

# **COMPETITION ENFORCEMENT AGENCIES**

## HANDBOOK 2019

Published in association with:

Atsumi & Sakai

Bowmans

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ELIG Gürkaynak Attorneys-at-Law

Lapidot, Melchior, Abramovich & Co

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SRS Advogados

Van Bael & Bellis



# Competition Enforcement Agencies Handbook 2019

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A Global Competition Review Special Report

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*Global Competition Review's* 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

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## Overview

The Superintendence of Industry and Commerce (SIC) is a technical agency attached to the Ministry of Trade, Industry and Tourism. It is organised into six principal divisions, each headed by a deputy superintendent:

- Competition Protection;

- Consumer Protection;
- Personal Data Protection;
- Industrial Property;
- Technical Regulation and Legal Metrology; and
- Judicial Affairs.

## Questions and answers

### How long is the head of agency's term of office?

According to article 2.2.34.1.4 of the Decree 1817 of 2015, the superintendent is in office for the same time as Colombia's President. This is a fixed term of four years. In this case, the new superintendent will be in office until 7 August 2022.

On the other hand, the deputy superintendent can be either appointed or removed from his or her duties at any time by the Superintendent and he or she does not have a fixed term of office.

### When is he or she due for reappointment?

According to article 2.2.34.1.6 of the Decree 1817 of 2015, once the presidential term has finished, the newly elected president must appoint the new superintendent within three months following the date that the new President takes office. This regulation does not establish as a possibility reappointing the superintendent.

### Which posts within the organisation are political appointments?

There are no political appointments at the SIC.

### What is the agency's annual budget?

SIC's total competition-related budget for 2018 was 13.8 billion Colombian pesos, which was distributed in two main areas. The first was the Competition Investment Budget with approximately 7.5 billion pesos; and the second was the Competition Functioning Budget.

Of the money distributed to the Competition Investment Budget, 79.78 per cent was allocated to recruitment. This budget was distributed into two main costs centres. The first one was the Deputy Superintendence for Competition Protection, which has an own investment budget of 5.6 billion pesos. This budget included a special budget for the Forensics Laboratory.



The second cost centre involves other areas different from the Deputy Superintendence, which also perform competition activities: the Office of the Superintendent of Industry and Commerce and the Economic Studies Working Group. The investment budget was estimated to be 344 million pesos.

#### **How many staff are employed by the agency?**

In 2018, the SIC had a total of 598 employees and 1,846 contractors, distributed across all six divisions. The Deputy Superintendence for the Protection of Competition, specifically, had a staff of 52 employees and 78 contractors at the end of the year.

#### **To whom does the head of the agency report?**

The SIC is an agency that, although attached to the Ministry of Industry, Commerce and Tourism, enjoys administrative, financial and budgetary autonomy. Therefore, it issues decisions without the approval from any superior body. SIC's decisions can only be reviewed by the Colombian courts.

Regarding competition investigations, it is worth clarifying that competition proceedings are divided into two big stages:

- the investigation stage, which is conducted only by the Deputy Superintendent for Competition Protection; and
- the decision stage, which is conducted by the Superintendent of Industry and Commerce's office.

These phases do not represent different instances but they are parts of the same procedure. The Superintendent of Industry and Commerce is responsible for making the final decision, this means whether a sanction will be imposed or the closure of the case.

#### **Do any industry-specific regulators have competition powers?**

Law 1340 of 2009 has established the SIC as the sole authority in competition in Colombia. In recognition of that quality, article 6 of Law 1340 of 2009 gave it exclusive competence to conduct investigations and impose administrative fines.

However, according to the articles 8 and 9 of Law 1340 of 2009 two specific regulators have enforcement tools to review operations between companies belonging to two particular sectors:

- the Civil Aeronautic Authority (Aerocivil) in the aeronautical sector; and
- the Superintendence of Finance (SFC) in the financial sector.

#### **Civil Aeronautic Authority**

The supplemental paragraph to article 8 of Law 1340 states that Aerocivil 'shall continue to have jurisdiction over the authorisation of all business operations between aircraft operators' that involve 'code-share agreements, joint service operations, charter aircraft use, and aircraft exchanges', among others.

