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Competition Enforcement and Regulatory Alternatives – Note by Colombia

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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1. The present document provides the Superintendence of Industry and Commerce's (henceforth, SIC) contribution to the discussion on how competition enforcement interacts with regulatory alternatives. It introduces the SIC's approach and best practices concerning the interplay of antitrust rules and regulatory obligations and sets out some case examples by means of illustrating how it has in practice come to play. The cases presented show the synergies between competition enforcement, advocacy and regulatory alternatives, they concern instances where regulation has followed from competition enforcement, from the risks of potential restraints to competition in a given sector, and a case where a practice was enforced by the competition authority as an antitrust infringement after a breach of a regulatory obligation.

2. The most common scenario in which the Colombian competition authority converges and interacts with sector regulators is by means of the exercise of its advocacy function. The SIC, as the National Authority for Competition Protection, holds the competition advocacy function as provided for in Article 7 of Law 1340 of 2009. Pursuant to this function, the authority has the faculty to deliver its opinion (either ex officio or at the request of the regulator) on those regulatory projects that may have an impact on free competition in the markets. Nonetheless, it is key to point out that this faculty does not entail for the SIC the possibility to directly participate in the design, implementation, or removal of the regulation; it will only allow the SIC to, first, issue those recommendations aimed at ensuring that the regulation does not hinder competition dynamics in the markets; and second, to provide comments to those bills that may have an impact on free competition. The reason being that the authority would then have to review or evaluate the regulations in which it was involved. In this context, Competition authority then engages in comprehensive dialogues with the regulators, with the purpose of gaining enough understanding of the sector that will receive the regulation and provide the most suitable recommendations.

3. The SIC and sectoral regulators may as well interact in accordance with their constitutional duties of coordination and collaboration that are applicable to the relationships between public entities. These duties are two-fold when it comes to the interplay between the SIC as the competition authority and the sector regulators. On the one hand, whenever the sectoral regulator identifies that a certain regulatory project may have an impact on competition in the markets, it must submit the draft regulation to the competition authority, so that the latter issues appropriate recommendations. The SIC then has a deadline to issue the respective concept, which may vary depending on whether the regulation deals with tariff concerns. Conversely, from the SIC's enforcement perspective, the SIC has the duty to inform the regulator whenever an investigation is initiated, so that it can make a statement on the investigated facts. The regulators are as well compelled to inform the SIC of possible anticompetitive conducts of which they become aware within the framework of their functions.

4. As for cooperation duties, the law establishes that agencies exercising regulatory, control and surveillance functions over all sectors of the economy shall provide technical support to the SIC for the exercise of its functions. In practice, it is common for the SIC to request information to the regulators or to conduct joint inspections to market agents. The purpose of which is to leverage the regulator's knowledge, databases, and the expertise it has on the sector, also to maintain a dialogue in the context of coordination in the fulfillment of the State's purposes. For example, in the cases known as "Lactosueros" the SIC, together

with the INVIMA –Colombia's National Food and Drug Surveillance Institute–, carried out inspections to collect samples of the food products related to the investigated facts, which were later analyzed in INVIMA's laboratories. (Resolution No. 26724 of 2016 and Resolution No. 35143 of 2017). The collaboration benefitted from the expertise of the INVIMA and its specific functions and powers assessing the sanitary matters. It is also recurrent that regulators and/or other superintendencies inform and consult the SIC about potential conducts or facts that may be of interest of the competition authority.

1. Cases

5. Take as a premise that the competition authority is the expert in competition matters and that the regulators are experts in the sector. In Colombia, the regulatory commissions are the regulators par excellence. Their function, in general terms, is to provide the necessary particular and general regulations to address and overcome market failures in their sectors. Although the regulators must consider as a cornerstone of their activity the promotion of free and fair competition in their sectors, the role of the Competition Authority guarantees an additional review, which is especially aimed at ensuring that the regulation fully complies with the objectives established in the competition protection regime: consumers welfare, free participation of firms in the markets and economic efficiency.

