GETTING THE DEAL THROUGH

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Colombia

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is set forth primarily in the following pieces of regulation:

- Law 155 of 1959, which establishes general prohibitions of conducts aiming at restricting free competition in the markets.
- Decree 2153 of 1992, which describes the functions of the Superintendency of Industry and Commerce (the Colombian Competition Agency (SIC)), contains a catalogue of conducts that are considered to be against free competition. These conducts may adopt the form of anti-competitive agreements or unilateral conducts such as acts or abuse of dominance.
- Law 1340 of 2009, which updated the Colombian competition law regime, adopted new aspects in cartel enforcement such as the leniency programmes and modified the proposal of remedies in investigations of anti-competitive conducts.
- Decree 2896 of 2010, which regulates all aspects related to leniency programmes.
- Law 1474 of 2011 (the Anticorruption Statute), which establishes that collusions in public tenders or contests are considered to be crimes that may trigger imprisonment of six to 12 years, and ineligibility to undertake contracts with the state or public entities for up to eight years.
- Decree 19 of 2012, which modified the investigative procedure into anti-competitive conducts.

These rules apply in conjunction with Decree 4886 of 2011. Colombian legislation makes no reference to 'cartels' but to 'anti-trust agreements'. When this type of conduct is investigated, it must be determined whether the agreement restricts or has the aim of restricting competition.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Cartel matters are investigated by the SIC through a special division led by the deputy superintendent of competition matters (DS). The DS is responsible for opening and conducting the investigation, as well as collecting the evidence. After conducting the investigation, the DS will issue a report addressed to the superintendent of industry and commerce (the superintendent), in which it will recommend whether to impose sanctions against the investigated parties. It is important to note that the DS cannot impose sanctions or absolve the investigated parties. The competent authority to make a final decision regarding the outcome of the investigation is the superintendent.

The SIC is the sole authority in Colombia charged with enforcing competition rules; a public entity within central government, it has administrative and financial autonomy.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

In addition to Law 1340 of 2009 and Decree 2896 of 2010, which respectively updated the competition law regime and regulate the leniency programmes, the main recent changes are as follows:

- the Anticorruption Statute, which establishes that collusions in public tenders or contests are considered to be crimes that may trigger imprisonment and the ineligibility to undertake contracts with the state or public entities for up to eight years. This is the only situation in which a cartel may be prosecuted under the criminal law; and
- Decree 19 of 2012, which modified the investigative procedure under which anti-competitive conducts are carried out by the SIC.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartel conduct is determined based on the existence of restrictive anti-competitive agreements. Law 155 of 1959 sets forth a general prohibition under which agreements aimed at limiting the production, supply, distribution or purchase of raw materials, goods or services, and in general all conducts or proceedings that restrict free competition or that maintain or determine unfair prices, are forbidden. Likewise, Decree 2153 of 1992 prohibits those agreements whose purpose or effect could be:

- direct or indirect price fixing;
- sales or marketing conditions that discriminate against third parties;
- market allocation between manufacturers or distributors;
- assigning manufacturing or supply quotas;
- assigning, distributing or limiting supply of productive materials;
- limiting or restricting technological developments;
- making the supply of a product conditional on accepting conditions or additional obligations that by their nature do not constitute the objective of the negotiation;
- abstaining from producing a good or product or affecting its production levels;
- colluding in public tenders or contests, distributing awarded contracts or fixing the terms of the proposals; or
- preventing or obstructing competitors from accessing markets or distribution channels.

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions?

There are no industry-specific offences and defences. Nevertheless, Colombian legislation considers the agricultural sector as an industry that requires special attention; therefore, the government can in specific cases regulate the internal market of agricultural products and supply chain agreements in this sector.

Likewise, the law establishes that when the SIC has knowledge of cases that involve sectors under surveillance or are regulated by other public entities (for instance, telecommunications), it should inform the sector-specific regulatory and control entities of the facts it has knowledge of so that those entities can issue a technical opinion referring to the matter in question. This does not affect the possibility of intervention by the regulatory or control entity during the investigation. The opinions issued by such entities are not binding on the SIC.

