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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Colombia**

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More documents related to this discussion can be found at
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Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

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Colombia

1. Purpose and structure of the contribution

1. This contribution is organized around several rules and principles regarding Transparency and Procedural Fairness guarantees in the context of competition law enforcement procedures conducted by the Superintendence of Industry and Commerce. First, we sketch and describe the rules applicable to the enforcement procedures in respect to the right to access to the case file and to the protection of confidential information. Then we explore the tensions that result from the coexistence of guarantees related to the access to the case file and to those that set forth the limits to that access in order to grant the protection of confidential information.

2. The main purpose of this work is to contribute to the discussion regarding the scope of the above-mentioned rules. The way in which the Colombian Competition authority guarantees the right to access the file and provides the protection of confidential information is analyzed through relevant case examples. The cases display situations that are at the heart of the discussion because they provide insights on the way in which the competition authority balances fundamental objectives within antitrust enforcement. This contribution discusses issues regarding the rights to access the information in possession of the agency depending on the stage of the administrative procedure, the access to information other than the one classified as evidence in the context of the investigation, and the protection and use of classified information by the SIC for enforcement purposes.

2. Rights, principles and rules regarding access to information and protection of confidential information within the enforcement administrative procedure

3. The wide acceptance of the 2019 ICN Framework on Competition Agency Procedures (CAP) is a circumstance worth highlighting. It shows that there is certainly a global consensus among competition agencies regarding fundamental principles of fair and effective procedures (International Competition Network, 2019^[1]). In the same sense, the 2019 Background Note prepared by the OECD's Secretariat on Access to the case file and protection of confidential information recognized, among others, common grounds on obligations to act fairly and in respect to the disclosure of evidence throughout the proceedings (Organisation for Economic Co-operation and Development, n.d.^[2]).

4. It is clear that agencies are mindful of the need to ensure proceedings and decisions that are lawful and that carefully observe and protect the rights of the parties within both: a global and a local framework. Procedural fairness safeguards help the agencies to improve enforcement just as it allows the parties to communicate better with the agency and to expect transparent and legitimate outcomes.

5. Accordingly, when the authority closely observes transparency and due process safeguards its decisions are less likely to be challenged by the parties, third parties and judicial reviewers, the communication among the authority and the parties is based on substantive issues, and certainly, a more efficient resource allocation for the competition is promoted.

6. From a local perspective, it is important to note that the Colombian competition authority rigorously applies to its enforcement proceedings principles and rules that materialize fundamental rights such as the right to a Due Process, to Privacy and to Access Public information. We intend to show how we apply them all through the administrative proceedings to contribute to the consolidation of experiences in implementing the best practices when procedural fairness issues arise.

7. The Superintendence of Industry and Commerce shall interpret and apply the laws that guide its activities and proceedings in light of constitutional and legal principles. Some of the most relevant principles to be satisfied by the authority in regard to procedural matters are the following: Due process, equality, transparency, publicity and effectiveness. To protect due process, the authority must fully guarantee rights to defense, to counsel and the right to challenge the decisions. In accordance with the principle of transparency, the administrative activity is of public knowledge. Henceforth, any person may have access to administrative actions and proceedings except to those that are classified as confidential under the law. Accordingly, based on the principle of publicity, the competition authority must disclose to the public and to interested parties each of its activities or resolutions through communications, notifications and the publication of its decisions when applicable.

3. Rules and principles through case study

8. This section has two purposes. First, to sketch and describe the rules applicable to the enforcement procedures in respect to the right to access to the case file and to the protection of confidential information. Second, to integrate into such description cases that show both an easy application of the rules and a more challenging one. We will address cases that consider: (i) access to information depending on the stages of the competition proceedings; (ii) the types of information included in the case file; (iii) the opportunity to access and the protection granted to each type of information; (iv) the relationship between the publication of the SIC's acts and decisions and the proper exercise of the rights of defense; and, (v) an approach to the protection of confidential information in general and in leniency applications.