#### **Superintendence of Finance**

Mergers that involve financial institutions under the jurisdiction of the SFC are sent to that agency by virtue of article 9 of Law 1340. This article establishes the prior notification requirements applicable to mergers and states that the SFC 'shall study and decide upon' mergers that exclusively involve entities subject to its control. The SFC's jurisdiction covers banks, insurance and reinsurance companies, securities brokers, financial cooperatives, bonded warehouses, foreign exchange houses, trust companies, pension funds and similar financial institutions.

#### **If so, how do these relate to your agency's role?**

Aerocivil does not relate to the role or to the functions of the SIC when studying operations between aircraft operators in the aeronautical sector.

Regarding mergers in the financial sector, it must be noted that before issuing a decision, the SFC is required, by article 9 of Law 1340, to ask the SIC's opinion concerning the transaction's competitive effects and the SIC may suggest conditions to ensure the effective preservation of competition. Although the SIC's opinion is not binding, the SFC must explain its reasons if it chooses to reject the SIC's advice. Besides, if only one of the participants of the merger operation is a financial institution under the jurisdiction of the SFC, the SIC maintains the faculty to conduct the administrative merger proceeding.

#### **May politicians overrule or disregard authority's decisions? If they have ever exercised this right, describe the most recent example.**

No. Only courts have the power to overrule or disregard the SIC's decisions, after conducting judicial review processes.

#### **Does the law allow non-competition aims to be considered when your agency takes decisions?**

No. The SIC's decisions are fully based on the evidence that is collected by the SIC officials during the course of an investigation. This evidence will also have also been harvest and analysed by technical experts in forensic IT methods. Therefore, the SIC's decisions

do not consider subjective motivations or aims of the parties that commit illegal acts covered in the competition regime. Sanctioning powers proceed when the SIC finds that companies' behaviours have the object or effect of affecting competition.

**Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?**

The SIC's decisions can only be overturned by courts, after a judicial review process. In a SIC case, any party (including recognised third parties) can seek judicial review before the administrative tribunals through the action of nullity.

**Has the authority ever blocked a proposed merger? If yes, please provide the most recent instances.**

Yes. Since 2000, 15 proposed mergers have been blocked, and six proposed mergers were blocked and then authorised with remedies.

**Has the authority ever imposed conditions on a proposed merger? If yes, please provide the most recent instances.**

Yes. Since 2000, 61 proposed mergers have been authorised with conditions by the SIC and, as mentioned above, six proposed mergers were blocked and then authorised with conditions.

**Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.**

Yes. Since Law 1340 of 2009, which was issued on 24 July 2009, the SIC has decided 124 Phase II investigations. It is worth mentioning that before the issuance of Law 1340 of 2009, merger control was conducted in a single phase.

**Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.**

No, the SIC has not pursued a company based outside its jurisdiction for a cartel offence or any anticompetitive practice.

**Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?**

Yes. Article 14 of Law 1340 of 2009 established a leniency programme as part of Colombia's competition law regime. That article is regulated by Decree 1523 of 2015, which establishes the general conditions and the way that the SIC can award benefits to natural or legal persons who have participated as market agents or facilitator in a restrictive agreement.

It is important to note that the instigator of an anticompetitive agreement cannot be a beneficiary of the leniency programme.

All potential applicants should contact:

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According to articles 2.2.2.29.2.2 of Decree 1523 of 2015, the SIC is able to award both full and partial leniency, depending on certain conditions. The same article establishes that full leniency will be granted to the first applicant who comes forward and to accept the following conditions:

- the participation in a restrictive agreement; and
- to provide, at least briefly, information about the existence of the agreement, its operation, the products involved in it and the participants.

Anyone wishing to be part of a leniency programme can do so regarding an unknown cartel by the authority or in connection with a cartel under investigation.

There are also conditions to receive benefits for collaboration (article 2.2.2.29.2.6 of Decree 1523 of 2015), which are:

- to recognise the participation in the cartel.
- to provide information or useful evidence about the existence of the agreement and its operation, including aspects such as objectives, principal activities, functioning, name of the participants, level of participation, location, service or product involved, affected geographical area and estimated duration of the agreements informed;
- to follow and obey the SIC's requirements and instructions during the negotiation of the convention;
- to finish the participation in the cartel; and

- the opportunity to submit the application to the programme is after an investigation has been opened and before the end of the 20 days given to the offender to provide or request evidence of the commission of the presumed infraction.

