GETTING THE DEAL THROUGH

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Merger Control

The international regulation of mergers and joint ventures in 75 jurisdictions worldwide

2014

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CONTENTS

Continued overleaf

CONTENTS

Colombia

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation is set forth primarily in Law 1340 issued on 24 July 2009 (Law 1340), which modified Law 155 of 1959. Also, Resolution No. 12193 of 2013 issued by the Superintendency of Industry and Commerce (SIC), states the set of rules applicable for antitrust clearance proceedings.

In Colombia, the SIC has been the National Antitrust Authority since Law 1340 came into effect; this entity has exclusive competence regarding the review and antitrust clearance of mergers, acquisitions and other types of business integrations. However, there are two exceptions for antitrust clearance which are: mergers related to banking or financial entities; and business integrations related to aeronautical matters, since for each of these sectors the competent authority is the Superintendence of Finance and the Aeronáutica Civil respectively.

Whenever a merger or business integration is under the review of the Superintendence of Finance or the Aeronáutica Civil, these entities should request the SIC to release a technical report regarding the potential effects that may result in the market from the proposed business integration. The SIC can also provide recommendations to ensure effective competition in the specific market if necessary. The technical report and advice issued by the SIC is not binding to the regulatory authorities.

SIC is the only competition authority in Colombia and is also the main authority for merger control with the exceptions mentioned above. Furthermore, it is worth noting that SIC also has other functions and is the competent authority in other fields such as the following:

- consumer protection authority in which it has jurisdictional and administrative powers;
- the industrial property authority competent for trademarks and patents registration;
- metrology competent authority in charge of the surveillance and controlling the weights and measures required for goods; and
- personal data protection authority.

2 What kinds of mergers are caught?

Colombian law expressly imposes an obligation to companies engaged in the same economic activity or acting within the same economic value chain, to report to the SIC any business integration that may consist of a merger, consolidation, acquisition or integration of control. In this context, it is understood that integration is a general term encompassing deals such as mergers, consolidations or acquisitions of control.

From this perspective, the main element to be analysed in all the different types of 'business integration' mentioned above is the 'business control' that may result after the execution or performance of the transaction. Business control means the capability to directly or indirectly influence the commercial policy of a company, the initiation or termination of the business activity, the variation of the activity, or the use of the essential assets of a company.

Hence, many kind of transactions may be caught and in some cases parties are exposed to a grey zone where is not always easy to determine whether or not the transaction needs to be cleared.

3 What types of joint ventures are caught?

Joint ventures could be reviewed or reported to the SIC if they produce a transfer of control of a business or its assets as described in question 2.

According to the most recent case law (Res. No. 553 of 2013 and Res. No. 4851 of 2013), joint ventures may adopt the form of an agreement among competitors or business integration. In the first case, the transaction does not imply the transfer of the business control from one party to the other and therefore, the operation does not require to be cleared by the antitrust authority. Agreements among competitors do not require prior approval by the SIC, but may be subject to an ex-post control in order to verify its pro-competitive or anticompetitive effects. In the contrary, should the joint venture supposes the transfer of business control, the transaction would be deemed as business integration and therefore, if the conditions for notification are met, the transaction would be subject to the ex-ante control by the SIC.

In a recent case ruling, the SIC set forth the elements to differentiate agreements among competitors from those that may be considered as a business integration. According to the SIC, the joint venture is caught under the merger clearance regime if the following elements concur:

- Vocation for permanence and elimination of competition between the parties to the transaction: The agreement is meant to be in the long term and the competition between the intervening parties would not continue to exist.
- The operation must have the effect of creating a union of a business or market: Concentrative effects over the relevant market should happen. In other words, as a result of the transaction, the parties should merge its businesses and this must trigger changes in the market structure of the relevant market. The sole transfer of a business function would not be considered enough for concluding that the operation (joint venture) requires prior approval by the SIC.
- The resulting business or entity must have full powers and independence in the market: The resulting entity of the joint venture, (whether the joint venture supposes the merge of two competing companies or the creation of a common company) must have independent resources or at least have the potential to develop it's activity independently in the market, as a separate business.

