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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Colombia --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm

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COLOMBIA

Introduction: Settlements in Colombia

1. The Colombian competition regime regulates "settlements" or "guarantees" as a tool to terminate investigations for alleged anticompetitive practices in an anticipated way. By virtue of this mechanism, the defendant may offer to settle the investigation without admitting a violation or suffering sanction, by proposing enough and reasonable commitments to the Superintendence of Industry and Commerce (SIC), aimed at guarantying the suspension or the modification of the conduct by which is being investigated. If the party does not comply with the commitments set forth in the settlements, the same sanctions provided by law for anticompetitive practices can be imposed.

2. Different views on the acceptance of settlements have been adopted in the Colombian doctrine. Some argue that settlements are detrimental to the development of competition law, since they prevent the SIC from analysing potential anticompetitive conducts and sharing its position regarding such behaviours, missing the opportunity to create a set of precedents. In the same sense, some critics consider that this mechanism may lead to amnesty, since the commitments involved are not always connected to the objectives of the competition law –especially from the perspective of its dissuasive function. On the other hand, some consider that settlements are beneficial, since they can modify the conduct of the economic agents without having to conduct a whole process to demonstrate the performance of anticompetitive practices, which, in turn, could serve to devote the limited resources of the authority on more relevant and complex cases.

3. Nowadays, the SIC considers that settlements must be seen as an exceptional mechanism, which means that they should only be accepted when they incorporate structural commitments. The SIC considers that one of its most important public policy objectives as a competition authorities is to strengthen its preventive functions, in order to deter and avoid -rather than sanction- the occurrence of anticompetitive practices for the benefit of consumers and markets efficiency. In this regard, the SIC has recognized that one of the principal means to achieve such goal is to implement, in a proper and effective way, its punitive capacity. This is one of the reasons why settlement offers have not been accepted to terminate investigations in advance under the current administration of the SIC (i.e., since October 2012).

4. Before explaining how Colombian settlements work and the way they have been implemented, it should be noted that they have specific particularities that differentiates them from similar mechanisms around the world.

5. In contrast to the US competition regime, alleged infringers are not expected to accept responsibility and/or cooperate with the investigation through "plea agreements". Moreover, the amount of the sanction is not fixed in settlement agreements, and the settlement itself cannot be an initiative of the competition authority. In Colombia, settlements do not imply a confession or an admition of the illegality of the conduct, since the decision taken in this scenario does not refer to the merits of the case. Besides, here are no negotiations about the amount of the sanction, but a termination of the investigative proceeding by the SIC; and the legitimacy to propose a settlement offer only relies on the investigated party.

6. In addition, unlike the "commitments" of the EU competition regime, settlements in Colombia's history have been considered appropriate in all antitrust cases, including cartels (although

the current policy changed such position). Besides, the SIC does not make any analysis of the investigated conduct to see if it is worth being investigated or not; and the commitments achieved do not respond to specific concerns previously identified by the competition authority. Moreover, the acceptance of settlements in Colombia has normally implied the need to subscribe insurance policies, which ensure the compliance of the guarantees offered.

7. After making this general overview on the particularity of the Colombian settlements, this paper will expose (1) the regulatory background of this mechanism, (2) the case law in this regard, (3) the monitoring strategies that the SIC has used to verify commitments compliance, and (4) the current policy that the Colombian competition authority implements regarding settlements.

1. Regulatory background

8. Since its origin - Article 4, numeral 12, and Article 52, paragraph 4, of Decree 2153 of 1992- settlements have represented a discretional power of the Superintendent of Industry and Commerce, since he "may" accept them or not, according to his judgement. Therefore, he may also decline them on enforcement policy grounds, such as the imposition of fines following dissuasive purposes. It should be noted that, considering that settlement offers or "guarantees" have the potential to terminate investigations without studying in depth the alleged anticompetitive practice involved, they are assessed and decided directly by the Superintendent of Industry and Commerce.

9. Before the enactment of Law 1340 of 2009, and according to the precarious normativity that existed in this regard at that moment, it had been considered that settlements could be offered at any time during the investigation (i.e. from the opening of the investigation until the issuance of the final decision). The enactment of Law 1340 represented an important change in this sense, since its Article 16 established that the 20 working days period available for the defendant to submit or request evidence during competition investigations, is also the period during which the defendant may offer to settle the investigation by guarantees.