3.1. Access to information depending on the stages of the competition proceedings

9. The SIC may begin an administrative proceeding on its own initiative (*ex officio*) or as the result of a complaint submitted to the Competition Protection Division. The Division initiates investigations *ex officio* based on information derived from a variety of sources, including news and alerts received from other government agencies. If the SIC receives a complaint from a private party, the Deputy Superintendent for Competition Protection reviews it and determines whether to open a preliminary inquiry or to dismiss the complaint. In making this decision, the Deputy is guided by Article 1.3 of Decree 4886 of 2011, which instructs the SIC to pursue only those claims that are "significant" for the purposes of maintaining competitive markets or promoting efficiency and consumer welfare.

10. The Deputy Superintendence, whether commenced *ex officio* or in response to a third party complaint, conducts a preliminary inquiry. There is no public announcement or notice to the suspected parties (this stage of the proceeding is confidential). During this phase the Division is authorized by law to collect all the evidence that is related to the facts that are subject to inquiry, in order to verify the facts, determine which persons were

involved in the alleged competition infringement and define if the conduct would effectively constitute a restrictive practice of competition. There are still no parties recognized as being under investigation and therefore the information collected is subjected to reservation as well. The confidentiality of the information as a characteristic of the preliminary inquiry stage is vital to ensure the effectiveness of the enforcement procedures. In addition, it is necessary to protect the case file information (documents, testimony, etc.) and to avoid the manipulation of the potential evidence.

11. During the preliminary stage of the proceedings, given that it is classified phase, the SIC can only provide access to the case file to the persons over which the documents revolve around and to other authorities exercising their functions. The first limit to the access to the general public is then the preliminary inquiry phase.

12. The limits to access the file during the preliminary inquiry stage were addressed by the SIC in the case *UAESP, EAB, AGUAS DE BOGOTÁ v Sic (2014) or “Basuras”* case (SIC, 2014_[3]). The Colombian Competition Authority sanctioned the “Empresa de Acueducto de Bogotá” (EAB), the Special Administrative Unit of Public Services (UAESP) and the “Empresa de Aguas de Bogotá S.A.” for restraining competition in the creation and implementation and execution of the garbage collection scheme that was going to be implemented in Bogotá.

13. The UAESP requested access to the entirety of the case file during the preliminary inquiry stage, claiming its right to an effective protection of its Right of defense. The SIC denied the access to the entirety of the file, instead granted a partial access to it given the stage of the procedure. According to the UAESP the SIC’s refusal to grant access in the terms of its request violated their right to a Due Process for it made it impossible to exercise their right to defense and to challenge the decision of the authority. The Competition authority rejected the claims of the UAESP primarily because the information had been requested during the preliminary inquiry phase of the process. Let us remember that during that phase both activities conducted and documents collected by the authority are confidential and that there are no parties under investigation or third parties.

14. The preliminary inquiry stage ends with the issuance of one of two types of administrative acts. On one the hand, with closing resolution, if the evidence in the record does not allow the Division to determine the possible occurrence of an anticompetitive behavior; or on the other hand, with a formal investigation resolution, if the evidence in the record allows the Division to infer that the restrictive behavior was performed by the suspected parties. If a formal investigation is opened, suspected parties get linked to the administrative proceeding as investigated parties and they are given access to the evidence in due time, so they can adequately defend themselves. In this stage, the Deputy Superintendent opens the probationary period and the parties under investigation exercise their rights of defense and can access the information used to determine the grounds of the charges allowing to guarantee procedural fairness. Also, it is important to note that the Superintendence issues non-confidential version documents to protect confidential information but still guarantee transparency (*Asocaña et al v SIC, 2015*) and that even though disclosure of confidential information is allowed to ensure the investigated parties the right to the defense, such information won’t be disclosed to third parties and to the general public (*Cementos v SIC, 2008*).