If as a result of the operation, the aforementioned elements do not concur, the joint venture would not be caught under the merger clear-

ance regime, and therefore, the transaction would be deemed as an agreement among competitors subject to the ex-post control of the SIC.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Decree No. 2153 of 1992 defines control as the possibility of directly or indirectly influencing the commercial policy of a company; the initiation or termination of business activity; the variation of the company; or the use of essential assets to the development of the company's activity.

It is important to highlight that the meaning of 'control' is not limited to 'corporate control', which is just one type of control under the Colombian Antitrust rules. Therefore, if the minority interest has the potential of influencing the commercial policy of a business, or the initiation or termination of the business activity or may through veto rights influence any other aspect related to the business, then should be considered.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

According to Law 1340, Resolution No. 12193 of 2013 and Resolution No. 79228 of 2012 of the SIC, it is mandatory to inform the authority of any merger or acquisition if the following conditions are met:

(i) the participating parties to the proposed operation engage in the same activities or participate in the same vertical value chain;
(ii) the aggregate or individual annual operations revenue or assets of the participating parties in Colombia or abroad (this includes all other companies belonging to the same corporate structure of the intervening parties) exceeded 100,000 monthly minimum Colombian legal wages; and
(iii) the participating parties have an individual or joint participation of at least 20 per cent in the relevant market.

The thresholds described in literal (ii) above are meant to be reviewed at the end of each year by the SIC.

If conditions described in literals (i) and (ii) are met but the joint market share in the relevant market is below 20 per cent, the transaction is deemed permitted and therefore, does not have to be cleared by the SIC, however, the parties to the transaction have to give prior notice of the operation to the SIC. Under this case, the SIC is entitled to verify the veracity of the data provided by the parties and may eventually open investigations against the parties if through its own analysis concludes that the joint market share exceeds the threshold of 20 per cent, and as a consequence, the transaction should had been subject to prior approval. Taking all the aforementioned into consideration, before closing, it is very important to have conducted the correct market definition analysis in order to avoid future investigations and/or sanctions, and be certain of the accuracy of the joint participation in the market.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Antitrust filing is mandatory whenever the conditions stated in question 5 are met.

Nevertheless, and as stated in the response above, even if the thresholds are met, if the joint participation in the relevant Colombian market is below 20 per cent, clearance is deemed to be granted and no prior filing will need to be made. In this case, the integration will simply have to be notified to the SIC prior to the integration. Such notices are also mandatory and should be done before the transaction becomes effective. It is important to note that the burden of proof for the definition of the relevant market definition relies on the parties.

Mergers or other kinds of transaction between entities belonging to the same corporate group or controlled by a common undertaking do not need to be submitted to the SIC for prior approval nor require prior notice.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

The theory of effects in the market is followed by the SIC. Consequently, any corporation or individual engaged in economic or commercial activities that have effects in the Colombian market, must inform the SIC. Therefore, foreign-to-foreign transactions where the companies are: incorporated in Colombia; are still foreign but perform or execute agreements in Colombia; own goods or assets in Colombia; have permanent investments in corporations incorporated under Colombian law; or perform business operations that have effects in the Colombian market, are subject to the SIC review and approval.

The SIC shall analyse case by case whether the transaction will or is likely to produce anti-competitive effects in the market.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

As mentioned before, while the SIC is the foremost authority for merger control in Colombia, specific sectors are excluded from the SIC's exclusive jurisdiction as described in question 1. Hence, the Superintendency of Finance reviews operations in the financial sector and the Aeronáutica Civil reviews transactions relating to aeronautical matters. However, as outlined in question 1, the Superintendence of Finance and the Aeronáutica Civil must request from the SIC a technical opinion on the potential effects that the proposed transaction may produce in the market.

On the other hand, while all the other economic sectors are under the SIC's jurisdiction, there are some special sectors that could require from their competent authority additional information or a recommendation on the matter. For instance, Colombian legislation considers the agricultural sector as an industry that requires special attention and therefore the government may, in specific cases, regulate the internal market of agricultural products and the supply chain of this sector. For these cases, the SIC is entitled to request from the corresponding regulatory entities information to be considered for its antitrust analysis.

