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Latin American and Caribbean Competition Forum

Session III: Ex officio Investigations

- Contribution from the Andean Community -

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The attached document from the Andean Community is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 9-10 October 2024 in Santo Domingo, Dominican Republic.

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Session III: Ex officio investigations

- Contribution of the Andean Community¹-

1. Over the past 55 years, the Andean Community, made up of Bolivia, Colombia, Ecuador and Peru, has become one of the most important regional integration processes in Latin America and the most longstanding. Its most important feature is its supranationality, rooted in the strong institutional framework provided by its various internal bodies. These bodies enable the countries to agree on and peacefully pursue their interests, while maintaining a sustainable legacy that achieves the overarching aims of balanced and harmonious economic development.

1. Introduction

2. The General Secretariat of the Andean Community (SGCAN in Spanish) is one of the executive bodies of the Andean Community. The SGCAN is responsible for administering the Cartagena Agreement: the founding charter that sets out the economic policies, mechanisms and instruments for achieving the objectives of the agreement, which are in practice pursued through development programmes that seek to deepen integration. In specific areas, the SGCAN acts as an authority, vested with special administrative powers that allow it to correct distortions in the liberalisation programme and restore the situation to its previous state, and to investigate and impose penalties in complex areas, such as free competition.

3. Integrating countries with dissimilar markets and marked differences in economic development has been challenging, particularly when it comes to examining market sensitivity and identifying existing asymmetries. Since the implementation of the trade

¹ This document was written by Laura Ardila Alarcón and Matheo Araoz González from the Anti-Trust Unit of the Directorate General of Trade within the General Secretariat of the Andean Community. The main aim of this contribution is to share with Session III of the Latin American and Caribbean Competition Forum (Ex officio investigations) the recent experience of the Community Competition Agency in the first landmark case of the Andean subregion on cartel creation in the toilet paper market, and the challenge of co-operation and collaboration between national competition agencies and the subregional authority. On 19 September 2024, the Court of Justice of the Andean Community handed down two judgements confirming the provisions of the General Secretariat of the Andean Community in Resolutions 2006 of 2018 and 2236 of 2021, taking enforcement action against two corporate groups (Colombiana Kimberly Colpapel S.A., Productos Familia S.A., Productos Familia Sancela Ecuador S.A., Kimberly Clark Ecuador S.A.) for fixing the price of toilet paper in Ecuador. The Andean Court of Justice confirmed that the General Secretariat of the Andean Community was competent to investigate the anti-competitive behaviour identified, due to the cross-border effect demonstrated, i.e. that the anti-competitive conduct started in Colombia and had real effects in the Ecuadorian market. It also noted that the General Secretariat of the Andean Community acted in accordance with the provisions of Decision 608, "Rules for the Protection and Promotion of Free Competition in the Andean Community", given its careful use of evidentiary material to demonstrate the effects and duration of the cartel. The judgements, which are final, took into consideration the behaviour of the companies investigated, in addition to the technical factor, to determine the level of the fines imposed on both business groups. The outcome of this process is a historic milestone for the Andean Community in terms of protecting consumer welfare and rights in Bolivia, Colombia, Ecuador and Peru, in full respect of the supranational competence established in the Cartagena Agreement and the Andean regulations in force. www.comunidadandina.org

liberalisation programme in 1990, the subregional market has aimed to respond to external vulnerabilities and economic contractions. However, each Member Country is in a different position in terms of trade relationships arising from trade agreements signed with third countries outside the Andean Community. This situation presents opportunities to improve the process of community integration. Simply put, the success of the integration process is directly proportional to the solutions proposed for economic and social development on equitable terms:

*"Integration is a process that involves the simultaneous adoption of measures aimed at liberalising trade and promoting economic and social development (...) are not mere liberalisation agreements, but they also seek to implement economic and social policies for the advancement and welfare of the communities that comprise them."*²

4. With globalisation and trade liberalisation processes leading to an increase in subregional trade, price manipulation, manoeuvres intended to disrupt the normal supply of raw materials and other activities with similar effects have been observed. For the Andean legislator, for 20 years competition policy took the form of a mandate on the agenda of the Member Countries. This led to the negotiation of regulations aimed at protecting and promoting free competition,³ to improve the efficiency of economic operators and the well-being of Andean consumers.