6. By articulating the regulators' knowledge of the sector with the authority's knowledge of competition, valuable synergies are created and fostered that are useful for the functions that each one exercises over the markets. This is true when it comes to all functions described: enforcement, advocacy, and the performance of market studies by the competition authority, and the design, implementation, or removal of the regulation by the regulators. The experience of this superintendence shows that the dialogue with regulators provides valuable insights for decision-making. For example, to ensure the best way forward in investigations, direct contact with regulators has made it possible to fine-tune conduct more precisely. In some cases, regulators may have assessed the circumstances that are currently attracting the attention of the competition authority, and their take on the issues ends up being key to the thorough assessment of the situation. This dialogue has also allowed us to clarify the rules of the game on certain markets and has provided us with a view as to how the failure to comply with competition provisions has harmful consequences for the consumer (see cases "*Azucar*" and "*Lactosueros*") and for the competitors (see case "*Portabilidad*").

7. The case known as "*Azucar*" exemplifies an instance where regulation followed from competition enforcement. Under the Resolution No. 80847 of 2010, the SIC instructed the Steering Committee of the Sugar Price Stabilization Fund (FEPA for its acronym in Spanish) and the National Government, to review the formulas for the settlement of compensations and assignments under FEPA. SIC's instruction was aimed at ensuring that such formulas didn't facilitate the allocation of production quotas or supplies in the sugar market in Colombia, and in general, to avoid any unforeseen anticompetitive effect. In compliance the sanction imposed by the SIC, the FEPA issued a resolution, where it incorporated considerations to comply with competition provisions, and created mechanisms to regulate the exchange of information between competitors. A policy was also established for the delivery of information by the Technical Secretariat of the Fund which included rules for the management of meetings of the Steering Committee and the circulation of aggregated information for competition purposes. Specifically, it was established that in the Steering Committee meetings: "*there should be no discussions related to individual market prices, quotas, market share levels, production, sales and*

marketing areas and any others related to commercial management and future commercial strategies in the market by competitors".

8. Another case that exemplifies the complementary relationship among the SIC and regulators is "*Casyp*", here the SIC urged the National Infrastructure Agency within the resolution sanctioning the investigated parties, to explore the possibility of regulating all charges directly associated with the provision of public transportation services, including those corresponding to fuel supply, in all concessions it enters, modifies, or negotiates.

9. The possibility of competition enforcement by means of potential risks of restraints to competition in the electricity and oil transportation sectors, led to the inclusion in different regulations of the duty for the Energy Regulatory Commission and gas (CREG in Spanish) and the Ministry of Mines and Energy to report and in general have at the disposal of the SIC information on possible anti-competitive conducts. In the case of the electricity sector, Resolution CREG 130 of 2019 states that the wholesale market administrator is required to have available for the SIC all the information submitted by retailers and bidders during the period of the respective call in the regulated market It also established that any breach of the Resolution is considered a practice that goes against its purposes and must be reported to the CREG, The Superintendence of Domiciliary Public Utilities and SIC. It expressly prohibits users of the system from engaging in practices that reduce, restrict, or prevent competition. It includes provisions so that prices are not manipulated, contracting conditions in such transactions, concerted practices, exchanges of information between competitors. In Resolution 72146 of 2014, Article 16 established that the Ministry of Mines and Energy shall inform the SIC of any conduct that has been brought to its attention, with which the transporter allegedly attempts to exploit the tariff methodology, distort the market, and illegitimately extract rents from the demand.

10. Finally, the case "*Portability*", shows a scenario in which a practice breached a regulatory obligation, and it then became an antitrust infringement. The case is the result of an agent's failure to comply with Resolution No. 3136 of 2011 of the Commission for Communications Regulation, which prohibited communications service providers from blocking or restricting the use of terminal equipment in networks other than their own. Additionally, the regulation established the procedure that users had to follow to request the unblocking of their mobile equipment, without allowing the communications service provider to add any further requirements.

11. At the time of the facts, the offending agent had a dominant position in the mobile outgoing voice market, which, together with the regulatory non-compliance and the evidentiary material provided in the investigation, allowed the SIC to conclude that its conduct constituted an abuse of its dominant position in accordance with the provisions of numeral 6 of article 50 of Decree 2153 of 1992. For this purpose, the SIC, in addition to considering the regulatory infringement, pondered evidence on the structure and characteristics of the market under investigation, the participation of the agents and the effect of the conduct on the users.