Additionally, the law establishes that whenever the SIC has to review transactions involving special sectors under surveillance or regulated by other entities (public utilities), and the file is not a fast-track filing (as will be further explained in question 18), the SIC should inform the specific sector regulatory and control entity about the facts of the filing so that the entity may issue a technical opinion relating to the matter. However, the opinions issued by the other entities are not binding on the SIC.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The effects theory is followed by the SIC. Therefore, the merger filing has to be submitted for review before the transaction is performed and executed. There is no explicit term in the regulation establishing the deadline for the merger notification or filling. However, the pertinent laws state that the SIC must clear the operation before it becomes effective.

The breach of the duty of filing the integration before it becomes effective is a violation of the antitrust law. The violation of the integrations regime may trigger antitrust investigations against the participating parties as well as against individuals that may have their responsibility involved. The sanctions are:

- fines against the participating parties (companies): up to 100,000 monthly minimum legal wages (US$31 million approximately), or 150 per cent of the revenue or profit obtained from the infraction of the antitrust law; and
- against individuals involved: up to 2,000 monthly minimum legal wages (US$620,000 approximately); and
- reversion of the operation: this proceeds when the SIC determines that the operation produces undue restrictions to competition and any of the following conditions are met:
  - the operation failed to be informed;
  - even if it was informed, the parties merged before the SIC cleared the operation;
  - regardless of the SIC's denial for the transaction, the parties were integrated; or
  - having had the operation approved with remedies, the parties did not follow the remedies.

It is important to note that the parties may be exposed to antitrust investigations in those cases where notification had been based on a supposed joint market share below 20 per cent of the relevant market, and the SIC subsequently found out that the party's joint market share was above 20 per cent.

10 Who is responsible for filing and are filing fees required?

All the companies or individuals who intervene or are a party to the transaction are responsible for filing. There are no filing fees required.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Pursuant to Law 1340, previous clearance of merger operations is required before it becomes effective. The implementation of the transaction has to be suspended until clearance from the SIC is obtained.

The waiting period depends on whether the transaction follows the fast track proceeding or whether it requires the full analysis by the SIC. In the first case the waiting period would be 30 working days as of the date of filing. If the SIC decides to conduct the full analysis, the waiting period would be three months as of the date the parties to the transaction submit all the information that the SIC may request.

However, within the proceedings the SIC may, at any time, request additional information from the participating parties, in which case the three-month term is interrupted and, as a consequence, the three-month term will start once again after the parties submit the requested information. Thus, the waiting period could possibly be longer than three months. It is not possible therefore to determine a specific waiting period, but under normal conditions the waiting period could be from four to six months if the transaction requires the full analysis by the SIC.

If the SIC fails to issue a decision within the three-month period, without occurring in any cause for interruption (request of additional information by the SIC) it is understood that the transaction has been authorised.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Closing transactions before clearance by the SIC is a breach of the antitrust law. This may cause an investigation from the SIC and potential sanctions may apply. Applicable sanctions may be fines to the participating parties and individuals who may be considered liable, and under some circumstances the reversion of the transaction if the transaction is deemed to produce undue restrictions to competition, as described in question 9.

There is no precedent in Colombia of reversion cases.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As stated before in questions 7 and 9, for all the merger cases regardless of their origin, the breach of the duty of filing the integration before it becomes effective is a violation of the antitrust law. Therefore, yes, sanctions would apply in cases involving closing before clearance in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

It is not possible to obtain an authorisation from the SIC that allows closing before clearance with regard to the Colombian market. With respect to the effects that the foreign-to-foreign merger may produce in markets other than Colombia, closing may become effective.

Nonetheless, it is important to take into account that, as mentioned in question 6, there are transactions that meet the conditions for a general authorisation and therefore the merging parties are not obliged to request authorisation by the SIC but must simply notify the SIC prior to closing.

