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Procompetitive Industrial Policy – Note by Colombia

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03544007

Colombia

1. Introduction

1. In Colombia, there exists a model of a social market economy in which freedom of competition is considered both an individual and collective right, comprising two main aspects. Firstly, a field of prerogatives that grants all individuals a set of rights to participate equally in the market. Secondly, a sphere that encompasses a social function and responsibilities that legitimize the exercise of economic freedoms. For this reason, the Constitutional Court has explained that freedom of competition "*is not only aimed at defending the particular interests of entrepreneurs interacting in the market, but also seeks to protect the public interest*¹."

2. Based on this groundwork, the objectives of competition policy are compatible with industrial policies that aim to structurally improve the performance of the domestic business sector. This is explained because freedom of competition, correctly understood, is justified by a social function and responsibilities that include contributing to the economic and social development of society as a whole.

3. In this sense, pro-competitive industrial policies refer to how the State develops strategies to promote economic development while maintaining free competition. Industrial policies, in general, are designed and executed from four perspectives: (i) business productivity, (ii) productive transformation of sectors and regions, including promoting productive associations, (iii) internationalization of businesses and consumers, and (iv) free competition. By promoting fair competition, pro-competitive industrial policy aims to prevent monopolistic practices, level the playing field for businesses of all sizes, and stimulate dynamic forces in the market in pursuit of the general interest.

4. It is important to highlight that in Colombia, the legal framework allows the competition authority to bear in mind considerations related to industrial policies. For example, Articles 333 and 334 of the Constitution, which establish economic freedoms, expressly assign the State to avert and control activities that constitute abuse of dominant market position, and to ensure valuable public policy objectives such as promoting employment, ensuring effective access to basic goods and services, harmonious regional development, and promoting productivity and competitiveness. This is a relevant rule for the competition agency as its administrative actions constitute a form of state intervention in the economy. Additionally, Article 3 of Law 1340 of 2009, which establishes the competition protection regime, expressly stipulates that the authority's actions must be aimed at promoting the free participation of companies in the market, consumer welfare, and economic efficiency.

5. To fulfill its constitutional and legal function, the Superintendence of Industry and Commerce (hereinafter SIC) has a structural organization that allows it to intervene in the market to promote free competition through two approaches. On one hand, it adopts a preventive approach aimed at promoting compliance with the competition protection regime. This approach is carried out through three functions. The first is the prior control of business integrations, the second is competition advocacy, and the third is the management carried out by its Compliance Office. This latter area specifically aims to build a culture of compliance in the market regarding free competition. On the other hand, the

¹ Colombian Constitutional Court. Court ruling C-616 of 2011.

SIC has a corrective or sanctioning function. In pursuit of this function, the agency conducts administrative investigations to detect and repress restrictive competition practices.

6. The SIC carries out activities inherent to the exercise of its functions to achieve the public policy objectives established in the reindustrialization policy promoted by the National Government, among other purposes. In this way, the investigations it pursues are also aimed at promoting objectives such as the development of the so-called popular economy, the internationalization of the economy, bridging gaps, and institutional transformation. From a preventive perspective, the exercise of competition advocacy by the SIC has also been characterized by constant interaction with policymakers. This approach is promoted to recommend strategies to ensure compliance with the public policy objectives that regulatory projects pursue, ensuring that they are achieved under conditions that best suit the competition protection regime.

7. It is important to highlight that, based on the experience of the SIC, constant dialogue with regulatory authorities has been fundamental for the work of competition advocacy. This dialogue helps reduce the risks associated with ignorance of competition rules and the specific dynamics of each market. Especially since the Competition Authority often lacks detailed knowledge of market dynamics, it is essential to involve the regulatory authority, who is the expert in the market in question, to construct appropriate regulations for the sector being regulated without negatively affecting the framework of free competition.

2. Actions demonstrating coherence between competition policy and industrial policy

8. The reindustrialization policy comprises several key public policy objectives aimed at promoting economic development under equitable conditions for society as a whole. Some of these objectives include promoting the so-called popular economy, inclusive and sustainable internationalization, closing gaps, and democratizing the public procurement system.

9. Below are some examples of actions taken by the SIC to align competition policy requirements with industrial policy objectives. Firstly, we will discuss certain administrative investigations aimed at achieving the goals of reindustrialization. Subsequently, we will delve into how the SIC, in its role of competition advocacy, engages consistently with regulatory authorities and provides recommendations that could enhance the harmonization between public policy objectives and norms regarding free competition.