It is also important to note that, according to article 1 of Law 155 of 1959, as an exception, the government may approve or authorise agreements that restrict competition but aim to stabilise a significant sector of the national economy.

Furthermore, Decree 2153 of 1992 sets forth three kinds of agreements between competitors that are deemed permitted:

- cooperation agreements for research and the development of a new technology;
- agreements related to the compliance of standards or rules not considered mandatory by the competent authority, always provided that it will not limit or restrain the entrance to the market of potential competitors; and
- agreements referring to proceedings, methods, systems or ways for using common facilities.

6 Application of the law

Does the law apply to individuals or corporations or both?

Antitrust laws apply to any person who performs an economic activity or affects its development, regardless of the form or legal nature of the alleged offender. Hence, antitrust laws apply to both individuals and corporations engaged in an economic or commercial activity. This covers, inter alia, corporations, partnerships, trade associations, joint ventures, employees, directors and individuals operating as sole traders, state-owned corporations and non-profit-making bodies.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

No, antitrust law does not apply to actions taking place abroad, but only to actions taking place in Colombia or that, having taken action abroad, may have effects in Colombia. Antitrust laws are only applied with regard to conducts that have or might yield total or partial effects in the national markets, regardless of the economic activity or sector.

Investigation

8 Steps in an investigation

What are the typical steps in an investigation?

The investigation starts with the DS performing a preliminary investigation. The preliminary investigation is not a formal investigation itself; it is merely a preliminary step performed by the DS with the aim of clarifying whether there is enough merit for opening a formal investigation. It is important to highlight that the investigated parties do not participate or intervene during the preliminary investigation due to the fact that such phase remains confidential. Should the DS deem that there is enough merit, the investigation will begin through a formal decision that will be served to the investigated parties. The DS is in charge of collecting the evidence and carrying out the investigation, after which it will recommend whether to sanction the investigated parties. The DS does not make the final decision about whether to impose sanctions against the investigated parties. Such decision is made by the superintendent.

The typical steps are as follows:

The investigation process starts either on the DS's own initiative or by a complaint filed before the SIC by any third party (this may include competitors, customers or even a public entity). Due to the creation of the leniency programmes, the complaint may also be filed by one of the parties involved in the cartel.

During the preliminary investigation, the DS may request information from the different players (competitors, suppliers, customers, regulatory bodies, etc) or conduct field visits to collect evidence that may enable it to open an investigation. This preliminary investigation does not have a specific time frame.

If the DS discovers that the conduct is producing or has the potential to produce a significant anti-competitive effect in the market, and there are merits for investigating the matter, it will open a formal investigation of an administrative nature. The DS will open the investigation through a resolution in which the supposed anti-competitive conducts are described and the investigated parties are identified. Once the investigation is opened, the resolution will be served to the investigated parties. Such parties may provide or request evidence that will support their defence within a term of 20 working days.

For the sake of publicity and transparency, Decree 19 of 2012 establishes that certain publications have to be carried out during the process. The publications can be published on the SIC's website, in newspapers, or both. The following must be published:

- the start of an investigation;
- the sanctions that may be imposed as a result of an investigation; and
- the remedies accepted by the SIC within an investigation.

The purpose of the publications is to inform the general public and to enable third parties (eg, competitors, consumers) to provide any useful information to the DS and intervene in the investigation. Such third parties may be part of the proceedings, and can intervene within 15 working days following the publication of the notice on the SIC's website by providing any comments or evidence they possess.

Before the term for providing and requesting evidence elapses, the investigated parties have the possibility to offer remedies aimed at closing the investigation in advance without sanctions. If the remedies are accepted, the SIC will specify the conditions for compliance and will determine the mechanisms for verification. Any breach of the commitments arising from the accepted remedies will be considered an infringement of the antitrust regulations, and as a result, sanctions may apply.

It is important to note that the offered remedies may not be accepted by the SIC, and the fact that remedies have been offered does not oblige the SIC to close the investigation. For many years, the offer of remedies was perceived as a mechanism to terminate investigations without any adverse consequences to the investigated parties. Likewise, many practitioners perceived the possibility of offering remedies as a way to avoid a discussion of whether the conduct subject to the investigation was anti-competitive. In a change to the SIC's doctrine, in recent decisions the SIC has denied remedies, and has established that closing an investigation through the acceptance of remedies will only occur in very exceptional cases where it is unclear that the conduct subject to investigation could be considered to be anti-competitive. On the other hand, there are practitioners

who believe that remedies should be considered an effective mechanism to remove all possible anti-competitive effects that conduct may give rise to without the need to conduct a lengthy investigation.