5. In recent years, according to SGCAN figures, cases have been investigated in relation to the markets for fibre optic network access (abuse of dominant position) and toilet paper (collusive practices). Requests for investigations related to the pharmaceutical market and the technology sector were unsuccessful, since the initial analysis carried out by the SGCAN found that these requests did not meet the minimum requirements to fall within the scope of the Community competition regulations, such as having a cross-border element and demonstrating the real effect of the damage.

2. Economic characteristics of the Andean subregion

6. The countries that make up the subregion form a market of more than 115 million inhabitants, with an economically active population of 60 million people reflecting a year-on-year economic activity growth rate of 4% compared with 2022.⁴ Most companies in the subregion are micro, small, and medium-sized enterprises (MSMEs), which make up 90% of businesses.

7. Territorially speaking, the Andean subregion is therefore a free competition zone with an imperfect common market, which can be understood, *"thus conceived, [as] an economic unit with a life of its own."*⁵

8. The internal effects of instituting a zero tariff between Andean partners for the free movement of goods go beyond the number of restrictions or levies requested and authorised so far. Community market forces continue to respond to various factors, including the

² Capuñay Mimbela, *Análisis del Acuerdo de Integración Subregional Andino [Analysis of Andean Subregional Integration Agreement]*. 1970.

³ Decision 608 adopted on 9 March 2005. The official version is available at the following link: [Official Gazette 1180 - Decisions 608, 609, 610 and 611 \(comunidadandina.org\)](https://www.comunidadandina.org/Gazette/1180-Decisiones/608_609_610_611)

⁴ See: <https://www.comunidadandina.org/DocOficialesFiles/DEstadisticos/SGDE984.pdf>

⁵ Ministry of Foreign Affairs of Chile, LAFTA Executive Secretariat, Chile. *Subregional Integration Agreement*. p. 9, 1970.

influence of companies with market power abroad that find an ideal scenario for participation in any of the Andean countries. It is clear to all who form part of this subregional community that, "(...) *the formation of the subregional market is achieved through the Liberalisation Programme and the establishment of the common external tariff. Together, these two mechanisms completely eliminate levies and restrictions that impede the free circulation of subregional production, and create a tariff barrier with respect to third parties.*"⁶

3. Detection of cross-border cartels

9. The SGCAN has a General Directorate of Trade,⁷ which is responsible for issues of market access and ensuring compliance with the trade liberalisation programme. This Directorate has an anti-trust unit, which, since Decision 608 was implemented in the Community legal framework, is made up of legal, foreign trade and economics experts from each of the four Member Countries, with a balance maintained between nationalities. Within this framework, the Andean Community Member Countries work to strengthen the standards that promote and protect the subregion's large market, making improvements to the regulations through a working committee.

10. The ad hoc Andean Anti-trust Committee is an advisory body formed of professionals that work in co-ordination with the SGCAN, through regular meetings to advance regulatory negotiation processes. As regards investigations into anti-competitive practices, this working group is composed of and represented by the heads of the national anti-trust authorities (Superintendency of Industry and Commerce (SIC) – Colombia; Superintendency of Economic Competition (SCE) – Ecuador; Company Auditing Authority (AEMP) – Bolivia; National Anti-Trust and Intellectual Property Protection Institute (INDECOPI) – Peru). It issues an expert opinion in a report, regarding, as applicable, the acceptability of agreements or the imposition of corrective measures and/or penalties.

11. Decision 608 sets out "Rules for the protection and promotion of free competition in the Andean Community"⁸ and establishes two criteria for Community competence. The first concerns relations between Member Countries, that is, between Andean countries: (i) acts must be committed in one or more Andean country(ies) and have an effect in one or more other Andean country(ies); the second introduces an extraterritorial component: (ii) acts must be committed in a country outside the subregion and have an effect in two or more Andean countries. In principle, these rules clearly define the objective scope of the decision. However, in practice, whether Community competence is activated in a specific case may be more complex in terms of identifying the conduct that constitutes the alleged anti-competitive practice.

⁶ Ministry of Foreign Affairs of Chile, LAFTA Executive Secretariat, Chile, Subregional Integration Agreement. p. 9, 1970.

⁷ The World Trade Organization provides an important frame of reference for trade facilitation issues in this Directorate.

