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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I: Digital Evidence
Gathering in Cartel Investigations**

- Contribution from Colombia -

28-29 September 2020, virtual Zoom meeting

The attached document from Colombia is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 28-28 September 2020, via a virtual Zoom meeting.

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Session 1: Digital Evidence Gathering in Cartel Investigations

- Contribution from Colombia -*

1. Powers to investigate anti-competitive conducts – *content and scope*

1. The Superintendence of Industry and Commerce exercises the administrative functions –also known as powers– of inspection, surveillance and control over anyone who engages in or affects any economic activity in Colombia. The inspection function is of interest for the present contribution particularly, because it is the one that allows the Superintendence to gather relevant evidence for the investigation. The Colombian Constitutional Jurisprudence describes the inspection function as the power to request and/or verify information or documents held by entities that are subject to control of the Authority¹. Its main purpose is to allow the Authority to properly detect irregularities in the development of any economic activity carried out in any sector of the economy and to verify that the entities subject to control are complying with the Competition Protection Regime.

2. The activities that are a part of the SIC's broad power of inspection are clearly limited in scope. Firstly, they must be exercised rigorously to guarantee and respect the Due Process tenets. Secondly, they must follow thoroughly the rules applicable to the administrative procedure and the provisions that regulate the gathering, request and practice of evidence by the Authority during the administrative proceedings. Thirdly, their use must be justified on their relevance and conduciveness to the verification of compliance with Competition Protection Regime. These activities or powers to investigate go from information requests and interviews to unannounced inspections.

3. Unannounced inspections play a key role for evidence and information gathering in cartel investigations. Their purpose is to obtain evidentiary material and information for determining whether a formal investigation should be carried out with respect to any behavior that may have occurred in the market and that could be of an anti-competitive nature. The inspections take place at the premises of the person who might have information about the matter under analysis in the preliminary investigation stage of the proceedings. Generally, during the administrative inspection visits, officials or contractors of the Superintendence take depositions from persons who may have information on the subject matter of the administrative proceeding and make requests for information. The Authority is empowered to require the submission of any kind of information, whether public or private, that it considers pertinent and necessary for the fulfillment of the aforementioned functions (Final section of Art. 15, Colombian Constitution).

* This contribution was written by the Superintendence of Industry and Commerce (SIC).

¹ Sentence C-165/2019 of the Constitutional Court of Colombia, M.P. Alejandro Linares Castillo and Sentence C-851/2013 of the Constitutional Court of Colombia, M.P. Mauricio González Cuervo.

4. Undoubtedly, most of the information that might be relevant to the Superintendence has been produced, stored and processed by entities mainly in a digital form as a result of the ongoing process of digital transformation across an important number of industries. Digitization and digitalization both contribute to such transformation towards a Digital Economy and are relevant to the authorities' activities. Furthermore, the connectivity trends show the increase of the demand of internet and digital communication services due to confinement measures and teleworking, which somehow has accelerated the digital transformation² of several sectors of the economy. This means that companies have had to embrace digital tools and adapt their current operating models to work accordingly. This is particularly true of communications, whether private or corporate, where technology is usually ever-present in a multitude of forms like cellphones, chats or emails, but mostly through technology.

5. The Superintendence has to keep up technically with the pace of digital transformation and it is constitutionally allowed to reach information that might be relevant to the investigation and that has produced and stored digitally. The nature and purpose of the inspections imply that the Superintendence will be able to access all types of information, whenever considered pertinent and necessary for the purposes of the investigation, including private information of persons who could have knowledge of the subject matter of the proceedings. Thus, it is relevant to mention Article 10 of the Statutory Law 1581 of 2012, an additional basis for the power to perform unannounced inspections of the Superintendence, which provides general requirements for the protection of personal data. Article 10 of that regulatory body specifies that a public or administrative entity in the exercise of its legal functions does not require authorization from the holder of the personal data for purposes of carrying out processing activities in relation to that personal information³. The Constitutional Court mentioned about this particular faculty, that whenever an authority requests personal data under its functions, it is bound to unrestrictedly guaranteeing the right to habeas data of the holder of the information. Likewise, the person subject to the inspection has a constitutional and legal duty to meet those information requirements. It should be noted that the private or personal nature of the information may not be opposed to the Superintendence of Industry and Commerce as a basis for disregarding its request.