15 Are there any special merger control rules applicable to public takeover bids?

There are no specific rules for public takeover bids. If such transactions have an effect on the Colombian market the merging parties are obliged to submit the merger filing before the SIC, unless they are undertaken in specific regulatory sectors as described in question 1.

16 What is the level of detail required in the preparation of a filing?

The Merger Review Guidelines have been established by the SIC by Resolution No. 12193 of 2013 (the Guidelines). The Guidelines outline the necessary information and documentation that is required to submit the merger filing before the SIC. The filling must include detailed information related to the proposed transaction, the participating parties, the relevant market that may be affected by the transaction (product and geographic market), the competitors, the customers, the distribution and trade channels, entry conditions to the market, raw materials, inputs and imports and exports data.

All the information should be lodged in a written submission or attached to the written submission (merger filing).

17 What is the timetable for clearance and can it be speeded up?

The timetable for clearance will vary depending on the circumstances of each transaction. If the thresholds are met but the joint market share of the participating parties in the relevant market is below 20 per cent, there is no obligation to request clearance from the SIC. In this case, the integration will only have to be notified to the SIC and once the notification is filed, the SIC will issue a notice of receipt within a term of five business days as of the date of filing.

On the other hand, should the joint market share of the parties be above 20 per cent, it is mandatory to request clearance from the SIC through a pre-evaluation process which has the following stages:

- Fast track: 30 working days after the submission. In the event the transaction does not present a risk to competition, the SIC will terminate its evaluation and the transaction will be cleared; and if deemed necessary.
- Substantive review: three months as of the date the participating parties provide all the requested information to the SIC for this analysis.

Should the SIC fail to issue a decision within the period of three months, the transaction will be considered approved.

18 What are the typical steps and different phases of the investigation?

As explained in question 17, the investigation has two main stages.

Stage 1 (fast track)

The interested parties should submit a request for the pre-evaluation of the proposed transaction before the SIC. The mentioned request should be accompanied by a brief in which the parties to the transaction express the intention of performing the merger and its basic conditions.

The Guidelines outline the information that the interested parties must include in the written submission. Within the next three working days after the filing, the SIC will request the parties to have an outline and description of the proposed transaction published in a newspaper, to make it public knowledge for interested third parties. The SIC will also publish a notification of the proposed transaction on its website.

Within the next 10 working days after the publication in the SIC's website, interested third parties may provide to the SIC further information to be considered in the analysis. Under some circumstances, the SIC may not order the publication in case the participating parties request to keep the transaction reserved and confidential due to public policy reasons.

Within the 30 working days as of the date of the filing, the SIC may decide to continue with the evaluation process or approve the transaction due to the lack of substantive risks to competition.

Stage 2 (substantive review)

Should the SIC decide to continue with the review, the SIC will inform the respective regulatory authorities and will request the participating parties to provide further information within the next 15 working days. The SIC is entitled to request completion of the data or clarification on the submitted information.

The participating parties may propose remedies or actions addressed to prevent the transaction's possible anti-competitive effects. Within the same term, the participating parties may examine the information provided by third parties and can also submit counter arguments against the same.

As mentioned in question 17, the SIC has to make a decision within three months as of the date the participating parties provide all the requested information. If within that period of time the transaction has not been denied it is understood that it has been authorised.

Substantive assessment

19 What is the substantive test for clearance?

There is no specific substantive test in the regulations. The criteria for clearance are determined by whether the effects of the transactions or the potential effects may be a substantial lessening of competition in the relevant market. During the last years, SIC has been working on a project of guidelines for the analysis of business mergers, however, it is not enforced.

20 Is there a special substantive test for joint ventures?

As stated in question 3, there is no special substantive test for joint ventures. However if the joint venture among competitors implies a modification in the affected market structure and meets the three conditions described in question 3, the joint venture will be caught by the antitrust clearance process. Such conditions are:

- long or permanent standing basis and elimination of competition in a specific business;
- the operation is not simply the transfer of a particular function from the allied companies, but must be the union of a business or market; and
- the resulting business must have full complete functions and independence in the market.