10. The amendment was done to limit settlement proposals to the beginning of the formal investigation stage, before the SIC has expended substantial resources to verify the commitment of a competition infringement, which ultimately converts the mechanism into a low cost tool. Another important change introduced by this Law is that it clarifies that failure to comply with the obligations arising from the acceptance of settlement offers is considered a violation of the competition rules, and will lead to the imposition of sanctions provided by law for anticompetitive practices.

11. Law 1340 also states that if guarantees or commitments are accepted, in the same administrative act by which the investigation is closed, the SIC will indicate the conditions under which it will verify the continued fulfilment of the obligations undertaken by the investigated parties. In addition, paragraph 4 of Article 19 of Law 1340 states that the request to terminate investigations by settlement offers will be notified to interested third parties, who may comment on the proposal.

12. Finally, Decree 019 of 2012 was issued, and its Article 155 amended Article 52 of Decree 2153 once again. This provision reiterates that the moment to file settlement offers before the SIC is the term of 20 working days that is granted to the defendants to exercise their defence right in a competition investigation. In addition, this provision formalized the possibility that the Superintendent has to request clarifications and additional commitments of the guarantees offered by the investigated parties, before he takes a decision regarding their viability.

13. If consensus is reached, the Superintendent issues an order accepting the commitments, closing the case, and specifying the method by which the defendant will comply with the conditions and the way such conditions will be monitored and assured. As in merger cases that involve conditions, the defendant is required by law (Article 22 of Law 1340) to make an annual payment covering the cost of the SIC's compliance monitoring activities.

2. Cases since 1998

14. Since 1998 and until 2012, approximately 46 competition cases -which involve 93 charges related to 23 anticompetitive conducts- were terminated in advance by the acceptance of settlement offers. The following table shows the most important trends that can be identified in the implementation of settlements in Colombia, considering the type of anticompetitive practices involved, the alleged conducts covered, and the economic sector in which the cases took place:

Table No. 1. Historic SIC's trends on settlements

Type of anticompetitive practice	**Alleged conducts**	**Economic sector involved**	**Number of cases** (that have charges related to each conduct)
Cartels	Price fixing	Food (4) Chocolate Rice Sugar Coffee Real state (1) Airlines (1) Slaughtering of cattle (1) Vehicles (1) Bricks (3) Ocean Freights (1) Advertising (1) Media (1) Tubes (1) Oxygen transportation (1) Land transport (1) Banks (2) Cement (2) Fertilizers (1) Music Editors (1)	23 Cases
	Discriminatory agreements	Food (2) Rice Coffee Media (1) Bricks (1) Cement (1)	5 Cases
	Market allocation agreements	Food (3) Rice Sugar Coffee Security transport services (1) Bricks (2) Oxygen transportation (1)	7 Cases
	Quota allocation agreements on production or supply	Food (2) Rice Coffee Bricks (2) Oxygen transportation (1) Fertilizers (1)	6 Cases
	Allocation agreements, distribution or limitation of production inputs	Oil (1)	1 Case
	Tied sales agreements	Food (1) Sugar Vehicular Natural Gas (1)	2 Cases
	Agreements to refrain from producing a good or service	Security transport services (1) Supermarkets (1)	2 Cases
	Bid rigging	Photocopier sales (1)	1 Case
	Agreements to prevent access to market or to marketing channels	Food (1) Sugar Cement (2) Oil (1) Vehicular Natural Gas (1)	5 Cases