2.1. Administrative Investigations Aimed at Achieving the Objectives of Reindustrialization

10. The SIC has initiated administrative actions aimed at suppressing restrictive competition practices in sectors crucial for realizing the aforementioned industrial policies. Its purpose has been to safeguard free competition in these sectors and, moreover, promote the realization of the objectives of the reindustrialization policy. One of these investigations sought to analyse the women's professional soccer market in Colombia.

11. The competition authority, by its own initiative, had identified several issues in this market, especially concerning the conditions of the players in the market. Although the general issue was publicly known and reported by the media before, the market signals up to that point did not indicate that the problem could be attributed to gender bias. The problem seemed to stem from the normal dynamics of the market, involving the interaction between supply and demand, specifically the lack of consumers for women's soccer.

Nevertheless, within the investigative action carried out by the competition authority in Colombia, some factors that served as indicators of the lack of promotion and development in the market were found. It was suggested that the obstruction of market growth was a result of the actions of key market players rather than being a natural consequence of market dynamics.

12. The following are brief summaries of the investigated behaviors:
 1. The agreement to standardize two clauses in the contracts of women players affiliated with the teams, particularly regarding the duration of women player contracts and their individual image rights. Regarding women player affiliation, they agreed that the contract duration would be equal to the duration of the league, which historically ranged from 1 to 4 months. Women players were not contractually bound to the club for the remaining time. Concerning individual image rights, teams stipulated that women players would not receive additional compensation for the use of their image, which, in many cases, represented additional income for them.
 2. The agreement to fix the salary of women players affiliated with the teams. Professional clubs, which affiliated the women players, agreed on a salary scale that determined the remuneration of each player based on their experience. The range varied between \$237 and \$1,000 USD.
 3. The reluctance of professional soccer executives to accept money from the Colombian government to promote the sport, due to the potential state controls it could impose on the flow of funds to the teams. This was despite one of the main arguments for the lack of market promotion being the absence of economic resources, according to the professional clubs.
 4. The signing of a contract for the exploitation of television and tournament broadcast rights with unfavorable conditions for the development of the Women's Professional Soccer League. This contract stipulated that only one women's league match should be broadcast, which could, in any case, be replaced by any other match, including matches from men's competitions.
13. This investigation, as the first of its kind, set an important benchmark for analyzing gender gaps in Colombia, particularly from the perspective of competition protection. While gender gaps may impact market efficiencies, it's not always evident that inefficiencies are solely caused by gender discrimination; they could result from other behaviors unrelated to gender discrimination.
14. The SIC's decision to intervene in this market aligns with Colombia's reindustrialization policies, as it seeks to promote economic development under equitable conditions for society as a whole, thereby addressing gender gaps. This is crucial, especially in a market where apparent development is influenced more by the actions of key market players rather than being a natural outcome of market dynamics.

2.2. Role of Competition Advocacy in Achieving Reindustrialization Policy Objectives

15. From the preventive perspective of competition advocacy, the SIC has leveraged ongoing interactions with regulatory authorities to contribute to harmonizing industrial policy with competition policy. A notable example is the competition advocacy review of the regulation project for implementing 5G technology in Colombia. This analysis was crucial for structurally improving the performance of the telecommunications sector,

especially given the unique characteristics of the market and the dynamics of the entities within it.

16. In 2023, for the first time in Colombia, the Ministry of Information Technology and Communications (MINTIC) made available the Radio Electric Spectrum (RES) in the 3500 MHz band, recognized internationally as crucial for adopting 5G technologies and enhancing service provision conditions, particularly for mobile services. The allocation of RES is a strategic instrument in defining and configuring communication service offerings, making it essential to promote competition in mobile service markets. This presented an opportunity for the SIC, in collaboration with regulatory authorities, to design participation and bidding rules for the RES auction with the goal of ensuring that society as a whole could benefit from the deployment of 5G technology at competitive prices.

17. Currently, telecommunications are managed through the Radio Electric Spectrum (RES). As stipulated by the Colombian Constitution², RES is a public, inalienable, and imprescriptible asset subject to state management and control to prevent monopolistic practices in its use. Article 2 of Law 1341 of 2009 mandates ensuring equal opportunities for access and use of the spectrum and maximizing social welfare through its allocation. Together, these rules justify state intervention in setting market rules to ensure effective access to basic goods and services, harmonious regional development, and promotion of productivity and competitiveness.

18. In analyzing the regulation project, the SIC determined that there were five mobile network operators in Colombia (CLARO, MOVISTAR, TIGO, WOM, and ETB). It was concluded that CLARO held a competitive advantage in the market due to its market share (46% in mobile telephony users and 53% in mobile internet as of 2023). In a concentrated market, the agent with the highest share is highly likely to have greater capabilities to acquire RES and rapidly deploy the necessary infrastructure for offering 5G technology. Furthermore, CLARO could gain a leadership position due to the "First-mover advantage"³ resulting from having the most available infrastructure in 4G technologies. While this circumstance alone may not be objectionable, it was crucial for assessing the potential impact on industrial policy implementation.

