television channels from the “Over The Top –OTT” platforms. This because the measure of share market is relate to the rating and for the OTT platforms this variable is not available. However, it was considered that advances in streaming technologies, which are provided at affordable prices, have allowed video subscription services on demand (Netflix, Amazon, YouTube, Twitter, Claro Video, Movistar Play and others) that compete more efficiently that traditional television services.

12. Regarding the sports content channels, the SIC found that the competitive pressures generated by OTT operators in the market have change the traditional way in which this type of content is sold. The new economic agents actively compete in the acquisition of broadcasting rights for sporting events, especially Facebook (with broadcasting rights of the UEFA Champions League and Cup Libertadores), IMG (with broadcasting rights of Serie A - Italian league) and Amazon (with Premier League streaming rights and NFL games). Also, sports leagues are starting to launch their own streaming services, to deliver it directly to final consumers, for example, the NBA, MBL, ATP and the Olympic games. On the other hand, digital platforms and other technologies are changing the dynamics of the wholesale market for television channels, for example, the SIC noted that by 2019 - 2022, Facebook acquired about 20% of the distribution rights to transmit by open signal, once a week, the Cup Libertadores matches. As well as, the rights for the transmission of 32 matches that will be broadcast live and free for each season. So, these platforms are starting to generate new competition dynamics.

13. The SIC incorporated these characteristics for the definition of the relevant markets and found that, in most markets related with the operation, markets shares would not be substantially affected after the merge. However, with respect to the film’s production and supply market, the merge would modify the market structure. In such a way that after the operation the incumbents would have the greatest participation in that market. However, the intrinsic conditions of this market lead to the geographical area of effective competition

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<sup>6</sup> SIC (2018a).

exceeding the national framework. Thus, there would be potential competitors in a market without effective market entry barriers.

### 3. New competitive pressures in the retail market: hard discount stores in Colombia<sup>7</sup>

14. The introduction of hard discount stores in Colombia generated considerable changes in the retail markets for massive consumer goods, especially in the modern trade channel (i.e. supermarkets, and chain stores). The changes in the market access conditions and development in marketing turn to diminishing costs and differentiated conditions of competition. Thus, for example, the SIC until 2014<sup>8</sup> considered that the stores that had areas of less than 400 m<sup>2</sup> were not part of the product market since it considered that they met different needs of consumers. However, compete in hard discount market don't have this spatial restraint. Formerly, the firms invest on shops that exerted a centripetal force to which consumers converged. Now, the firms compete in a model of atomized shops in densely populated areas. New participants in the retail market splitted the modern sales channel<sup>9</sup>. However, the fast-organizational dynamics on the market led to a convergence that broke the traditional structures of the large stores in the modern retail channel.

15. For 2018, the SIC tackled these conditions in the analysis of a merge operation filled by JERÓNIMO MARTINS COLOMBIA S.A.S. and TIA S.A.<sup>10</sup>. The operation was the acquisition of a shop of TIA S.A. by JERÓNIMO MARTINS COLOMBIA S.A.S.. The latter firm is an important incumbent in the market of hard discount stores in Colombia. This is especially relevant because TIA S.A. was an important participant in the modern retail channel in Colombia. For the analysis of the operation, the SIC identified the geographic area of effective competition and assessed the static effects on market share quotas. This as approach for measure the potentials restraint on competition. Such, the SIC avoid the shop's length as an issue for geographic market delimitation. Thus, the SIC recognized that markets are not ruled by usual conditions and unexpected sources of structural changes are relevant for define the effective competition space.

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<sup>7</sup> SIC (2018b).

<sup>8</sup> Resolution No. 34904 de 2006 (Éxito-Carulla), 38171 de 2010 (Éxito – Cafam) y 54416 de 2014 (Éxito – Súper Inter).

<sup>9</sup> This was related to factors such as diversity in the acceptance of means of payment and a lower supply of brands of consumer products.

<sup>10</sup> File identified with No. 18-000052

#### 4. Digital platforms, dominant paradigm in the tourism services industry<sup>11 12</sup>

16. In 2018, for one side AVIANCA, an important incumbent in the Colombian aeronautical transport industry, and for other side PRICE RES, owner of the fifth air ticket sales platform in the country<sup>13</sup>. Filled at the SIC a merge for a Joint Venture for a new company. The new company would use the PRICE RES technology and the AVIANCATOURS brand of AVIANCA to operate a platform that pairing consumers and suppliers of tourist services (i.e. hotels, plane tickets, trips, etc.).