3.2. Case file: types of information included, and protection granted to each type

15. Colombian legislation establishes that all the documents and proceedings regarding a single administrative activity will be organized into one case file (Article 36. Law 1437/2011). The information will be classified into different books depending on the nature of the information. With the information that has a classified nature under the law, the Superintendence will have a separate and classified book. Either the Constitution or the law grants anyone the access to the case file except to those documents or books that are classified. The right to access the file is accompanied by the right to request copies and certificates of the accessible information.

16. The Superintendence may only deny the access to the consultation of the documents and books and to the issuance of copies and certificates through a motivated decision and when those documents and books are classified according to the Constitution, the Law, or when they are related to defence and national security. Another of the rules that apply in this regard is that such restriction to access will not apply when the petitioner is an authority exercising its functions. In those cases, the other authority must as well ensure the confidentiality of the information once it is under its possession. Finally, the authority cannot deny access to the person over which the documents revolve around.

17. When the petitioner of a classified information insists over a request denied by the SIC, the SIC will send the request to the judiciary that will decide whether to accept or not the information request.

18. Rules differ as to the access to the public and the reserved parts of the file. The starting point in the application of those rules, is to classify every piece of information that is collected during the investigation process to further determine if it is rendered confidential or not and if it might be disclosed later for being relevant incriminating evidence. For that purpose, Colombian Law determines which information is considered as confidential (Article 24. Law 1437/2011, Articles 18-19. Law 1712 de 2014). Some of the information protected with confidentiality is justified in the fact that its disclosure might infringe private rights such as privacy when regarding personal information, or because it regards business secrets, commercially sensitive information, and information covered by professional privilege.

19. The Andean community Decision 486 of 2000 is relevant to protect confidential information such as industrial secrets that may be used for any productive, industrial, or commercial activity (Article 260). The reason of the protection of this kind of information is the fair competition provided that the protection is limited to prevent the unfair use in the market of such information.

20. In respect to competition law enforcement procedures, Article 15. Law 1340/2009 allows the parties subjected to an investigation to request confidential treatment to the information relative to their business secrets. In that scenario, the person who is interested in obtaining a reserved treatment of their information should present a free access summary to be included in the public part of the file so to guarantee both the protection of the information as well as the publicity regarding its existence. The latter intends to guarantee the right of the parties to know (but not to access) what information rests on the file. Some other information, if exposed, might jeopardize public interest such as national security, international relationships, justice administration or macroeconomic stability.

21. The relevance of the protection of this type of information is not minor. The consequence established by Colombian legislation for those cases in which confidential

information is wrongfully disclosed, is that the staff member that was responsible for the disclosure can be disciplined for a serious offence. The protection of these kinds of information must be carefully analysed by the competition authority. In fact, the SIC has stated that if some information identified as reserved reaches the market, to competitors and other relevant market agents, the impact and the damage in the legitimate interest of some actors could be at risk. The harm to the owner whose information was wrongfully disclosed may certainly affect its performance in the market.

22. The SIC distinguishes between the information that is evidence from the one that is not from the case file. Such burden is required in order to decide on matters regarding the right to access granted to the parties. In *Brinsa et al v Sic (2018)* (SIC, 2018^[4]), for instance, one of the investigated parties requested to access the entirety of the information contained in the case file (meaning both public and confidential books of the file) claiming that it was necessary for the exercise of its right of defence. The SIC granted a partial access to the information, leaving aside the confidential books of the other parties that were also its competitors. The competition authority motivated its decision on the fact that the information contained in those confidential books was not considered as evidence for the accusation. The identification of this type of information (evidentiary material) works as relevant criteria when deciding to what information the party has the right to access to properly exercise its right of defence. In this sense, the right to access to information as a part of the right to defence is limited to the evidentiary material, to the public information contained in the case file and not to the entirety of the information possessed by the SIC as the party in that case claimed.