Abuse of dominance	Predatory pricing	Bricks (1) Cell phones (2)	3 Cases
	Discrimination of equivalent operations	Food (2) Milk Coffee Supermarkets (1) Fuel (1)	4 Cases
	Tied sales	Food (1) Milk Cell phones (2) Supermarkets (1) Beer (1) Vehicular Natural Gas (1) Carbon black (1) Telecommunications (1)	8 Cases
	Differentiated sales	Bricks (1) Telecommunications (1)	2 Cases
	Differentiated sales by region	Bricks (1)	1 Case
	Obstruction to access markets or marketing channels	Cell phones (2) Food (1) Milk (1) Supermarkets (1) Port operations (1) Slaughtering of cattle (1) Vehicular Natural Gas (1) Carbon black (1) Telecommunications (1) Natural Gas transportation (1)	11 Cases
Anticompetitive acts	Refusing to sell or give a service as a retaliation for a pricing policy	Supermarket (1)	1 Case
Mergers	Uninformed mergers	Food (1) Eggs Supermarkets (2) Travel agencies (1) Isotonic beverages (1)	5 Cases
Administrative unfair competition	Acts of clientele diversion	Domestic gas (1)	1 Case
	Confusion acts	Domestic gas (1)	1 Case
	Deception acts	Domestic gas (1)	1 Case
	Discredit acts	Domestic gas (1)	1 Case
	Induction of contractual breach	Domestic gas (1)	1 Case
	Violation of rules	Electricity (1)	1 Case

Note: One case may involve more than one charge or conduct.

15. According to the information provided by the table, the following trends can be highlighted:

- From the 93 charges involved in the 46 cases, 56% refer to cartels; 31% refer to abuses of dominance; and the remaining 13% is distributed among anticompetitive acts, uninformed mergers and administrative unfair competition.
- Regarding charges on cartels, 44% of them are related to price fixing conducts, percentage that is followed by a 13% related to market allocation agreements, and 12% related to quota allocation agreements on production or supply.
- With respect to the charges on abuse of dominance, 38% of them are related to obstruction to access markets or marketing channels, conduct that is followed by tied sales (28%) and discrimination of equivalent operations (14%).
- The economic sector in which more charges took place were food (19%), bricks (12%), supermarkets (6%), cement (5%) and domestic gas (5%).

3. Monitoring strategies

16. Economic agents, along with the settlement offer, must provide the necessary means to demonstrate that they will fulfil the corresponding commitments. Therefore, once a settlement offer is accepted, a communication and information exchange strategy must be also agreed between the SIC and the investigated party, in order to let the authority monitor and verify the compliance of the commitments agreed.

17. Traditionally, investigated parties have been obliged to constitute an insurance policy (collateral), normally valid for one year and renewable for another year at the discretion of the Entity. The amount of the policy is graduated by the SIC based on the maximum fine that could be imposed if the investigation proved competition infringements, and considering criteria such as the financial capacity of the economic agents and the potential effects of the conduct (generally, the amount has ranged between 10% and 100% of the value of the maximum penalty).

18. Regarding the monitoring system itself, it can be said that the most common commitments that have been agreed are the followings:

- Suspend specific behaviors, such as coordination of actions, information exchanges with competitors, determination of prices, distribution of markets, among others.
- Submit periodical information to the SIC (for instance, regarding price variations, new contracts signed, certifications, etc.).
- Implement training programs addressed to employees on competition rules.
- Modify contracts by eliminating, amending or adding specific clauses.
- Create manuals of good practices, promote them with suppliers and send reports to the SIC regarding the compliance of the manual's provisions.
- Modify sales policies.

19. To structure monitoring systems, the SIC has taken into account criteria such as the type of anticompetitive conduct involved, the scenarios where the economic agents performed their activities, market failures in the economic sector involved, eventual information asymmetries, competitors of the investigated parties, among others.

20. On the other hand, it should be noted that Article 22 of Law 1340 of 2009 establishes that those whose investigation is finished by settlements must pay an annual contribution to cover the cost of the SIC's compliance monitoring activities. The rates will be determined by the SIC, taking into account the sum of assets of the previous fiscal year of the companies, as well as the administrative costs to develop such monitoring activities. In turn, Article 16 states that monitoring conditions will be determined in the same administrative act that orders the early termination of the investigation. However, it should be noticed that, in practice, such revenues were not always enough to cover SIC's monitoring expenses.

21. Finally, it is worth mentioning that neither the Decree 2153 of 1992 nor the Law 1340 of 2009 determined a maximum period for the execution of guarantees or settlements. In this regard, it has been said the SIC -and not the alleged offender- is in charge of determining the period during which they must maintain the guarantees. Thus, the Superintendent decides the term in a discretionary basis.