⁸ Adopted on 9 March 2005; Published in the Official Gazette of the Cartagena Agreement No. 1180, on 4 April 2005.

12. When building a case with cross-border aspects, in terms of when and how the conduct happened, greater creativity has been required in practice and in discussions between the countries to apply the competition rules.

13. A cross-border effect is understood as a consequence that crosses the legal, administrative and, of course, geographical borders of the national competition agencies (NCAs) of the Member Countries, and covers all the conduct described in Decision 608, both that which restricts free competition (Article 7) and that which constitutes abuse of a dominant position in the subregional market (Article 8).

14. The question of what is meant by "cross-border" can be answered by looking beyond the concept of trade and the free movement of goods. Therefore, although foreign trade makes up part of what is traditionally understood as the exchange of products between countries, across borders, this concept in fact encompasses all economic activity and, consequently, all kinds of commercial, corporate and other cross-border associative and/or managerial operations. These operations may be utilised to further an activity that is not traditionally seen as foreign trade.

15. Indeed, in recent case law of the Court of Justice of the Andean Community,¹⁰ anti-competitive conduct can take various forms, from the instigation, recommendation or planning of an agreement by an agent domiciled or resident in a Member Country, to the adoption and execution of the agreement and its harmful effects in another Member Country. Many of these eventualities do not meet the evidentiary standard for cartel formation.

16. It is important to remember that Decision 608 includes in the term "conduct" any act or agreement; and that "agreement" should be understood as any contract, agreement, arrangement, scheme, decision, recommendation, co-ordination, consultation or other activity with equivalent effects made between economic operators or entities bringing them together. There is therefore a broad spectrum of conduct that might emerge in the Andean subregion. This is because Community law, on which the anti-trust regulations are based, is not static. On the contrary, it is a self-contained, evolving, flexible law with the capacity to adapt over time.

17. According to the analysis set out by the Court of Justice of the Andean Community, there is no traditionalist concept of trade and it is the relationship between different economic operators that constitutes *sine qua non* the single criterion for a cross-border scenario. This is clearly expressed in Case 484-IP-2018:¹¹

"In all or part of the Andean subregional market there may be companies that have affiliates, subsidiaries or related companies in two or more Member Countries, and collusive practices may take place not only between multinational companies but also with local companies, so there could be anti-competitive conduct that, due to the type of companies involved, could have both cross-border and local effects."

18. This also means that, considering the jurisdictional rules set out in Decision 608, it is possible to observe not only one practice, but several practices in several Andean countries with Community aspects.

¹⁰ Judgement 01-AN-2021 "Application to void the ruling brought by the Colombian companies Kimberly Colpapel S.A. and Kimberly-Clark Ecuador S.A. against Resolutions 2006 and 2236 of the General Secretariat of the Andean Community" Paragraph [3.4.8.]

¹¹ Official Gazette of the Cartagena Agreement No. 4126 of 14 December 2020.

19. All the above raises the underlying question of how the SGCAN recognises the cross-border effects of practices that may take place within the narrow ecosystem of the subregional market and in which sectors, subsectors and segments of products and services efficiencies are generated and, at the same time, a predisposition to price fixing, market sharing, the imposition or changes in marketing conditions, and other similar practices, is observed.

20. It is therefore essential for the anti-trust unit to identify where subregional trade is most vulnerable. Given that 90% of the business ecosystem in the subregion is made up of MSMEs, many of these businesses are active participants in regional value chains. As such, based on a diagnostic study of regional value chains in the Andean Community, three chains have been prioritised within the three broad sectors of economic activity: primary (natural resources), secondary (processing industries) and tertiary (services).¹² Within these sectors, the value chains with the greatest potential for the movement of goods from the subregion to the rest of the world are: animal feed, other chemical products (cosmetics, toiletries, pesticides, etc.) and computer services (software).

21. Based on studies that identify the main regional value chains, we can focus on strengthening awareness raising as part of anti-trust advocacy. This should help protect the establishment, sustainability and durability of these economic operators in the Andean Community market (intra- and extraterritorial), in accordance with the standards established in Andean regulations.