6. It is also important to address that the Constitutional Court endorsed the constitutionality of the powers that can be exercised in the context of the unannounced inspections. In this regard, the Court admitted that administrative authorities are empowered to request the provision of certain information as long as they comply with the obligations of protection and safeguard derived from the fundamental right involved with the required information.

2. Availability of digital tools

7. The SIC uses different digital tools to support the detection and gathering of evidence of anti-competitive conducts. Some of this are forensic and are used, among others, for copying and analyzing evidence found during unannounced inspections and have been acquired externally. Other tools have been developed in-house to collect and analyze data from the markets. This section briefly describes these tools.

² OECD (2020), A Roadmap Toward a Common Framework for Measuring the Digital Economy. P Available at: <http://www.oecd.org/sti/roadmap-toward-a-common-framework-for-measuring-the-digital-economy.pdf>

³ Sentence C-748/2011 of the Constitutional Court of Colombia, M.P. Jorge Ignacio Pretelt Chaljub.

2.1. Acquired externally forensic digital tools

8. The SIC has a specialized IT unit to assist with the use of digital tools during the whole investigation process and, in particular, as part of the unannounced inspections. This unit is integrated by engineers and professionals with technical and specialized knowledge in computer forensic science. They are based on a forensic lab that was created in 2014. From this laboratory they run the digital tools and organize the evidence before it can be analyzed and used in the investigations.

9. Some of the activities conducted by the IT Unit are: the extraction of information through forensic methods; protection and preservation of evidence; investigation assistance, and the recovery of magnetic or electronic media. The staff working at the IT unit are familiar with the administrative procedures, for that reason they have an active role during the investigations. For instance, as they know background and the main hypothesis of the cases, they are able to actively contribute not only to maintaining the chain of custody of the evidence but also to the analysis of the information.

10. The Superintendence strictly follows technical procedures throughout the different stages of the administrative proceedings and the processing of information. An internal guide has been created to regulate the use of digital tools and it is applied by the unit members to guarantee uniformity, high standards and compliance with due process rules.

11. The staff follows rigorous documented procedures during the different stages of the investigations for each data processing activity: collection, processing and analysis. These activities are supported by different digital tools which are described as follows. (i) Collection: the IT staff can collect data in unannounced inspections through copying or making forensic images of the digital data. The IT staff ensures integrity of the data and through the chain of custody it guarantees the authenticity of the evidence. Also, hash values are generated to secure the integrity and to support the verification of the authenticity of the copy with respect to the original piece; (ii) Processing and preservation: after the information is copied by the SIC the information is processed and then the research can be carried out to find pieces of evidence. The access to the information that was gathered is restricted and can only be analyzed by the case team with a request to access. (iii) Analysis: Under the guides of the lead investigator and using digital tools, a first filter of the information is made. The information is filtered by creating labels and identifying the relevant information for the case hypothesis. These results will be further analyzed by the other members of the investigation team. This creates efficiencies as it allows to focus efforts in relevant material.

12. For the activities described above, the IT unit uses various digital tools and scientific and analytics techniques to have access to the technological infrastructure. The selection of the appropriate tool is part of the expertise and preparation of the IT unit members. In the inspection, the source of digital information must be identified to select the appropriated digital tool. Digital tools could be classified by the source of information to which they can have access, such as (i) computers and servers, (ii) mobiles phones, (iii) hard disks and USBs and (iv) CDs, DVDs. These digital tools also have limitations regarding the function they are used for. Some programs are used to extract the information but not to organize it. The SIC has tools that help with different functions such as: (i) to acquire information, (ii) process the data, (iii) visualize and (iv) organize the evidence. These tools also can be classified by the type of software they are in, they can be on (i) web platforms and (ii) applications.