Numbers 2 and 3 of article 2.2.2.29.2.2 of Decree 1523 of 2015, establish that the condition for partial leniency is providing useful information or evidence that adds significant value to the information that the Superintendence already knows. Including the information given by other applicants. The degree of exemption will depend on the order of arrival to the programme.

**Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?**

Since 2011, bid-rigging in Colombia has been the only antitrust behaviour with criminal consequences. It is a criminal offence punishable by imprisonment of up to 12 years, fines of up to approximately US\$235,000 and disqualification for up to eight years from future procurement proceedings. Enforcement of this conduct is conducted by the Office of the Attorney General and the final decision is made by a criminal judge. It is important to point out that so far no one has been criminally punished for cartel behaviour by the Colombian State Prosecution Office.

Regarding leniency benefits, complete amnesty is available under the SIC's leniency programme, whereas the leniency programme applicable in criminal bid-rigging cases entails maximum reductions of a third of the imprisonment term, 40 per cent of the fine, and three years of the eight-year disqualification period for participation in public procurement proceedings. Leniency in criminal cases is available only to defendants that have earned complete amnesty under the SIC's leniency programme.

**Are there any plans to reform the competition law?**

Colombia plans to implement a law that consolidates and harmonises all the rules related to competition protection. The SIC participated in the elaboration of the National Development Plan with the intention to incorporate an article providing the executive body with extraordinary powers to regulate the competition regimen in a unique and coherent normative body or code.

**When did the last review of the law occur?**

The last review of the competition law was made with Law 1340 of 2009.

**Do you have a separate economics team? If so, please give details.**

Yes. In compliance with the National Development Plan, the Economic Studies Working Group (ESWG) was created in 2012. It produces studies that support the decision-making functions of the SIC, creates market reports according to the needs of the different deputy superintendence offices and prepares semi-annual studies to determine the level of competition in the markets and the existence of failures in them, among other functions. The chief of the ESWG is Jacobo Campo, whose contact information has been listed above.

**Has the authority conducted a dawn raid?**

Yes. By virtue of numbers 62, 63 and 64 of article 1 of Decree 4886 of 2011, the SIC, without any court warrant, has, among others, the ability to:

- request information;
- practice all type of searches and dawn raids, including emails, computers, or any electronic device; and
- receive testimonies under oath.

Private locations such as residences and automobiles cannot be inspected. However, mobile phones used for business purposes can be searched. The consent of the mobile phone's owner must be given.

During preliminary inquiries, whether commenced ex officio or in response to a third-party complaint, the Deputy Superintendence for Competition Protection employs the SIC's full array of investigative methods to determine whether there is sufficient evidence to open a formal investigation. There is no public announcement or notice to the suspected parties (this stage of the proceeding is confidential). During this phase, the division is authorised 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. After the formal investigation is opened, dawn raids must be announced previously by public resolution to the investigated parties.

**Has the authority imposed penalties on officers or directors of companies for offences committed by the company? If yes, please provide the most recent instances.**

Yes. Articles 25 and 26 of Law 1340 of 2009, state that the violation of any of the Colombian antitrust provisions, including obstructions of investigations and omissions to duly comply with SIC's information requests, orders and instructions, will result in the imposition of administrative and pecuniary fines.

According to article 25 of Law 1340 of 2009, for legal persons, the maximum sanction is up to 100,000 statutory monthly minimum wages or if more, up to 150 per cent of the gross profit of the conduct. For natural persons, article 26 establishes that sanctions will be up to 2,000 statutory monthly minimum wages.

The provisions regarding the imposition of sanctions are the same in the event of restrictive agreements or procedural breaches. Therefore, the criteria for imposing sanctions does not change for any infringement.

The Colombia competition regimen allows the taking into account any good or bad procedural behaviour to mitigate or aggravate the fine. In accordance with article 25 of Law 1340 of 2009, the criteria to graduate the sanction to legal persons are the following:

- the impact that the behaviour has on the market;
- the size of the affected market;
- the benefits obtained by the offender with the behaviour;
- the degree of participation of the offender;
- the procedural conduct of the party under investigation;
- the market share of the infringing company, as well as the part of its assets and its sales involved in the infringement; and
- the assets of the offender.