22. This information provides the foundation for future targeted market studies that will help improve Andean consumer welfare. Moreover, better identifying links — i.e. MSMEs participating in value chains in industries with a high concentration of foreign capital, whether in large companies or multinationals based in Latin America ('multilatinas') within and outside the subregion — makes it possible to analyse whether the goods and services involved in forming regional value chains are vulnerable to distortions that are likely in economies of scale.

3.1. Ex officio follow-up and monitoring of cases opened in the jurisdictions of the Member Countries

23. The ex officio follow-up and observation of cases opened in the jurisdictions of the Member Countries allows the SGCAN to proactively determine the status of issues under investigation at the national level. This approach makes it possible, through a comparative analysis, to identify any systematic behaviours in relation to a type of product or service, economic operator, type of conduct, time horizon or the opening of investigations at the national level that, from a Community perspective, merit investigation.

24. Given the difficulty of identifying cross-border conduct and its effects ex officio, the Community investigative authority also identifies this type of practice in the Andean subregion through the submission of requests for investigation by the NCAs of Member Countries. All economic agents operating in the Andean subregion or with operators in the Andean subregion may also report anti-competitive conduct. Article 10 of the regulation establishes that reports may be submitted by national authorities with anti-trust competence or the national integration agencies of Member Countries, natural or legal persons, whether

¹² Study carried out with the financial support of the Inter-American Development Bank/The Institute for the Integration of Latin America and the Caribbean (IDB/INTAL), the participation of the General Secretariat of the Andean Community and the co-operation of the International Trade Center. 2021

public or private, consumer associations and organisations and other entities with evidence of conduct that could unduly restrict competition in the market.

25. The number of reports handled by the SGCAN is likely to increase, given the increase in foreign companies based in Andean countries and, in general, the large number of MSMEs involved in various economies of scale. In particular, an increase in the number of reports submitted by NCAs would be desirable. However, one aspect of the issues that arise in respect of Community jurisdiction relates to the prevention of impunity. On this point, it is worth clarifying two things: the first relates to how impunity is understood by the NCAs, and the second relates to the shared approach that should be comprehensively taken — and adopted — by the NCAs and the SGCAN. For the NCAs, determining whether or not conduct is cross-border may create extra work requiring additional human resources, i.e. extra person hours, diverting attention from the countless cases in progress at the national level. Therefore, in practice, to reduce risks related to the time it takes to open investigations and avoid the much-feared statute of limitations, they move forward with all reports, whether or not they have a cross-border component.

26. Without doubt, from the SGCAN's perspective, this raises the question of whether outcomes differ if cases involving cross-border elements and effects are investigated exclusively by the NCAs. They do: the ability to impose penalties in the legal interest of the Community, in this case, and a level playing field in the Community market, corresponds to a legally protected interest at the geographical level of the subregion. Here we should clarify that community laws and national laws can and should coexist, including the investigation of the same facts, without this implying double jeopardy or a violation of the due process or rights of the offending market operators.

27. The double barrier approach plays a key role that makes it possible to justify the absence and/or imprecision of the arguments relating to impunity. This is because there is no room for impunity when, under an institutional framework organised around a policy of subregional jurisdiction, the overarching interest is based on defending and properly understanding the nature of the supranationality underpinning its regulations.

28. It is reassuring at the community level to understand that the benefit of the coexistence of regulations is that it increases the dissuasive effect of any penalties for certain conduct in the market for those directly involved: the economic operators.

29. Understood in this way, and as expressed in the case law of the Court of Justice of the Andean Community,¹³ *"The national competition authorities have the power to limit their investigation to facts that have no cross-border effect"*. Any such limitation, i.e. an investigation initiated by the NCAs, does not prejudice nor preclude the opening of a Community case when there is evidence of cross-border relevance.

30. The power to limit an investigation ensures proceedings are valid. Because, incidentally, the existence of cross-border effects is in itself the differentiating and specific element that allows the SGCAN to exercise its competence. We are faced with what could be called a "unique feature" of cross-border conduct in a multi-jurisdictional context.

¹³ Preliminary interpretation 484-IP-2018 (May 2020) of the Court of Justice of the Andean Community.

3.2. Public engagement by the SGCAN: sharing the Andean regulation as a proactive approach

31. On 23 October 2007, two years after Decision 608 was adopted, the "Practical Guide for the Implementation of Decision 608"¹⁴ was issued. Its purpose was to provide information on and explain, among other things, the objectives, relevance, content and scope of application of the new anti-trust regulation, which was unique and unprecedented in Latin America.