If the remedies are not accepted, the DS will conduct an evidentiary phase involving the parties under investigation and interested third parties. During the evidentiary phase, the DS will hold one hearing where the parties under investigation and third parties can present arguments and defences on the facts under investigation.

Once the evidentiary phase ends, the DS will present a report for the superintendent providing recommendations on whether sanctions against the investigated parties should be imposed. The investigated parties and interested third parties may make comments regarding the report.

The SIC can order, as a precautionary measure, the immediate suspension of any conduct that may be considered against the regulations.

Upon the report of the DS, the superintendent will issue a decision imposing sanctions or absolving the investigated parties. The investigated parties and the interested third parties are entitled to challenge the SIC's decision through an appealing that must be confirmed by the superintendent. With the final decision of the SIC, the administrative process ends. The parties may file a nullity and reestablishment of rights action before the administrative courts against such decision.

9 Investigative powers of the authorities

What investigative powers do the authorities have?

The SIC is competent to:

- officially initiate any investigation or give course to the claims filed by any third party;
- request information from subjects under investigation, competitors, non-competitors and third parties as many times as it considers necessary;
- collect any kind of information or evidence;
- grant legal terms to parties that exercise the right of a defence;
- direct and conduct the investigation in general;
- order precautionary measures to cause the immediate suspension of the conduct, as described in question 8;
- impose pecuniary sanctions; and
- accept any remedies to end the investigation.

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The SIC has entered into several interagency cooperation agreements for competition protection purposes with authorities from different countries. The agreements that are currently valid have different scopes and purposes.

The SIC has technical cooperation and non-confidential information exchange agreements with competition agencies in Chile, Ecuador, Peru and Spain. These agreements do not foresee the possibility of cooperation in investigations related to cartel infractions.

The SIC has signed cooperation agreements for the prevention of anti-competitive behaviours, technical cooperation and information exchange (including confidential or sensitive information) with the competition agencies of Mexico and Panama. These agreements foresee cooperation regarding investigations into antitrust infringements in the event that the signatory parties consider it necessary.

The SIC is also in the process of subscribing to interagency cooperation agreements with the competition agencies of Brazil, Taiwan and the United States, and expects to ratify an agreement with Ecuador. The purpose of these agreements is mostly technical cooperation, information exchange and the training of SIC officials in new investigation techniques.

In addition to the above, Colombia has signed international treaties under which it commits to provide cooperation on antitrust matters to the other members' competition authorities. For example, among the member states of the Andean Community (Bolivia, Colombia, Ecuador and Peru), according to Decision 608 of the Andean Community, cooperation may occur between the national antitrust authorities for investigations into antitrust matters. The national antitrust authorities of the member states may exchange information through the general deputy of the Andean Community.

Free trade agreements between Colombia and other parties (eg, the United States and the EU) contain provisions aimed at reinforcing cooperation among the competition agencies.

11 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and penalising of cartel activity in the jurisdiction?

In Colombia, the SIC has exclusive jurisdiction for administrative investigations regarding competition matters. Since Law 1340 of 2009 came into effect, it is clear that the investigative powers regarding antitrust matters in all sectors of the economy are performed and exercised by the SIC, which is the only competent entity for conducting antitrust investigations. Nonetheless, within an investigation, regardless of the sector, the SIC will inform the regulatory or controlling entities so that they may issue a technical opinion, which, however, would not be binding on the SIC. The legislation allows these entities to intervene at any moment during the investigation to provide technical opinions to the SIC, but they themselves have no powers to impose sanctions or begin investigations in connection with an antitrust case.

Cartel proceedings

12 Adjudication

How is a cartel proceeding adjudicated?

The superintendent is in charge of adjudicating all cartel matters. As previously mentioned, decisions of the SIC may be challenged before the administrative courts through a nullity and reestablishment of rights action.