On the other hand, in accordance with article 26 of Law 1340 of 2009 the criteria to graduate the sanction to natural persons are the following:

- the persistence of the offending conduct;
- the impact of the conduct in the market;
- the repetition of the prohibited conduct;
- the procedural conduct of the offender; and
- the degree of participation of the offender.

The offender or a requested company can be subject to a sanction for procedural breaches when:

- the requested information is provided late;
- the provision of the information is false or incomplete;

- some information has been destroyed;
- refuses to provide information; or
- lacks of notice or disclosure.

In general, when there are obstructions to the investigation by refusing, delaying or challenging the powers of the Authority to carry out investigative measures.

**What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?**

The Colombian pre-merger notification system is based on both objective and subjective assumptions.

The objective assumption can be met one of two instances. When the merging parties (either individually or jointly), have had an operational income during the previous fiscal year that exceeded the amount of monthly minimum wages set by the SIC. Or, when the parties reported an amount of total assets from the previous fiscal year that exceeds the amount of monthly minimum wages set by the SIC.

The thresholds for 2018 were defined in the SIC's Resolution 88920 of 2017 (60,000 monthly minimum wages for both operational income and total assets). This threshold is applicable to the fiscal year.

There is a second threshold regarding market share. If the parties meet the objective assumption described above, but have (individually or jointly), less than a 20 per cent share in each one of the markets involved in the transaction (vertically or horizontally related – the Colombian merger regime does not review conglomerates), then the case is deemed automatically approved. This requires, however, that the parties must inform the SIC that the transaction is going to take place. If the parties have more than a 20 per cent share in one or more of the involved markets, the transaction must be reviewed by the SIC.

**Are there any restrictions on investments that involve less than a majority stake in the business?**

There are no restrictions on minority investments. However, a minority investment may trigger the obligation to report a merger before the SIC, if such investment enables the investor to exercise material influence (positive or negative control) on strategical decisions of the target company or business.

**Are there any restrictions on investments that involve less than a majority stake in the business?**

As mentioned above, there are no restrictions on minority investments. The general criteria to trigger merger control is the acquisition of positive or negative control – material influence (or even the change from

negative to positive) over the target company or business, regardless of the means (for example, majority or minority investment, joint ventures, assets acquisitions) by which it is acquired.

**What discounts are available to companies that cooperate with cartel investigations?**

As said, the Colombian leniency programme is regulated by Decree 1523 of 2015. As per article 2.2.2.29.2.2, the SIC is allowed to grant full amnesty for the first party to apply and who accomplished the following conditions:

- it must not be the instigator (this is the person who, by serious threat or coercion, induces another person to do an anticompetitive practice, provided that such coercion or threat remains during the execution of such practice);
- it must finish its participation in the conduct; and
- it must preserve evidence and provides complete information relating to:
  - the identities of the other participants of the cartel;
  - the nature, duration, objectives and operations of the anticompetitive agreement; and
  - the geographic and product or service markets affected.

Number 2 of article 2.2.2.29.2.2 of Decree 1523 of 2015 grants to the second applicant a reduction of 30 per cent up to 50 per cent of the sanction, depending on the usefulness of the information provided.

Number 3 of Article 2.2.2.29.2.2 of Decree 1523 of 2015 grants the third and the rest of the applicants up until 25 per cent of a sanction reduction, depending on the usefulness of the information provided.

If the Deputy Superintendent determines that the evidence provided by the applicant is not sufficient to warrant total exemption of the fine, the applicant may withdraw the application and the evidence submitted, or request the deputy to consider the application as a petition for a reduced fine. The benefits earned by a business entity will extend to the entity's officers, but not vice versa.

Article 2.2.2.29.4.1 of Decree 1523 of 2015 enables leniency applicants who are not the first in applying for leniency benefits to earn an additional 15 per cent reduction in their fine by disclosing the existence of a different cartel in another market.

In the same track, article 2.2.2.29.4.1 of Decree 1523 of 2015 states 'facilitators' may receive extra benefits when revealing the existence of a restrictive practice, different from a cartel. A facilitator is any person who collaborates, facilitates, authorises or tolerates anti-competitive practices.

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