32. Hopes for the regulation were high and much-discussed, especially because of the debt in respect of the previous standard (Decision 285 of 1991)¹⁵ — and because of the conceptual similarity of the Community regulation's design to the European Union. In a kind of self-fulfilling prophecy of the integration process in all its splendour, this process became a wide-ranging negotiation of the free competition regulations that would apply between the Member Countries. Countries such as Ecuador and Bolivia, which did not have a national competition law, were therefore willing to accelerate the implementation of the provisions of Decision 608.

3.3. The toilet paper case: International co-operation (between Member Countries)

33. Resolutions 2006 of 2018 and 2236 of 2021 comply with Article 93 of the Cartagena Agreement, which grants the SGCAN the power to oversee the implementation of the regulations to prevent or correct practices that could distort competition in the subregion. Decision 608, in particular Articles 5 and 10, establishes that the SGCAN has the power to investigate, rule on and punish cross-border anti-competitive conduct. This is the framework within which the SGCAN was acting when it issued Resolution 2006, confirmed by Resolution 2236, in respect of the investigation of anti-competitive conduct by companies.

34. Regarding the SGCAN procedure in cases of anti-competitive practices, it is important to understand that during the investigation and the related proceedings, the SGCAN must co-ordinate with the competent authorities of the Member Countries, especially with those authorities where the alleged conduct has had cross-border effects.¹⁶

35. Therefore, the specific focus of the proceedings on the concurrence of the rival companies in the toilet paper market of the Community ostensibly provided the framework for the following reasoning: "The proven interaction of the Colombian market with the Ecuadorian market reflects the criteria of 'effect, interference and influence'"¹⁷ recognised by the case law of the Court of Justice of the Andean Community. This objectively responds to the recurrent assertion put forward by the Kimberly Group companies as a whole in their written statement, which the complainants do not consider to have been resolved by the

¹⁴ Working paper: SG/dt 369 of the SGCAN.

¹⁵ Decision 285 established, more broadly, the rules to prevent or correct distortions in competition through changes to the scope of the regulation, introducing concepts concerning the effect of restricting, preventing or distorting competition so as to preclude practices such as agreements, parallel actions or concerted practices between companies. It is important to note that Decision 285 was also the starting point for separating some concepts such as restrictive practices and abuse of dominant position, as key factors that threaten competition. It should also be noted that economic penalties were not provided for under this Decision.

¹⁶ See Decision 608,¹⁶ adopted on 9 March 2005, Articles 15 to 19.

¹⁷ Case 05-AN-2015, Decree of 9 March 2017. Application to void by ANGELCOM S.A. against communications SG.C/D.1/2450/2013, SG.C/D.1/106/2014, and SG/E/311/2014.

SGCAN, in the mandatory terms indicated throughout the document, which we will now contradict below.

36. Throughout the proceedings, the respondents objected to the fact that cross-border effects had been established up to the year 2016, i.e. part of the period under investigation in relation to the conduct.¹⁸ They asserted that the SGCAN's power in respect of the case had expired pursuant to Article 43 of Decision 608.¹⁹

37. The anti-trust investigation, in this case into collusion in the form of price fixing, identified ongoing anti-competitive conduct. Moreover, under Article 43 of the Andean regulations, in the case of ongoing conduct, the three years established for the statute of limitations for the investigation run from the day after the conduct ceased. For the SGCAN, the evidence to demonstrate the practice and execution of the conduct was circumstantial. It took into account the relevance, usefulness and validity of the evidence provided by other competition agencies, in conjunction with the economic analysis produced by the SGCAN using the information provided in advance and the information formally obtained during the course of the proceedings from the companies involved.

38. The toilet paper case²⁰ is the most significant case to date because it is the first in the subregion to involve the detection of a *hardcore cartel* with cross-border scope. Community co-operation was key, both from a procedural point of view and with regard to the contribution of information that made it possible to assess the direct and indirect evidence and build the case. The SGCAN had to co-ordinate as effectively as possible with the competent authorities of the Member Countries, especially with those authorities in the countries where the conduct had cross-border effects.