13 Appeal process

What is the appeal process?

As previously explained, the DS carries out the investigation, but the superintendent makes the final decision. A measure to set aside final decisions of the superintendent may only be brought before the superintendent.

Nevertheless, the parties can turn to the administrative courts to request the annulment of the final decision, but to do so they must have exhausted all measures before the superintendent. In addition, it is important to bear in mind that turning to the court does not suspend the investigated party's commitment to pay the fines that could have been imposed by the SIC. In practice, these procedures may take approximately three to five years.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The DS has the burden of proof. For such, it may request or collect evidence from the investigated parties, competitors or any interested third party.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

In general terms, antitrust violations do not trigger criminal sanctions. However, cartels aiming to collude in public tenders or contests, distribute awarded contracts or fix the terms of proposals are considered to be criminal, and imprisonment from six to 12 years may be imposed, as well as a prohibition to participate in public biddings or execute contracts with public bodies for up to eight years. To date, no individual has been arrested for antitrust violations in Colombia.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity? (How do recent civil penalties compare with previous decisions? How frequently are fines levied? What is the maximum possible civil penalty and how are such fines calculated?)

According to the antitrust regime, sanctions are of an administrative nature. Therefore, there are no civil penalties for the breaching of competition provisions regarding cartels in Colombia.

Law 1340 of 2009 substantially increased the amount of administrative fines. Fines against individuals can be up to 2,000 monthly minimum legal wages, while fines against corporations can be up to 100,000 monthly minimum legal wages or 150 per cent of the revenue obtained from the antitrust infringement.

The SIC is not competent for determining damages that may be caused by anti-competitive conducts. Such matters must be brought before the courts by those that were harmed.

17 Sentencing guidelines

Do sentencing principles or guidelines exist? Are they binding on the adjudicator?

Law 1340 of 2009 foresees that three administrative decisions made by the SIC on the same issue regarding competition matters constitutes a case law precedent that is binding on the adjudicator.

18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements?

In administrative procedures conducted by the SIC for cartel infringements, it is not possible to impose debarments from government procurement procedures automatically or discretionarily. Nevertheless, in cases where collusion in public tendering is being investigated by the criminal courts, and it is concluded that the conduct is a criminal offence, debarment or ineligibility for up to eight years may be imposed.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

For collusion in public tenders, both criminal and administrative sanctions may be imposed. However, the SIC is not entitled to impose criminal sanctions, which in any case will be subject to a criminal proceeding before a criminal court.

The sanctions described in Law 1340 of 2009 are of an administrative nature. Therefore, should a cartel cause damages to third parties, civil claims may be filed with the civil courts to obtain an indemnification.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damage claims are not foreseen under the antitrust regulations; as such, damages cannot be determined within an antitrust investigation. Nevertheless, the possibility of such claims cannot be ruled out in that, after determining any antitrust conduct resulting from a cartel, an offended party can structure remedial actions against the offender; this would usually be done through the civil courts. Class actions may also proceed. The possibility of recovering damages depends on the ability of the affected party to prove the economic harm caused by the anti-competitive conduct within the civil procedure. In Colombia, private claims based on antitrust conducts do not often occur.

21 Class actions

Are class actions possible? What is the process for such cases?

As stated previously, according to the Colombian antitrust regime, the possibility of actions other than the administrative procedures conducted by the SIC are not foreseen. As such, damages cannot be determined within the SIC's investigation. Nevertheless, free competition is considered a collective right that is subject to protection through class actions. As such, class actions may be exercised to request the payment of damages suffered where a number of persons have been uniformly affected by the same conduct.

The class action must be brought by a group of at least 20 individuals and exercised within two years from the date on which the damage occurred. The class action may be exercised before the administrative courts in cases where the damage was caused by the administration, or before the civil courts for damages caused by individuals or corporations. There have been some cases of class actions brought before the courts in which antitrust conducts were alleged.

Cooperating parties

22 Leniency/immunity

Is there a leniency/immunity programme?

Law 1340 of 2009 and Decree 2896 of 2010 have introduced a leniency system applicable to any individual or corporation that participates in a cartel.

