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Interim Measures in Antitrust Investigations – Note by Colombia

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This document reproduces a written contribution from Colombia submitted for Item 2 of the 135th OECD Working Party 3 meeting on 21 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

Sabine ZIGELSKI
Sabine.Zigelski@oecd.org, +(33-1) 45 24 74 39.

JT03495730

Colombia

1. Introduction

1. Firstly, the Colombian Superintendence of Industry and Commerce (SIC) will refer to relevant aspects regarding the interim measures such as legal standards, procedural requirements, and conditions of imposition. Secondly, the SIC will give some details about the *Ferlag* case, in which the SIC used interim measures successfully.

2. Relevant aspects of interim measures: Legal standards, procedural requirements, and conditions of imposition

2. Precautionary measures in the administrative sphere are intended to ensure compliance with the rights and duties of citizens and the protection of the general interest. In this context, the competition protection regime, through article 18 of Law 1340 of 2009, entitles the SIC to order, as a precautionary measure, the immediate suspension of conduct that could be in breach of the provisions outlined in legislation on the protection of competition.

3. For the SIC to adopt precautionary measures it should assess whether the failure to adopt such measures could jeopardize the effectiveness of a future sanctioning decision. Article 3, numeral 7 of the Decree 4886 of 2011, modified by article 3 of Decree 092 of 2022, also establishes that it is a function of the office of the Superintendent of Industry and Commerce to “7. *To order, as a precautionary measure, the immediate suspension of conducts that may be contrary to the provisions on the protection of competition and unfair competition*”. To order an interim measure for an alleged commission of anti-competitive practices, SIC must prove (i) the probable occurrence, existence, or configuration of anti-competitive conduct; and (ii) the risk to the effectiveness of an eventual sanctioning decision if the interim measure is not ordered.

4. The first element arises from the very essence of the precautionary order that may be adopted by the Superintendence, since as it is clear from article 18 of Law 1340 of 2009, the Superintendence of Industry and Commerce may order “*the immediate suspension of conducts that may be contrary to the provisions outlined in the rules on the protection of competition*”.

5. It is important to emphasize that this precautionary power of the Superintendence of Industry and Commerce consists of an *a priori* intervention of the Authority in the market, intending to protect its future decision from a possible illegal intervention. It is worth noting that such intervention does not constitute any prejudgment on the investigations that may be simultaneously being carried out by the Deputy Superintendence for the Protection of Competition concerning the conducts under examination. However, the evidentiary standard for the adoption of a precautionary measure must be higher than that for the initiation of an investigation, since the evidentiary requirement is directly proportional to the degree of intervention in the markets generated by the actions of the administration.

6. The SIC has mentioned previously, in Resolution no. 7335 of 2016, the following:
“The degree of rigorosity for deciding to launch an investigation is not the same as for decreeing a precautionary measure. Indeed, the need to launch an

investigation may even be based on a simple indication, if it can be reasonably inferred that anticompetitive conduct may have taken place; whereas the precautionary measure requires not only more solid proof of the conduct under investigation but also of the production of irreversible damage if the measure is not adopted in time.

This is quite logical if one considers that the only effect that emerges from the act of initiation is the formal link to an investigation, while the imposition of a precautionary measure already implies a mutation of the outside world, and more specifically, of the sphere of the person under investigation, anticipating the effects of a decision”.

7. The Authority must consider at the time of analyzing the appropriateness of a precautionary measure if within the average parameters of the reason there is a high probability that the claims of the petitioner will be satisfied by the final decision of the SIC.

8. As to the second element, the risk to the effectiveness of an eventual sanctioning decision if the interim measure is not ordered, the SIC has said that for an interim measure to be adopted during an administrative proceeding for presumably anti-competitive practices, there must be a risk of harm against an eventual decision on the merits declaring that there was anti-competitive conduct. In other words, what is sought with the adoption of a precautionary measure is to prevent the final decision on the matter from being nugatory. This has been referred to as ‘danger of delay’, a concept that is understood as the risk that the right or interest protected by law may be affected by the passage of time. Therefore, it is intended that through the precautionary measure the decisions that the Superintendence of Industry and Commerce may adopt in matters of protection of competition do not become “paper decisions” but are effective to protect the market.

9. Additionally, not only the ‘presumption of sufficient legal bases’ and the danger in the delay that may be caused concerning the effectiveness of the final decision are required, but also the judgment of proportionality between the measure and benefit of the general interest of the market.