39. In the case of the toilet paper cartel, given that the conduct originated in Colombia and had cross-border effects in the Ecuadorian market, co-ordination efforts and requests for information focused on the competition authorities of those countries (the Superintendency of Industry and Commerce and the Superintendency of Economic Competition – formerly the Superintendency of Control of Market Power, SCPM in Spanish).

40. The following is a detailed description of the information obtained during the investigation by the SGCAN in co-ordination with the competition authorities of the countries.

- **Information on market behaviour** — Main actors, technological and manufacturing aspects of the product under investigation, participation of companies by segment and distribution channel, sales strategies, third party competitors, list of officials with positions related to cross-border operations, powers of subregional managers, etc.
- **Documentary evidence** — Statements of the main actors, list of e-mails containing details such as future points of contact and meetings, list of attendees, intentions for negotiation, co-ordination and follow-up of the agreements, renegotiation and threats of non-compliance with the agreements.
- **Technical information related to internal aspects of the cartel's creation** — Price lists shared between competitors, value and volume of sales by product type,

¹⁸ Written submission dated 25 November 2021, page 123 et sequens.

¹⁹ Written submission dated 25 November 2021, page 49 et sequens.

²⁰ For more information: <https://www.comunidadandina.org/DocOficialesFiles/Gacetitas/GACE3292.pdf>

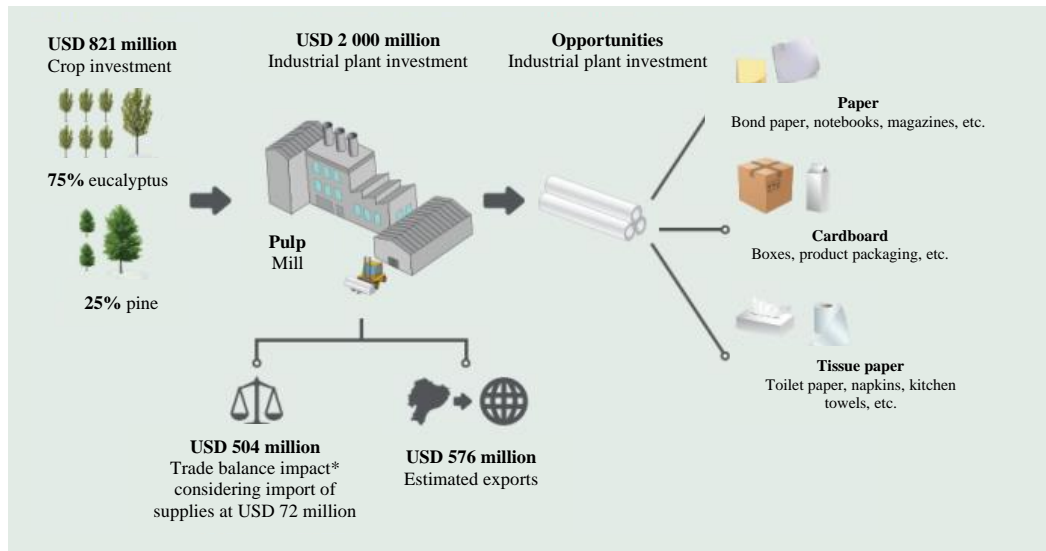
list of promotions and discounts applied, list of competitors' prices in the market, etc.

41. Co-ordination is essential to obtain information on market behaviour, since it is necessary in identifying the relevant market, the market power to fix prices, the products affected and the factors that could point to the origin and effects of the practice (*plus factors*).

42. The following example shows how the Ecuadorian competition authority provided information on the *characteristics of toilet paper sellers*:²¹

Figure 3.1. Production process

43. [571] To understand the characteristics of toilet paper sellers, the SCPM described the toilet paper production process and shared the diagram prepared by the Co-ordinating Ministry of Strategic Industries of Ecuador: "Ecuadorian proposal to develop its strategic industries":



Source: Resolution 2006 of the General Secretariat of the Andean Community

44. As regards documentary evidence, e-mails evidencing the corporate ties between one of the companies under investigation, headquartered in Colombia, and a subsidiary in Ecuador offer an example of how information was provided as part of work at the Community level:

