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Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by Colombia

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This document reproduces a written contribution by Colombia submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

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1. Jurisdictional safe harbours and presumptions in antitrust cases

1. As the national competition authority in Colombia, the Superintendence of Industry and Commerce (SIC) must investigate antitrust cases in which the criterion of "significance" is met. This condition is directly associated with: (i) free access to markets; (ii) consumer welfare; and (iii) economic efficiency. In consequence, the SIC should not investigate conducts that are not substantially affecting one of these three issues.

2. Nevertheless "significance" criterion is not objectively defined in the Colombian competition regime. On the contrary, it is the competition authority who reasonably evaluates in each case whether this criterion is met or not.

3. In this sense, for example, an agreement between competitors that seek to fix a minimum sale price of a product may not be considered illegal if from the preliminary analysis carried out by the SIC, it is inferred that it is not "significant", in the above terms.

4. With significance as a necessary condition, in Colombia there is presumption of illegality on certain behaviours that are considered competition restrictions *per se*, fundamentally based on economic theory. Thus, if the investigated facts can reasonably be framed in any of those behaviours, it will not be necessary for the SIC to evaluate whether the investigated conduct represents a potential harm to market competition, or if it has indeed restricted it.

5. In contrast, Colombian competition regime includes a general prohibition, for cases that cannot be easily related to *per se* antitrust conducts. When these kind of behaviours are being investigated by the SIC, the agency has the burden of proving that they represent a potential or effective harm to competition, applying the rule of reason.

6. Regarding the list of behaviours that are deemed objectively restrictive for market competition, they can be framed in two broad categories: (i) anticompetitive agreements and (ii) anticompetitive unilateral behaviours. This second category, is also divided into two major groups: (a) abuse of dominance and (b) anticompetitive conducts.

7. In the list of agreements that are considered *per se* anticompetitive, there is no differentiation between vertical or horizontal agreements, so regardless of the economic relationship that exists between the offenders, when their coordinated behaviour can be adjusted to any of the ruled conducts, it will be understood by the competition authority as illegal, without having to prove the potential or effective harm.

8. In cases of abuse of dominance, the SIC has to prove that the alleged offender is, in fact, a dominant competitor in the market. For this reason, in spite of not being specifically indicated in the law, in investigations of alleged abuses of dominance the competition authority has to conduct detailed market analyses to demonstrate, in the first place, that the investigated party has a dominant position.

9. The methodology that is usually used to perform such analysis is the definition of a relevant market, so the SIC can subsequently estimate the market share of the alleged offender and its closest competitors, calculations that must be complemented with analysis of entrance and expansion barriers, countervailing buyer power, among other relevant factors for the particular case.

10. On the contrary, investigations on unilateral anti-competitive conducts and anticompetitive agreements do not require that the SIC carry out a detailed market

analysis, as there is no need to clearly determine the relative position of the alleged offenders between their close competitors, nor if they have market power.

11. Now, in the list of behaviours that are categorically prohibited in the Colombian competition regime, both in the category of anticompetitive agreements and abuse of dominance, are: (i) discrimination between equivalent operations; (ii) tied or conditioned sales; and (iii) undue obstruction to the course of trade.

12. Other types of agreements that are considered *per se* anticompetitive are: (i) direct or indirect price fixing; (ii) distribution of markets (*via* supply or demand); (iii) supply restrictions; and (iv) bid rigging. Predatory prices are also considered abusive, when they are applied by a dominant firm.

13. Finally, there are three (3) conducts listed as *per se* anti-competitive unilateral conducts: (i) infringement of the advertising rules established in the consumer protection statute; (ii) influence a firm to raise its prices or refrain from lowering them; and (iii) acting against a firm in retaliation to its pricing policy.

14. On the other hand, the Colombian competition regime contemplates three (3) exceptions for conducts that, despite of leading to cooperation between agents that are presumed independent, are not considered competition restrictions: (i) cooperation for research and development of new technologies; (ii) agreements for compliance of good practices, provided that this does not limit the entry or expansion of competitors in the market; and (iii) agreements for using common facilities.

15. Regardless the "*per se*" illegal condition of the conducts mentioned in this chapter, the SIC has concluded in some cases that under specific conditions, such behaviours may not be harmful for market competition. This is the case, for instance, of RPMs which must be analysed under the rule of reason criteria – maximum or suggested prices to not necessarily lead to competition restrictions.

16. However, the implementation of the rule of reason has been controverted by some practitioners, as they believe that, according to the Civil Law Tradition, there is no margin of interpretation for the competition authority in conducts that are expressly prohibited by law. Hence, the SIC should not apply the rule of reason for any of the listed behaviours.

17. Nevertheless, the SIC doctrine has ratified that there can be some room to reasonably determine if behaviours that fit in the listed antitrust conducts can be considered illegal, an thus sanctioned, or not.

2. Safe harbours in merger control

18. The merger control regime in Colombia considers certain cases in which companies, despite exceeding the thresholds of income or assets to notify the transaction, are exempt from the duty to submit it to prior control by the SIC.

19. These cases refer mainly to processes of group-internal or intra-person restructuring, as they have no effect on market structure.