21 What are the 'theories of harm' that the authorities will investigate?

In Colombia, the Law is silent in that respect. Nonetheless, and according to recent case rulings, the Theory of Harm makes reference to those transactions that has the potential of creating an undue restriction to free competition. According to Colombian Law, a merger may restrict free competition if it affects the free participation of businesses in the market, or affects the consumer welfare or the economic efficiency. The SIC analyses the transaction in relation to the potential effects that it may cause regarding market dominance, unilateral effects, coordinated effects, and vertical foreclosure, among other aspects.

It is worth noting that there is no reasoning or analysis in the law or guidelines that describe the analysis conducted by the SIC. Nonetheless, the SIC has been following the analysis developed in the European Union and in United States. Also, in recent years a high economic component has been present in the SIC's analysis. Although the SIC's merger analysis has become more sophisticated, we are still uncertain as to what kind of analysis the SIC applies.

22 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Non-competition issues are less relevant than market issues. In fact, there are no recognised or well-known cases that have been authorised under such arguments.

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies could be taken into account pursuant to article 12 of Law 1340. However, it is important to note that the burden of proof regarding the economic efficiencies lies with the interested parties. Therefore, participants can demonstrate within the process using technical studies and recognised methodologies, that the transaction has positive effects that benefit consumers; such benefits exceed the possible anti-competitive impact that the transaction may have on the market; and there is no alternative measure to generate those positive effects.

Since Law 1340, 2009 was issued there are no recent records of cases accepted due to the evidence of efficiencies. On the other hand, the burden of proof is very high and costly. Therefore, in practice the possibility for obtaining an approval based on the efficiency defence would be remote.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The SIC is entitled with full powers to prohibit or impose remedies to a transaction. Nonetheless, all its decisions denying a transaction must be motivated. The participating parties may file reconsideration

petitions against a decision denying the transaction, which in any case will be decided again by the SIC. Likewise, it is worth mentioning that mergers carried out without previous clearance are considered a breach of the merger control regime which may trigger investigations and sanctions against the parties and their managers.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Given that the proposed transaction may produce undue restrictions to competition, both divestment undertakings and behavioural remedies may be offered by the intervening parties and accepted by the SIC as mechanisms to correct such distortions.

In this sense, whenever the SIC considers that a proposed merger or acquisition will pose or is likely to pose a risk to competition, the transaction can be authorised provided that the parties modify the proposal, to address the likely anti-competitive consequences of the transaction.

There is one precedent where the remedies imposed by the SIC were a prior condition to make the transaction effective or be able to proceed with the closing. In other words, the closing was subject to fulfilling the conditions or remedies imposed by the SIC. In most of the cases, the transactions have been approved and the conditions or remedies could be fulfilled after the transaction became effective.

In those cases where the transaction is cleared, but subject to conditions or remedies that should be fulfilled after the transaction became effective, if the participating parties do not comply with the terms of the clearance, applicants are exposed to potential investigations and are subject to the sanctions discussed in question 9. Likewise, the breach of conditions may trigger the reversion of the transaction. There is no precedent of this nature.

Finally, there has been some cases where the parties have decided to withdraw their intention of being merged due to the strong and heavy remedies imposed by the SIC.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no specific basic conditions or timing issues by law. It depends on the criteria of the SIC, considering the actual effects that the transaction could have in the market. The analysis is made on a case by case basis. Nonetheless, structural remedies as well as behavioural could be required. It has been common that the SIC requires that an external auditor certifies the compliance of the remedies and that the parties provide a bank guarantee or insurance bond addressing to grant compliance of the remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

It is not possible to discuss the SIC's track record of required remedies in detail, since the authority does not make public such statistics. However, in case of a decision in which remedies are imposed, the SIC requires the parties to publish such remedies in newspapers or on their websites. Also, the SIC may publish such decisions on its website: www.sic.gov.co. Nonetheless, it is worth mentioning that it is common to see involved foreign companies.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The clearance decision covers all matters related to the merger, therefore ancillary restrictions are under the purview of the SIC and can be part of the decision.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

Yes, customers and competitors are involved in non-confidential clearance reviews. Competitors and customers can intervene in the process and it is common for the SIC to request information from them in order to carry out its analysis. These enquiries may include consultations with competitors, suppliers, customers, industry associations, government agencies and consumer associations, among others.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As described in question 18, the SIC will order that details of the proposed transaction are published in a newspaper so as to inform third parties, and to obtain further information and evidence that may contribute to the analysis of the operation.