3.3. An approach to the protection of confidential information from the leniency policy perspective

23. The Superintendence of Industry and Commerce¹ protects the confidentiality of the leniency applicant as well as the information provided by the applicant in order to be granted the benefits from collaborating with the authority². One of the conditions defined by Colombian law to determine whether to grant leniency to the applicant is the submission of “at least brief information about the existence of the agreement, its operation, the product(s) involve in it and the participants”. According to the law, all the documents and proceedings regarding the leniency application will be stored into one separate and confidential case file different from that of the principal proceeding.

24. The information provided by the parties in pursue of leniency benefits may be of interest for the parties subjected to the investigation proceedings. For instance, a party may believe that it needs to be familiar with that information so to exercise its rights of defence. In the case *Mineros v Sic (2018)* (SIC, 2018^[5]), the collaboration of six whistleblowers was essential to determine that one of the investigated companies had encouraged suppliers of stone construction (contractors) materials to fix prices and allocate supply quotas. The company sponsored the anticompetitive agreements between its civil works contractors that allowed both of the restrictive behaviors. The alleged anti-competitive agreements were

¹ The Colombian leniency program is regulated by Decree 1523 of 2015.

² According to Article 2.2.2.2.9.4.3 of Decree 1523 of 2015, the applicant will be granted with confidentiality in accordance with the second paragraph of Article 15 of Law 1340 of 2009, when in consideration of the Authority, the whistle-blower may suffer business retaliation from other competitors.

implemented through an association that brought together the main suppliers of stone construction materials in the region and facilitated cartel behaviors.

25. The accused Company challenged the decision regarding the evidence of the case. The claim was that the Authority did not transfer the entirety of the information contained in the leniency file to the file of the principal proceeding. Failing to do so meant, in words of the company, a violation to its right to defense and to challenge the SIC's decision. In addition, the company argued that in accordance to the principle of publicity that guides the administrative activity conducted by the SIC, all of the documents and activities conducted by the SIC are of public access, and that the restrictions on the access to such documents and activities can be justified only in specific cases determined by the law. In that sense, the SIC had to transfer the entire leniency case file, and not just the evidence for without that information the investigation Company couldn't determine which information was favorable to its defense.

26. The Competition Authority stated that the claim was hypothetical and undetermined. In that case, it was not admissible to argue the violation of its rights to access the information, of defense and to challenge the authority's decisions on the expectation that the information contained in the leniency's case file could work as evidence in its favor. Moreover, the SIC demonstrated that there was no such alleged violation because the persons subject to investigation knew the entirety of the evidence that substantiated the decision.

27. The position of the party under investigation in regard to the extent of its rights mixes up the right to defense and challenge the decision with the right to access information. The information requested was not only not relevant for the investigation but also confidential given its nature. What is more, the SIC argued that to transfer the entire leniency case file to the principal investigation case file in order to grant access to the parties under investigation would discourage any future leniency applicant. That, in turn, would affect some enforcement outcomes.

4. Conclusions for further application

28. The Superintendence of Industry a Commerce follows a set of principles and rules to properly guarantee the materialization of the rights to a Due Process, to Privacy and to Access Public information. In that context, the competition law enforcement procedures conducted by the SIC include clearly stated rules as to the rights to access the information in possession of the agency depending on the stage of the administrative procedure, the access to information other than the one classified as evidence in the context of the investigation, and the protection and use of classified information by the SIC for enforcement purposes.

29. Colombian provisions and case law show the treatment given to confidential information when advancing enforcement procedures and guaranteeing the rights of the parties. For starters, the Competition Authority establishes whether the information in question is confidential according to the Constitution and the Law. The information classified as confidential cannot be disclosed by the authority, in principle. Still, disclosure may occur to prove and infringement and further in the proceedings the parties may be allowed to request confidential treatment. Also, in order to guarantee the parties rights of defense.

30. It is important to note that the Superintendence issues non-confidential version documents to protect confidential information and includes summaries into the case file referring the existence of confidential information in it. Even though disclosure of confidential information is allowed to ensure the investigated parties the right to the defense, such information won't be disclosed to third parties and to the general public.

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