23 Elements of the leniency/immunity programme

What are the basic elements of the leniency/immunity programme?

According to Decree 2896 of 2010, leniency would only be granted to those informants or collaborators that fulfil the following conditions:

- they must provide useful information and evidence in connection with the anti-competitive conducts under investigation. For the collaboration, the informant must:
  - provide evidence and information related to the investigated conducts;
  - respond to all the requirements and requests of information by the SIC; and
  - refrain from destroying, altering or hiding information or evidence;
- the collaborator should not be the instigator or promoter of the cartel; and
- the collaborator must end its participation in the cartel.

If the above conditions are fulfilled, the collaborator may be the beneficiary of an exoneration of the sanction, or a partial reduction of it. The SIC decides the benefits to be granted. In this sense, and after the evaluation of the usefulness of the collaboration, the SIC will decide whether to grant the benefits.

Another important aspect of the leniency programme is the obligation of the SIC to protect the identity of those informants that apply to the programme.

24 First in

What is the importance of being 'first in' to cooperate?

According to Decree 2896 of 2010, the 'first in' to cooperate can be given a 100 per cent exemption of the sanction.

25 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The 'second in' to cooperate can be given an exemption of up to 70 per cent of the sanction. The reduction of the sanction would be partial.

26 Approaching the authorities

Are there deadlines for applying for immunity or leniency, or for perfecting a marker?

According to Decree 2896 of 2010, investigated parties may request leniency until the date before the DS submits its report, in which it may recommend imposing sanctions on or absolving the investigated parties, to the superintendent.

27 Cooperation

What is the nature and level of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The SIC expects full cooperation from all the leniency programme applicants. In this sense, the SIC will determine which applicants may be subject to immunity or to a reduction of the imposed sanctions, taking into account the quality and usefulness of the information provided, and especially the following factors:

- the effectiveness of the collaboration in clarifying the facts and identifying the offenders. Leniency applicants should provide useful information and evidence that establishes the existence, form, duration and effects of the behaviour, the identification of the offenders, their level of participation and the benefit obtained by performing the illegal conduct; and
- the opportuneness of the collaboration.

28 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?

Law 1340 of 2009 sets forth that the SIC may keep the confidentiality of the applicant of a leniency programme when the request is made on the condition of an existing risk of retaliation against the applicant in accordance with the criteria of the competition authority. For this purpose, the confidentiality will cover the identity of the applicant, the existence and number of applications for leniency and the order of preference among the applications. Likewise, the confidentiality will be kept during the investigation unless the applicant gives the confidentiality up.

29 Settlements

Does the enforcement authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

There is no mention of plea bargaining in the regulations. Nonetheless, within the course of the collaboration it may be possible that there is some negotiation between the informants and the authority with the aim of mitigating or reducing of the sanction. In all cases, the SIC has the sole discretion of whether to grant the benefits.

On the other hand, there could be a degree of bargaining between the authority and the parties regarding the offer of remedies. Nonetheless, as stated previously, according to the new doctrine developed by the SIC, the remedies would be accepted only under very exceptional situations, such as when there is a lack of certainty about the illegal nature of the investigated conduct.

30 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

When a total or partial mitigation of the sanction is granted to a corporate defendant, the same benefits will automatically be granted to the administrators or employees who were involved in the conducts. Nonetheless, if the employees request leniency acting in their own name, the benefits granted to them do not imply that these shall automatically be extended to the corporate defendant. However, if the corporate defendant collaborates, it could receive benefits according to the usefulness of its collaboration, and always provided that the conditions set forth in the applicable regulations are met.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

In general, in a preliminary stage is very important to be cautious. If a company or individual decides to apply for leniency, it is very important to provide useful collaboration to try to ensure the benefits. It is difficult to give a more accurate assessment regarding this topic since, although it is known that some applications have been made in Colombia, there is no precedent of cartel dismantling due to a leniency programme. In general, there is still a lack of clarity and certainty about leniency programmes, as there have been no precedents so far (at least to public knowledge).

32 Ongoing policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No. The leniency programmes are regulated by Law 1340 of 2010 and Decree 2896 of 2010. The SIC has not yet developed doctrine or precedents in this regard, and there is still a lack of legal certainty as to the manner in which a party may participate or apply for obtaining the leniency benefits.