17. For the analysis of this operation, the SIC determined that the stakeholders of new company compete in several related services<sup>14</sup>. However, it established that the coincident economic activities of the participants could be frame in two relevant markets, namely: (i) the intermediation market in the marketing and reservation of packages and tourist services, and (ii) the provision of technological solutions for the reservation of packages and tourist services. The above, for the entire national territory. The intermediation platforms market shares were calculate using the sum of the incomes received from their different services.

18. Once the operation were evaluate, the SIC authorized subject to fulfillment some settlement for mitigate potentials verticals restrains<sup>15</sup>. First, the new company will not sell individual air tickets directly or through its subordinates, national or international. Second, AVIANCA's national and international tickets would have to be offered under equal conditions to potential competitors of the new company. This settlement would prevent the market foreclosure.

19. In same context, SIC at 2019 had to evaluate a merge operation between DECOLAR.COM INC. and TRAVEL AGENCY AND TOURISM FALABELLA –Travel Falabella–<sup>16</sup>. The operation was the acquisition of all ownership rights of VIAJES FALABELLA by DECOLAR.COM INC.

20. DESPEGAR GROUP is the holding of DECOLAR.COM INC. The holding owns a platform that's an important incumbent in the market of intermediation of travel related products and services through the online channel in Latin America. The Holding has two recognized brands that are: (i) Despegar and (ii) Decolar. In Colombian, DECOLAR.COM INC compete in two markets: (i) Intermediation in the marketing and reservation of packages and tourist services, air tickets (National and International) and (ii) technological solutions for the reservation of packages and tourist services, air tickets (National and international).

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<sup>11</sup> SIC (2018c).

<sup>12</sup> SIC (2019b)

<sup>13</sup> It operates mainly under the domain of ([www.tiquetesbaratos.com](http://www.tiquetesbaratos.com)).

<sup>14</sup>These services would be: Passenger air transport (National and International); provision of technological solutions for booking tourist services; marketing and reservation of air tickets (National and International), packages and other tourist services.

<sup>15</sup> Resolution No. 60515 of 2018.

<sup>16</sup> File identified with No. 19-9346.

21. VIAJES FALABELLA match in the market of Intermediation in the marketing and reservation of packages and tourist services, air tickets (National and International). This company was part of the FALABELLA GROUP an important holding that participates in the financial, insurance, retail markets in the modern sales channel, among others.

22. Therefore, the projected operation had the potential to generate horizontal and vertical effects in the affected markets. The SIC delimited the relevant markets by applying the traditional analysis to assess the horizontal static effects using market shares quotas. This as approach for measure the potentials restrain on competition. This according from the structural conditions - high atomization in the offer - prevailing in the intermediation markets in the commercialization and reservation of packages and tourist services, air tickets (National and international).

23. On the side of the potential vertical restrictions related to the market of technological solutions for the reservation of packages and tourist services, air tickets (National and international) the SIC did not consider that DESPEGAR had market power or dominance position that allowed it to manipulate the competition conditions.

## 5. Conclusions

24. Having made this brief tour over some of the relevant mergers cases evaluated by the SIC, important challenges were identified in the study of markets where the speed of change matters. In that sense: First, the market definition can't be static and it's dynamic depend on unexpected conditions. Thus, the competition authorities should evaluate constantly the framework for relevant market definition. Second, the length of the settlements has changed according the dynamics of the markets. For example, the average length of time framework of the settlements in the cases exposed was three (3) years. Third, the SIC approaches show that the antitrust toolkits must be adapted to the new context of markets evaluation. Fourth, the merger analysis can't restrain the technical progress. At last, the competition authorities must design mechanism for acquire ex-ante information; screening technical would be a usual tool. For example, activities for enforcement developed by SIC through economics screening studies to detect and prevent competition restraints.

25. To highlight the relevance of technological innovation as a key factor for the development of the market and the competitive dynamics of the country. In such a way that, finding the balance between competition and technological development and innovation becomes critical for the evaluation of mergers, where free competition must be the engine of the technological development of markets and the actions of competition authorities must ensure the strengthening of efficiency and welfare in the markets.

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