Nevertheless, the participating parties may request the SIC to refrain from ordering the publication in order to preserve public policy. If the authority accepts the petition, the confidentiality of the transaction and procedures will be maintained.

In general terms, the process and the filing will be public but the parties may request to the SIC to keep reserved and confidential specific information such as trade and business secrets and other confidential information.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Antitrust law does not apply to actions with effects abroad, but only to actions with effects in Colombia. Antitrust laws are only applied to conducts that have effects in the national markets, regardless of the economic activity or sector.

Colombia has signed several antitrust international cooperation agreements. Most of these agreements were established through free trade agreements (FTAs) signed by the country. These FTAs established a competition chapter that foresees cooperation between agencies in order to exchange information, perform consultations and implement common competition policies for the compliance of the competition provisions of the countries. Additionally, there are many bilateral cooperation agreements with individual antitrust authorities, including the authorities of Brazil, Chile, Ecuador, Mexico, Panama, Peru, Spain, South Africa and the US, and, in general, the authorities that are members of the ICN and the OECD.

Most of these cooperation agreements are technical assistance programmes where officials from the SIC get training from other antitrust agencies.

The SIC has had some kind of cooperation agreement relating to different activities with each of these authorities, including agreements relating to investigations of anti-competitive conduct, and agreements to train investigating officers on investigation techniques, among others.

Information exchange is limited. For instance, in a merger with global scope the SIC is not entitled to exchange the parties' information unless the parties have expressly provided waivers over such information. Should the parties give waivers, cooperation between the SIC and other agencies may occur.

Update and trends

In recent years the SIC has continued building up an important and significant doctrine regarding new aspects of the merger control regime.

In this respect, it is important to note that in 2012, 168 cases were filed before the SIC. This shows an increasing activity by the SIC in relation to merger control review. Likewise, the SIC has been very active in investigations regarding the breach of the merger control regime. One of the main reasons for such investigations is the grey zone imposed by the market share threshold of the 20 per cent that defines the need for obtaining prior approval. This is a highly relevant aspect of the Colombian merger review regime because it defines whether the parties need to obtain a prior approval or, on the contrary, may proceed with the transaction without such authorisation by the SIC. The SIC in this respect has been very keen in monitoring the conditions of the transactions, both those informed and those that do not meet the conditions for being submitted to the SIC.

Transactions that are not supposed to be business integrations that require merger clearance, but that my fall under the definition of transaction of the same value chain (vertical transaction), may also come under investigation. The concept is not very clear, and there are many cases that are in a grey zone. In this respect, it is worth mentioning the constructor's case in which a group of construction companies through a joint venture created a common company with the main purpose of creating and publishing a magazine aiming at the promotion of their housing projects. Such transaction was not reported or submitted to the SIC's review and therefore the SIC opened an investigation. The charges against the construction companies were that such joint venture was a vertical integration that required prior approval by the SIC. In the end, the SIC closed the investigation without penalties against the parties. According to the SIC decision, although such transaction was a joint venture, the same did not reach the conditions for being considered a vertical integration, due to the fact that their housing projects did not modify the market structure of the construction market and was not created with full powers. In consequence, the operation was not subject to the notification regime of business mergers. This precedent is very important because it establishes in which cases joint ventures may be caught by the SIC as business integrations.

Likewise it is important to make reference to the pharmaceutical distributors case, in which a group of pharmaceutical distributors made a sales and marketing joint venture with the purpose of creating a marketing scheme to distribute and promote all the products of the members of the joint venture. The joint venture was notified to the SIC as business merger, but the authority after making the analysis of the operation concluded that the joint venture was not subject to notification as a business integration, because it was a collaboration agreement among competitors. This decision establishes a precedent in which the SIC differentiates between a merger and a collaboration agreement among competitors. The SIC concluded that agreements among competitors are not mergers and therefore do not require to be subject to prior review by the SIC. However, such agreements could be subject to an ex-post control if they create anticompetitive effects.