Defending a case

33 Representation

May counsel represent employees under investigation and the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

The same counsel may represent both the company under investigation and its employees; there are no regulations that forbid it. It would, however, depend on the wishes of the subjects under

Update and trends

Opened investigations

Alleged cement cartel

Through Resolution No. 49141 of 21 August 2013, the SIC opened an investigation against five cement manufacturers in Colombia (Cementos Argos SA, Cemex Colombia SA, Holcim Colombia SA, Cementos Tequendama SAS and Cementos San Marcos SA) and some individuals for the alleged violation of the Colombian competition regime. According to the DS, the investigated parties allegedly entered into an agreement to fix prices and allocate markets. Such conduct would have resulted in sustained and unjustified increases in the prices of gray cement since January 2010 to the present.

Alleged sugar cartel

Through Resolution No. 15294 of 8 April 2013, the SIC opened an investigation against several sugar mills, distributors of sugar and the Colombian association of sugar cane growers, Asocaña, for their alleged violation of the Colombian competition regime due to their coordinated behaviour to set prices among the sugar mills. The period under investigation ran from 2006 until 2010.

The basis of the investigation was that Asocaña disseminated sensitive information to its members that would have allowed no competition between sugar mills. The alleged non-compete agreement, together with the exchange of information, may have resulted in the distribution of sugar production quotas in the national market.

Sanctions

Nule Group

Through Resolutions No. 54693 and No. 54695 of 16 September 2013, the SIC sanctioned individuals and corporations related to the Nule Group (an enterprise group under liquidation for alleged corrupt conducts) with a fine exceeding US$15 million for committing bid rigging on government procurement processes undertaken by the Colombian Institute for Family Welfare.

The sanctions were based on the adjudication of two auditing contracts: an audit of the concession agreement for the operation of the food production plants of Bienestarina, and an audit of the technical and administrative supervision of emergency ration programmes, children's breakfasts and nutritional recovery in some parts of Colombia.

According to the SIC's investigation, the group presented several proposals in the above-mentioned public tendering procedures through different companies, thereby simulating competition between them in the selection processes and increasing their chances of being awarded the various contracts.

investigation. In most cases, companies hire the same attorney to represent both the company and its employees.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Yes, it is possible that an attorney could represent multiple corporate defendants. Of course, in each case this will depend on the strategy that the defendants want to implement for their defence.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

Under the previous regime, the possibility of this was not forbidden. With Law 1340 of 2009 in effect, in cases where individuals have collaborated with, facilitated, authorised, executed or tolerated conduct that violated the antitrust regulation, the fines cannot be paid by the employer or the corporation. This prohibition extends to the corporation's headquarters or any of its subsidiary companies (article 26 of Law 1340 of 2009).

36 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions?

Colombia's competition laws do not foresee the possibility of taking penalties imposed in other jurisdictions into account. However, in cases where the cartel investigation is related to an international cartel, decisions that were taken abroad may somewhat influence the decision of the SIC. In addition, the SIC is enhancing its links with other competition authorities precisely with the aim of fostering exchanges of information and collaboration.

37 Getting the fine down

What is the optimal way in which to get the fine down?

Under the actual competition regime, there are different criteria to evaluate the fines and to verify aggravating or extenuating circumstances. With regard to corporations and according to article 25 of Law 1340 of 2009, such criteria are:

- 'the impact that the conduct might have in the market';
- 'the dimension of the affected market; the profit or benefit obtained by the infringer; the degree of participation of each party implied in the conduct';

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- 'the procedural conduct carried out by the investigated parties';
- 'the market share of the investigated parties, as well as the assets and/or turnover resulted from the infringement'; and
- the patrimony of the investigated parties.

Similar criteria apply to individuals. Persisting in the conduct may be perceived as an aggravating circumstance. On the other hand, a successful and useful collaboration in a leniency programme may bring about the total or partial mitigation of the sanction for those applicants that collaborate with the SIC in the dismantling of the cartel.

The decision of the competition agency can be challenged through the exercise of nullity and re-establishment of a rights action before the administrative courts.

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