10. Furthermore, the logic explained above is based on the principle of effectiveness of the administrative function. Administrative precautionary measures are expressed as the exercise of a state power whose purpose is to ensure the supremacy of the general interest and the validity of a righteous order, therefore, circumstances, facts, acts, or actions that threaten to harm freedom of competition or that have already occurred should be suspended or halted using effective measures that can help correct the anomalous situation. Thus, when the Superintendence of Industry and Commerce orders the adoption of an administrative precautionary measure to safeguard the principle and the constitutional and legal collective right of free economic competition (arts. 88 and 333, C.P.), it does so to ensure the effectiveness of the interests of society as a whole.

11. As it will be explained, the SIC has developed these requirements to order an interim measure, which is an exceptional measure not only to protect an investigation, but to prevent or diminish actual harm to the market.

3. Case “Ferlag”

12. The SIC initiated an investigation because of complaints filed by COLOMBIA COMPRA EFICIENTE -Colombia’s central purchasing body-.

13. The SIC conducted administrative dawn raids to COMERCIALIZADORA FERLAG LTDA, INVERSIONES Y SUMINISTROS LM S.A.S., and LUZ MARINA

SÁNCHEZ RODRÍGUEZ on September 8 and 9, 2016, where important evidentiary material was collected.

14. The SIC determined, in a preliminary manner, that COMERCIALIZADORA FERLAG LTDA, and INVERSIONES Y SUMINISTROS LM S.A.S. coordinated their behavior during the preparation of the framework agreement. Afterward, the SIC established that both companies were pretending to be competitors, were simulating independence and autonomy, when in fact they obeyed the same direction and hidden control headed by CÉSAR FERNANDO LAGUNA VARGAS.

15. In this way, the investigated parties would have adopted behaviors that undermine rivalry or competition in the Framework Agreements, generating potential harm to the economic interests of the State by reducing its alternatives within the Online Store in Colombia, with the consequent loss of the value of public resources.

16. The SIC adopted as an interim measure the exclusion of the investigated parties from the Framework Agreements. The interim measure was adopted because the SIC had enough evidence that showed a coordinated behavior in the beforementioned public processes. In consequence, the SIC adopted the measure to avoid the risk of the actual and negative market effects of a very likely anticompetitive behavior.

17. As explained before, the SIC can order the suspension of the behaviors or conducts that might be contrary to the competition. Thus, in the specific case, the SIC went further and establish three requirements for the imposition of the interim measure: (i) the appearance of the infraction (*fumus commissi delicti*); (ii) that the impact of the behavior causes risks to the market (*periculum in mora*); and, (iii) the proportionality of the interim measure.

18. As to the *fumus commissi delicti*, the SIC found that FERLAG LTDA. and INVERSIONES Y SUMINISTROS S.A.S. were controlled by the same person: CÉSAR FERNÁNDO LAGUNA VARGAS. Those enterprises participated in the same public procurement processes in a coordinated manner and simulated to be rivals.

19. Regarding the controlled companies, the SIC found that FERLAG LTDA. and INVERSIONES Y SUMINISTROS S.A.S. had the same corporate purpose, addresses and public accountant. Also, the representatives of the companies were siblings. In addition, the controlled companies shared workers. Furthermore, CÉSAR FERNANDO LAGUNA VARGAS directed and managed the companies, as SIC verified in some e-mails.

20. Additionally, the SIC found that the insurance documents presented by the companies were issued by the same insurer and almost simultaneously. In addition, the SIC established that the same person presented, on behalf of the controlled companies, the observations regarding the public procurement processes, to COLOMBIA COMPRA EFICIENTE. Finally, the companies used the same brands and offered similar prices. By presenting all this evidence the SIC reached the preliminary conclusion that there was no evidence of an independent behavior or that the controlled companies carried out any measure to assure their independence.

21. As to the *periculum in mora*, SIC considered that when the investigated companies participated in this coordinated manner, at least one rival within the Framework Agreement would be excluded in the public procurement procedures. The exclusion of other competitors harmed the competitive processes, because it artificially reduced the number of competitors, which at the same time, had the potential to harm the State as a consumer.

22. The SIC considered that the exclusion of the investigated parties of the Framework Agreement, neutralized the effects of the presumably anticompetitive behavior caused by the common control of the companies.

23. In conclusion, the interim measure was effective insofar as it managed to eradicate actual adverse consequences of a presumably anticompetitive behavior. At the end of the administrative procedure, SIC imposed fines to the investigated parties because it was proven that they engaged in the anticompetitive conduct.