2.2. In-house developed new tools – modernization

2.2.1. The “Sabueso” project

13. The main objective of the “Sabueso” Project is data search. In this case, the SIC uses process automation and machine learning. This solution works based on public information. The automation part is about data collection of available goods in online websites. It follows thousands of daily registrations. A large amount of data is collected, analyzed, and presented in a user-friendly manner. The system is based on inference engines based on machine learning. Machine learning solves the problem of dissimilar descriptions and names in different retail websites. There is no standard name for products, and, in principle, machines are not able to understand which the same products are. However, with the coding that rules the inference engines, the system can identify the same product in different stores. This system gives to the investigation team hints to recognize possible competition distortions. For instance, if there is a concern regarding a specific product, the system will allow to: (i) select a specific period of time and present the price behavior during that period, (ii) discover dates of the beginning and the end of the potential distortion, (iii) find other products, brands or companies with similar dynamics, and (iv) detect patterns that might be seen as alerts in certain products or markets.

14. The use of digital tools represents a key part for the investigation process. It has benefits regarding analysis capacity and providing major access. Regarding the analysis capacity the digital tools can be used to process important amount of data. They also uncover individuals and collective behavioral patterns. In terms of access, they incorporate to the cases information that otherwise would not be possible to collect. Such as the recovery of deleted information. Moreover, digital tools allow remote collection of certain data, reaching multiple premises even during the lockdown pandemic. Nevertheless, these tools are still developing. In the next sections we present some practical and legal challenges that the Superintendence has faced.

3. Legal challenges associated with the digital evidence gathering in cartel investigations: Constitutional Court Ruling C-165/2019: The controversy regarding the scope of the investigative powers of the SIC

15. The OECD’s background paper identifies three main legal challenges related to the collection of evidence via digital tools. (i) the limitation of the scope of the investigation to what is considered proportional, given that digital tools allow the copying of large volumes of data at high speed; (ii) the interplay between access to personal electronic devices and data storage systems that may be kept at work or contain work-related information and the right to privacy; (iii) the location of digital information and whether, if they are not located at the business premises, searching them may go beyond the scope of the judicial warrant or competition authority’s order.

16. These issues were addressed in 2019 by the Colombian Constitutional Court that reiterated the constitutionality of the SIC’s investigative powers during administrative proceedings. The decision revealed some key thoughts on the perception of the scope of the SIC’s antitrust enforcement tools and the relationship between procedural rules applicable and due process guarantees. To the plaintiff, some of the administrative powers of the Superintendence were drafted too widely, which in turn implied their vagueness. This issue goes to the proportionality of the investigation. The alleged vagueness was said to affect due process guarantees as well as the protection of fundamental rights such as the right to privacy and inviolability of the home. The plaintiff argued that such

indetermination in respect to the scope of the SIC's powers, enabled the authority to engage in any kind of investigative action, which may as well enable interceptions and registry of private communications. All of which, in Colombian context require a court order.

17. Regarding the claim, the Court held that the Superintendence could not gather any kind of evidence or else engage in activities that require a court order because such actions exceed SIC's given functions. Also, that the inspections have the legitimate purpose to strengthen the effectiveness of the Superintendence's functions. It is the element of surprise prone to the inspections conducted by the SIC that works the most for the effectiveness of enforcement, in the sense that it reduces the chance that the persons subject to investigation may hide the information. Moreover, the fact that the inspections are not notified before the authority conducts them does not violate due process. In fact, the Court highlighted in the ruling that the inspections do not need to be previously notified not even subjected to ex ante or ex post judicial control.