19. One of the requirements set by MINTIC for the auction was that the participant with the highest bid for the spectrum allocated in the 3500 MHz band would have the first choice of position within the band. This meant that the highest bidder would have the authority to choose the location within the band. Considering that CLARO would be in the best position to do so due to its advantages and investment capacity, the mechanism would allow it to choose a position with lower costs or restrictions for its operations, creating an additional competitive advantage. At this point, the analysis aimed to address a cornerstone of Colombia's industrialization policy: ensuring equal opportunities for access and use of the spectrum.

20. In light of the analysis of the market's special characteristics, the SIC determined that specific differential measures should be imposed on the market leader (CLARO) to ensure access to RES under equitable conditions. The purpose of these measures was to place other market players, who are not market leaders, in a position where they have a real opportunity to compete in the market if they make the necessary investments, efforts, and develop appropriate strategies (compete). This, again, is consistent with the aim of striking

² Article 75 of the Political Constitution of Colombia.

³ Marvin B. Liberman, David B. Montgomery. 1988. First Mover Advantages. *Strategic Management Journal*, Volume 9, Special Issue: Strategy Content Research (Summer, 1988), 4158.

a balance between industrialization policies in markets for efficient functioning and respecting the rules of free competition for equitable functioning.

21. It is important to mention that in seeking a balance between industrial policies in Colombia and rules on free competition, authorities must seek measures that are: (i) **appropriate** to promote free competition and prevent monopolization practices, (ii) **required** or where there is no less harmful means to achieve the intended goal, and (iii) **proportional** to the sought objective, meaning that the benefits derived from the measures outweigh the restrictions imposed on the regulated participants.

22. Under these conditions, the SIC made the following recommendations, which are consistent with the objective of reconciling industrial policies in the country with the protection of free competition:

- Given that CLARO holds an advantageous position in the market, derived from the capacity of its networks and financial strength, MINTIC should evaluate the possibility that CLARO cannot commercially offer 5G technology-based services supported by 3.5 GHz spectrum until it provides other requesting agents a serious and real opportunity for access and interconnection to CLARO's networks temporarily. This measure would promote agent concurrency in the offering of 5G services without creating a disproportionate burden to the detriment of CLARO, aiming to foster diversity of offerings and dynamic pricing for consumers.
- The inclusion of a rule in the project whereby CLARO cannot choose its position in the band based on the value of its offer to prevent it from concentrating new benefits to the detriment of its competitors. This would ensure that any additional costs associated with choosing the location are borne by the agent best positioned to do so.

23. Collectively, the concept formulated by the SIC was timely and essential for protecting free competition. Estimating sector-specific rules, especially in concentrated markets, can generate additional competitive advantages for those with market power. These advantages can lead to imbalances in competition dynamics, substantially tilting the scale towards one or a few agents. In this regard, state intervention, led by its competition agency, is essential to achieve constitutional objectives aimed at protecting competition, consumer welfare, and market efficiency.

3. Conclusions

24. In conclusion, the debate regarding the balance between industrialization policies and competition standards in Colombia is crucial for the sustainable economic development of the country. While it's important to foster industrialization to drive growth and job creation, it's equally essential to ensure a fair competitive environment that promotes innovation, efficiency, and consumer welfare. Therefore, finding an appropriate balance between these policies is essential to guarantee inclusive and equitable long-term economic development.

25. Furthermore, it's crucial that industrialization policies are implemented transparently with effective oversight mechanisms to prevent anti-competitive practices that could distort the market. Additionally, collaboration between public entities and between the public and private sectors should be encouraged to design strategies that enhance the competitiveness of local businesses without compromising fundamental principles of free competition. This way, Colombia can fully leverage the benefits of industrialization without compromising efficiency and equity in its economy.

26. Lastly, the cases analysed illustrate the complexity of striking a balance between industrialization policies and competition norms in Colombia. On one hand, industrial policies governing a market may, albeit not overtly, be tainted by gender stereotypes, as seen in the investigation of the women's professional soccer market. This can hinder market growth and limit opportunities for women in sports, presenting a challenge for competition agencies that may not have all the available information to reach such conclusions. On the other hand, the spectrum auction case in Colombia highlighted how established rules could impact competition in a concentrated market. Here, the challenge lay in designing rules that promote effective competition and prevent the consolidation of a dominant position by one agent to the detriment of consumers.