Figure 3.2. Example information

45. [717] A similar thing happened in the case of Productos Familia S.A. Its certificate of incorporation and representation, which appears on folios 2654 to 2679 of the SIC dossier issued in March 2013, certifies that

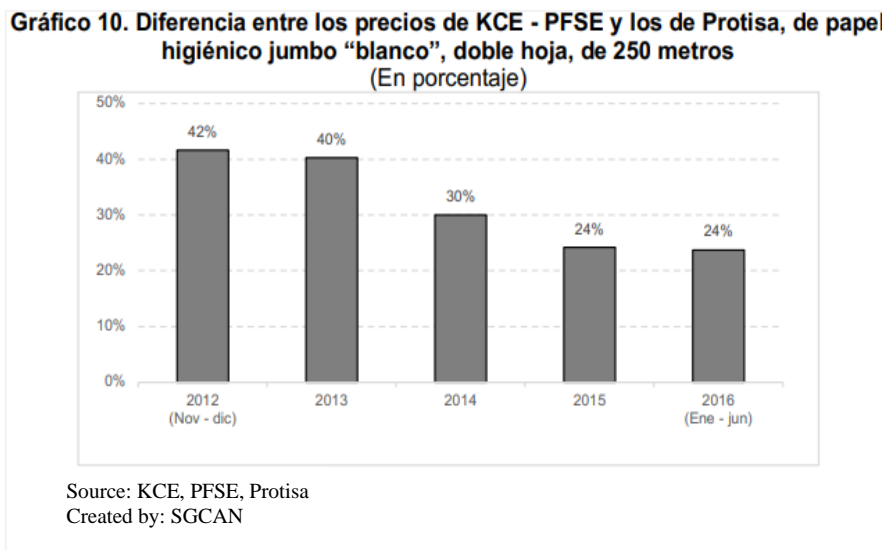
²¹ See paragraph 571 of Resolution 2006 <https://www.comunidadandina.org/DocOficialesFiles/Gacetitas/GACE3292.pdf>

“GRUPO EMPRESARIAL
 PRODUCTOS FAMILIA S.A.
 MATRIZ CC2643 04 PRODUCTOS FAMILIA S.A., PERO LA SOCIEDAD PODRÁ
 IDENTIFICARSE IGUALMENTE EN EL SIGUIENTE ORDEN: FAMILIA SA,
 FAMILIA SANCELA S.A., PRFA SA., PRODUCTOS FAMILIA SANCELA SA.,
 PRODUCTOS FAMILIA SANCELA DE COLOMBIA S.A.
 DOMICILIO MEDELLÍN – COLOMBIANA
 (...)
 Controla a:
 (...)
 PRODUCTOS FAMILIA SANCELA DEL ECUADOR S.A.
 DOMICILIO QUITO – ECUATORIANA
 Subordinada
 PRESUPUESTO ARTÍCULO 261 – INCISO 1 DEL CODIGO DE COMERCIO:
 POSEE MÁS DEL 50% DEL CAPITAL
 ACTIVIDAD FABRICACIÓN DE PRODUCTOS DE PAPEL.
 DOCUMENTO PRIVADO DEL 26 DE ABRIL DE 2002
 DATOS INSCRIPCIÓN: Libro 9 Nro 9683 97/11/24”

Source: Resolution 2006 of the General Secretariat of the Andean Community

46. Finally, regarding the technical information concerning internal aspects of cartel formation, the following item shows the companies' internal information. This was obtained through the investigation work plan that was developed with the competition authorities of the countries involved. This particular item shows the difference between the fixed price of one of the products investigated and the price of a third party competitor's product:

Figure 3.3. Difference between KCE-PFSE and Protisa's prices for "white", double-sheet, 250-metre, jumbo toilet paper



Source: Resolution 2006 of the General Secretariat of the Andean Community

3.4. Challenges affecting community co-operation with other organisations

47. When looking for the best way to adapt to the limited information available at the evidence-gathering stage of the toilet paper case, the SGCAN faced a series of challenges in terms of identifying suitable and relevant means of corroborating and providing a *sufficient* technical and economic basis for the documentary evidence provided as part of the investigation.

48. Quantitative evidence refers to all the techniques for economic analysis that a competition authority may use to test an investigative hypothesis. Because this case concerns the formation of a cartel, specialised techniques should be used to detect "moments"²² for which there is evidence of prices behaving anomalously. There are a variety of econometric techniques available to provide this information; however, these techniques often have to be repeatedly adjusted to the adverse scenarios that an authority faces in the course of an investigation.