20. On the other hand, the Colombian merger regime establishes a joint market share threshold of 20%, below which a transaction is considered automatically approved; that is, it does not need to be pre-evaluated by the SIC. This threshold applies for both vertical

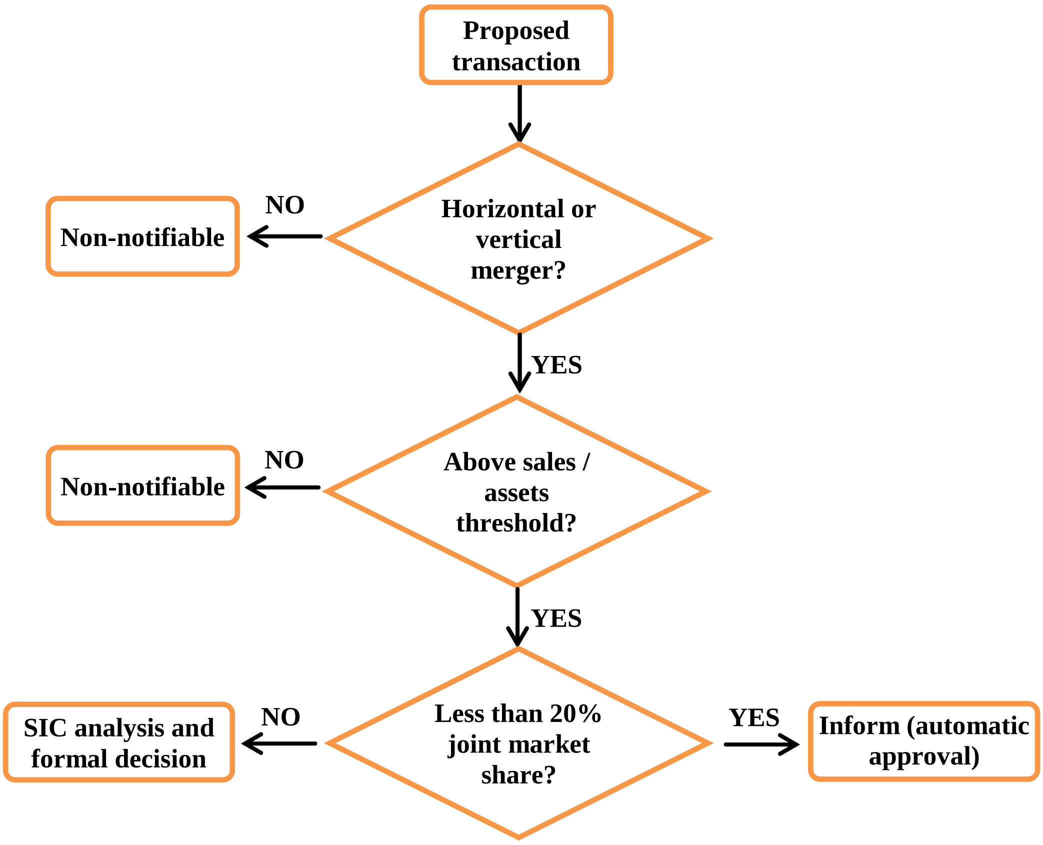
and horizontal mergers, and must be verified for each of the markets involved in the transaction.

21. In cases where the parties do not jointly exceed 20% market share (in each of the markets involved in the transaction), they just have to inform the upcoming merger to the SIC. Hence, the SIC does not conduct any analysis, except for the verification that the submitted market shares are duly supported.

22. When the parties have a joint market share above 20% in at least one of the involved markets in the transaction, it must be submitted to the SIC for pre-evaluation, whose analysis may result in approving, conditioning or blocking the merger.

23. Thus, when a group of companies intend to merge, they must answer a series of questions that will lead them to determine, first, if they are obliged to inform the SIC about the merger, or if, on the contrary, they are exempt from such duty. Secondly, if this is the case, they will come to establish whether they should only inform the transaction to the competition authority, or if they must submit it for approval.

24. The following flow summarizes the exercise that companies must do to determine if they are obliged or not to report the operation, and if, in the first case, they must obtain formal approval from the SIC.



25. Although this threshold is appropriate in most cases, since it is atypical that a merger between firms that do not exceed 20% market share can substantially lessen competition, it is crucial that the parties use an adequate definition of the relevant market.

A broader or narrower definition could lead to the parties to believe that they do not require SIC's approval to perform the merger, when they actually have to submit it for pre-evaluation.

26. It is well known that many of the discussions that arise between the competition authority and the parties in merger cases are, precisely, regarding the definition of the relevant market, which by the way is not necessarily the expertise of the companies.

27. Thus, there is a very high risk for firms when they have to define the relevant market on their own and determine whether or not they must obtain a formal approval from the competition authority to be able to perform the proposed transaction.

28. On the other hand, there are several cases in which the relevant market methodology is not appropriate for analysing merger effects, such as digital markets, multi-sided markets, platforms, among others. Also, it is not uncommon to have cases in which competition variables are not conventional (prices, quantities, quality, etc.), but others such as the volume of data or the use of algorithms, where concentration and market power analyses cannot be addressed with conventional methods.

29. In such cases, the delimitation of a relevant market and the consequent market shares can lead to wrong conclusions or to the automatic approval of transactions that in fact represent a substantial lessening of competition. Likewise, they can lead to the objection or conditioned approval of transactions that do not represent substantial harm.

30. For this reason, the SIC has expressed in different scenarios the convenience of eliminating the threshold of 20% market share for automatic merger approval. This criterion could instead be included in soft laws or guidelines, and be used only when the relevant market methodology is appropriate. In any case, this exercise should always be addressed by the competition authority and not by the merging firms.

31. Another exception contained in the Colombian merger regime are conglomerates, since the competition law limits the powers of the agency exclusively to the prior control of horizontal or vertical mergers.

32. Although the substantial lessening of competition in conglomerates is occasional, mergers in related markets can lead to exploitative or exclusionary behaviours leveraged by the market power that the merged firm could have in related products.

33. In this regard, the SIC has also expressed the desirability of including conglomerates control in the Colombian merger regime.

34. However, the aforementioned adjustments require an amendment of the competition law in Colombia, which is why its materialization in the short term is uncertain.