4. Current policy on settlements

22. As it was mentioned before, the Colombian competition regime -Article 52 of Decree 2153 of 1992- gave to the Superintendent of Industry and Commerce the discretionary power to terminate investigations in advance when alleged offenders give enough guarantees to suspend or modify the conduct by which is being investigated.

23. The historic experience on settlements –which have been described in previous points- generated an administrative burden on the SIC, since many human and financial resources were used to monitor commitments, in cases that did not lead to any sanction, and did not send any dissuasive message to economic agents in Colombian markets.

24. Because of that, and considering that one of the most important public policy objectives of the SIC nowadays is to strengthen its preventive functions, the Superintendent have not accepted settlements to terminate investigations in advance since October 2012. Moreover, the current policy in this regard states that settlements are not appropriate in cartel cases -under no circumstance- since for such behaviours the SIC have been promoting the implementation of leniency programs.

25. In order to describe the current policy on settlements, it is worth mentioning that the SIC has identified the following cumulative criteria to determine when a given settlement is reasonable to suspend or modify the conduct under investigation:

4.1. Settlements cannot refer exclusively to commitments to comply law

26. Settlement offers that only guarantee compliance with the competition regimen by the parties under investigation are not reasonable enough to eliminate or modify the behaviour for which they are being investigated. Compliance with competition rules is something that they must do for the simple fact of being market agents. The competition regime applies to anyone who develops an economic activity, regardless of the sector or the economic activity in which the agent participates.

27. In this regard, Article 2 of Law 1340 of 2009 states:

> *"**Article 2. (...)** The set of rules and regulations governing competition protection shall apply to whoever performs any economic activity or to anyone who affects or may affect such performance, regardless of its form or legal nature, and in relation to conducts that have or may have a total or partial effect upon the national markets, whatever the activity or economic sector may be".*

28. Pursuant to the cited provision, it is clear that any market agent, understood as anyone carrying out an economic activity or anyone who affects or may affect the market development, is obliged to comply with the provisions on competition protection. Thus, the obligation of the investigated parties to comply with the competition regime arises from law, and not from an acquired commitment contained in the settlement offer accepted by the SIC.

29. Therefore, settlement offers that represent commitments to comply with the competition protection regime are innocuous to guarantee the suspension or modification of the conduct under investigation.

4.2. Settlements must be effective in suspending or modifying the alleged anticompetitive conduct identified in the statement of objections

30. It is essential that settlement offers given by the investigated parties allow the SIC to assure the suspension or modification of the alleged anticompetitive conduct, in terms and conditions consistent with the competition regime.

4.3. Settlements must be structural

31. As a general rule, the SIC considers that structural settlements are more suitable and reasonable to suspend or modify alleged anticompetitive conducts, since they eliminate or reduce substantially and permanently the economic incentives of the agents to perform the investigated conducts. In this sense, structural settlements are aimed at generating pro-competitive effects in the market, which could not be generated with the imposition fines as a result of an investigation.

32. Examples of structural settlements are the assets divestments of a vertically integrated company in a market affected by the conduct under investigation. Another example could be the elimination of exclusivity clauses in contracts with suppliers or customers.

33. Contrarily, the SIC considers that although commitments on promoting compliance with competition rules through activities such as advertising, conferences and training are desirable, they represent behavioural (non-structural) settlements, which, generally, are not sufficient by themselves to suspend or modify the investigated conduct. In this regard, settlements that include commitments to follow a certain behaviour, but do not supress or reduce the economic incentives to incur in an anticompetitive behaviour, do not constitute a structural settlement, and, thus, cannot be considered as a reasonable guarantee.

4.4. Acceptance of settlements must be adjusted to the policy of competition promotion and protection

34. Settlement offers must comply with the purposes of competition law, which are, among others, to ensure free participation of economic agents in the market, consumer welfare and economic efficiency. In each case, the SIC must evaluate whether the settlement offer and the early termination of the investigation are well suited to the purposes pursued by the competition regime. This implies that the SIC should assess if such measures maintain the deterrent effect of sanctions for violation of the competition protection regime.