49. It is worth mentioning that this type of technical report — issued by the authorities in the course of their investigation as evidence of the anti-competitive activities of cartels — is important mainly because this type of practice is subtle and the exchange of information is almost imperceptible to officials.

50. Under the co-operation framework set out in Decision 608, in the toilet paper case, the SGCAN evaluated the methodologies used in the past and in other cases by NCAs in the Andean subregion. This was with a view to using the best practices at the international level for detecting collusion. It therefore reviewed and examined cases in which the companies involved had a history of participation, and identified two cases in particular in which an economic analysis was used to complement the legal analysis.²³

51. By comparing the aim of each methodology and identifying their strengths and weaknesses, the main one being the "best available information", three possible methodologies were identified that could be used to corroborate suspected price fixing in the period under investigation.

52. The table below shows the methodologies analysed and evaluated by each competition agency in the region:

Table 3.1. Methodologies analysed and assessed by each competition agency in the region:

	KIMBERLY INDECOPI CASE	KIMBERLY CASE SIC	KIMBERLY CASE SGCAN
Econometric tool to detect collusion	Bai-Perron test	Granger causality	Pearson coefficient
Authors	Bai J. & Perron, P. (1998)	Granger, C. W. J. (1969)	Abrantes-Metz et al. (2006)
Objective of the method in the case	Find structural breaks in a price series when the dates of the changes are unknown	Causality analysis of final consumer prices to determine whether there is dependence between company prices	Price variability analysis to evaluate periods of volatility during times of collusion

Source: SGCAN, INDECOPI and SIC.

53. Particularly for the SGCAN, the additional challenge that remained to be solved was detecting moments for which no documentary evidence was provided to guarantee the absolute reliability of the continued existence of collusion. The Pearson coefficient methodology therefore proved to be the most appropriate, given that it was complemented by a theoretical criterion based on the evidence of residual cartels.²⁴

²² According to the Real Academia Española (RAE), a moment is defined as "*a period of time that draws special attention for any reason.*" In this document, moments will be understood as those points in time when collusive agreements are reflected in the anomalous price behaviour.

²³ Resolution 01 0-2017/CLC-INDECOPI and the Reasoned Opinion of the SIC//14 -151027

²⁴ "*Residual collusion refers to the continuation of supracompetitive prices after a cartel has been shut down, meaning firms no longer communicate for the purpose of co-ordinating their prices.*" (See Harrington Jr, Joseph

4. Final thoughts

54. The experience of the Andean Community and specifically of the SGCAN in anti-trust investigations offers a valuable model that has borne fruit over time in the fight against anti-competitive practices. The implementation of Decision 608 and the collaboration between Member Countries' competition agencies underscore the importance of establishing regulatory frameworks that are not only effective at the national level, but that also consider the interconnectedness of markets in a global context.

55. The approach adopted by the SGCAN combines the application of community rules with cross-border co-operation, highlighting the need for developing and emerging countries to strengthen their institutional and legal capacity to handle competition in an increasingly globalised environment. The ability to investigate and punish cross-border anti-competitive behaviour is crucial to protecting the economic interests of Member Countries and ensuring a level playing field for all market players, especially at the community level, for the benefit of Andean consumers and MSMEs.

56. The outcomes of the toilet paper case attest to the SGCAN's experience of adapting economic and legal analysis methodologies to detect collusion and can serve as a reference for creating best practices in other regional contexts. Collaboration between countries when investigating anti-competitive practices not only improves the effectiveness of regulatory measures, but is fundamental to creating an environment of trust and co-operation, which is essential for sustainable economic development.

57. In conclusion, 20 years after the enactment of Andean regulations on free competition, the model of the Andean Community and the SGCAN provides a roadmap for international discussions on competition regulations, highlighting the importance of, and need for, co-operation and the adaptation of regulations to respond to the realities of subregional trade.

E., Competitor Coupons: A Remedy for Residual Collusion (4 November 2023). Available at SSRN: <https://ssrn.com/abstract=4480952> or <http://dx.doi.org/10.2139/ssrn.4480952>