Another important case was the acquisition of the Carrefour retail business in Colombia by the Chilean company Cencosud. This was one of the biggest transactions of 2012, in which Carrefour had presence in the Colombian hypermarket market and Cencosud, through its subsidiary Easy, in the retail home improvement market. This case created a great challenge for the definition of a relevant market and the differentiation of retail formats.

Finally, it is worth mentioning the Pfizer/Nestlé case in which Nestlé acquired Pfizer's infant milk formula business.

This was a transaction with global effects that was approved with heavy conditions and remedies. The conditions were:

- Nestlé must license to an independent party for a 10-year period, brands of infant milk formulas currently marketed in Colombia by Pfizer. Likewise, the third party shall receive the licences, industrial property, inventory, contracts, physical assets (among others) that are needed to operate effectively in the market of infant milk formulas.
- This condition will allow for 10 years an independent third party to compete in the market with the brands and infant milk formulations of Pfizer, while having the opportunity to develop their own brands of infant milk formulas in that period.
- Once the licence expires, Nestlé could not use for an additional 10-year period the licensed brands, so as to ensure that the independent third party may consolidate its own market during this period. After 20 years of the imposition of the conditions by the SIC, Pfizer brands may be used again by Nestlé.

It is important to note that if Nestlé breaches the conditions imposed by the SIC the transaction would be understood as unauthorised and the SIC may impose sanctions and fines.

Judicial review

32 What are the opportunities for appeal or judicial review?

The superintendent makes the final decision on the antitrust clearance; therefore a measure to set aside final decisions of the superintendent may only be brought before the superintendent himself. Nevertheless, the parties can request the courts to annul the administrative decision, but to do so the party seeking review must first exhaust all possible administrative remedies before the superintendent.

While an annulment decision is pending at the courts, the parties are not entitled to pursue with the transaction.

Nonetheless, for cases of merger clearance there is no precedents for judicial reviews.

33 What is the usual time frame for appeal or judicial review?

The parties have five days to file an appeal before the superintendent. The term in which the superintendent is expected to reach a decision is two months. A judicial review may take years; therefore parties are not always keen to request a court review.

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

It is common that mergers submitted in Colombia are related to foreign companies; however, as explained in question 27 it is not possible to access enforcement records of the SIC related to foreign to foreign mergers.

35 What are the current enforcement concerns of the authorities?

The greatest current enforcement concerns of the authority are those relating to the remedies proposed by the parties in order to get the transaction authorised. The authority requires that the parties comply with the structural and/or behavioural remedies set out as conditions and undertaken by the intervening parties in order to have the merger cleared. Pursuant to article 11 of Law 1340, the SIC is the national authority in charge of the surveillance of such commitments.

Another important aspect of concern for the antitrust authority are those transactions that do not follow the clearance process due to fact that the joint market participation reported by the parties do not reach the 20 per cent threshold. In this point, it is very important

for the parties to have accurate market definition analysis. Due to the lack of market studies or market data, in some cases the parties assume risks when the figure reported is below but close to the 20 per cent threshold. In this cases, the SIC can review the reported information and redefine the relevant market case in which the parties may be exposed to investigations in case that the result of the market participation is above the threshold.

36 Are there current proposals to change the legislation?

Resolution No. 12193 of 2013, issued by the SIC, updated the procedure and guidelines for the authorisation of business integrations (mergers) in Colombia, repealing the previous provisions set forth by SIC resolutions Nos. 35006-10 and 52778-11. Further to this change, there is no other change or proposal to change the legislation. The substantive changes made in this new resolution, in comparison to the previous provisions, are:

- the thresholds referring to assets and operating income are calculated over the assets and incomes of intervening parties as well as over those of the parent companies; and
- the Resolution sets forth the requirements for requesting the modification, suspension and termination of conditions or remedies.

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