18. Some key ideas regarding the impact of the decision on the authority's functions are: firstly, that the concerns regarding the application of due process guarantees during the early stages of the investigative procedure, particularly those from before initiating a formal administrative proceeding, were cleared up by the Court by emphasizing the constitutionality of the SIC's procedures and powers. Secondly, the Court stated that the SIC can request, copy and review information contained in computers, tablets and e-mails without it being a registry or interception of communications in the terms of the paragraph 3 of Article 15 of the Constitution, thereby without a Court order. Thirdly, the Court established the interpretation of the powers bestowed to the authority in conformity to the Constitution. The interpretation considers an extremely important feature of the unannounced inspections, which is that the SIC can request documents that are stored on computers and institutional mail of the persons under investigation and also the data messages sent through those mailings for they are business information. Therefore, to comply with procedural guarantees the SIC gathers The Superintendence gathers information contained exclusively in corporate devices and in those used for commercial ends (emails and cellphones).

4. Practical challenges for the authority about evidence gathering

19. The SIC has faced some practical challenges when applying digital tools in administrative investigations, some of which are related to the operation of the tools and the continuous evolution of technology and some others that have recently emerged due to confinement measures and teleworking.

20. As mentioned above, the authority is equipped with different digital tools. The application of the tools varies depending both of the task that is going to be performed (collection, processing or analysis) and also of the kind of device that will be accessed. Some practical issues identified for the present contribution are related to (i) the language of the OS of the computers and other devices that are going to be accessed and reviewed by the Authority during inspections and (ii) the technological developments and permanent update of OS in devices where information is contained. Tech industry is rapidly creating new software and applications for their users. This fact demands constant updates from the fabricant of the digital solutions used by the Authority to be able to cope with new realities. This also requires continuous preparation from the team in charge of using them.

21. Covid-19 pandemic poses a major challenge for the SIC's ability to gather information. In pandemic time the Superintendence had to strengthen the use of electronic means. Article 53 of the Law 1437 of 2011 allows the Authority to use electronic means for the administrative procedures. This power has been significant during lockdown were mobility restrictions were imposed and were the health safety of the investigators and the public in general was a paramount concern. This situation directly impacted the regular execution of activities and demanded from staff and contractors a process of adjustment to achieve the missions of the entity through the prioritization of research and measures aimed primarily at ensuring that markets work correctly in the middle of the crisis. Some of the activities of the inspection, surveillance and control functions of the SIC that have impacted by the mandatory preventive confinement measures were: (i) the practice of unannounced inspections and the practice of face-to-face depositions; (ii) the collection of information through information requirements; and the (iii) remote analysis of the information collected and stored in emails. The faculty to conduct inspection activities has been affected, for instance, by the elimination of the surprise factor inherent to some mechanisms; since the authority now has to "notify" persons subject to investigation of the practice of virtual depositions and in this case, also there have been major drawbacks in the collection of information contained in computers, mobile devices and e-mails as well as the collection of physical documents of the entrepreneur stored on site; and the impossibility of to make physical administrative visits in other cities in the national territory other than Bogotá.

22. Despite the difficulties that the SIC has faced in the exercise of its functions, the particular conditions brought about by the emergency have allowed it to implement different tools and methods to advance its activities. Through these tools the competition authority has achieved, still in the course of the mandatory preventive confinement decreed by the National Government, to continue with the fulfillment of its functions in an efficient way and to act in a reasonable amount of time in the face of circumstances arising in the context of the pandemic. Among the innovative tools implemented by the Deputy Superintendence for Competition Protection for the full performance of its functions is, for example, use of electronic means to remotely collect the required information and the depositions necessary to clarify the facts that are relevant to the authority in development of the administrative procedure. The use of electronic means allows the authority to maintain direct, expeditious and prompt communication with the market agents who are the subject of investigation. This also guarantees the continuity of the exercise of the functions attributed to the SIC. Another example of the way in which the SIC has relied on non-traditional tools is the use exclusive of electronic addresses as the means of communication for issuing information. This tool shortens the response time of the economic agents required allowing the authority to work more efficiently in its surveillance functions in the compliance with the Colombian competition regime.