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Colombia

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Legislative Developments

Merger control rules in Colombia changed following Decision 35006 (the “Decision”) issued by the Superintendency of Industry and Commerce (the “SIC”) on June 30, 2010, in which the competition authority set forth the rules for the notification and authorization of mergers in Colombia in accordance with Law 1340 of 2009 (the “Competition Law”).¹

The Decision establishes that it is mandatory to notify a merger, consolidation, integration or acquisition of control between companies which carry on the same activity or participate in the same value chain within Colombian territory (including vertical integrations), regardless of how the transaction is implemented, as long as one of the following conditions is met: (i) the parties’ turnovers in Colombia exceed 150,000 minimum legal wages (approximately US\$37 million); or (ii) the value of the parties’ assets in Colombia exceeds 150,000 minimum legal wages (approximately US\$37 million). The Decision increased the notification thresholds, which were previously 100,000 minimum legal wages (approximately US\$25 million). The objective is that only mergers that may have a real impact on the market are subject to merger control, while all others will be deemed to be authorized by the SIC.

In the event that the parties to the transaction comply with either of the above conditions, but jointly have a market share of less than 20% of the relevant market, the proposed operation will be automatically authorized by the SIC. In this case, the parties have to submit a notice or report to the SIC with a description of the transaction, a description of the parties to the transaction, the definition of the relevant market and the market share of both the parties and their competitors in the relevant market.

As a result, if the thresholds are met, and the parties have a joint market share of more than 20% in the relevant market, the proposed transaction should be notified to the SIC through a pre-evaluation request prior to completion, and the transaction may not be closed until a clearance letter is issued. The Decision also modified the list of information and documentation that must be submitted to the SIC at each stage of the procedure (simple notification, pre-merger filing and substantive evaluation period), which includes financial, economic and technical information concerning the market and the parties to the transaction. In addition, it regulates: (i) confidentiality for those mergers that require handling in this way for public policy reasons; (ii) the rules that have to be followed by the parties when publishing the transaction in a newspaper; and (iii) the timetable for review and clearance, among others.

In addition, the Decision specifies the types of businesses that are exempt from the duty of information and prior notification.

Regarding anticompetitive practices, the President issued Decree 2896 of August 5, 2010, which sets forth leniency provisions for the parties that incur in an infringement of Article 14 of Law 1340, 2009, in order to be eligible for total or partial immunity provided that the party concerned cooperates with the antitrust authority by providing evidence and information regarding the violation.²

It is important to point out that whoever wishes to collaborate has to (i) provide information and evidence of the anticompetitive practice; (ii) facilitate the obtaining of testimonies from people involved in the conduct; (iii) respond in a timely manner to the requirements for information made by the SIC to clarify the anticompetitive behavior; and (iv) refrain from destroying, altering, or hiding information or evidence regarding the practice in question. Moreover, the applicant cannot be the instigator

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¹ Colombia’s Official Gazette Number 47758 of July 2, 2010.

² Colombia’s Official Gazette Number 47.792, August 5, 2010.

of the illegal conduct –if so, immunity is not available– and has to cease its participation in the restrictive agreement or practice.

Mergers

The SIC approved, subject to conditions, the merger between Coltabaco (owned by Philip Morris) and Protabaco.³ In order to ensure the maintenance of competition in the cigarette market, the authority imposed both structural and behavioral remedies.

The structural remedies consisted of the sale of the trademark Premier, along with another trademark, to a domestic or a foreign competitor provided that it has a market share of not less than 2% in the middle-lower segment within the cigarette market and has increased, or at least maintained, that market share in the last three years.

In addition, in order to ensure that the new competitor will have the actual production capacity in Colombian territory, the parties are obliged to sign manufacturing agreements (*maquila*), if the buyer so wishes, whereby the merged companies offer the new competitor their production capacity.

These structural remedies must be fulfilled by the companies within three months of the date of the decision.

As regards the behavioral remedies, these refer to the commercial relationships with the tobacco leaf growers and wholesale and retail distributors of cigarettes.

In relation to the relationship with growers, the SIC established the obligation to remove any contractual provision or practice involving exclusivity in the sale of such raw materials, as well as the obligation not to limit the funding of the necessary inputs for the crop to a specific financial institution. The authority emphasized the need for companies to report to the grower about the costs associated with inputs and technical visits.

As to the distribution network, the SIC prohibited exclusivity agreements with wholesale distributors and retailers, and declared that the parties may not give preferential treatment to the companies involved in the operation. It also established that the buyer may, if desired,

use all or part of the companies' wholesale and retail distribution network.

The decision thereby rules on the appeals filed by Protabaco and Coltabaco against the Decision, which did not clear the merger on the basis that the operation would negatively affect competition. According to the SIC, these negative effects are unlikely to occur, if the parties comply with the conditions mentioned.

Finally, it is worth noting that on January 5, 2010, Coltabaco abandoned its proposed acquisition of Protabaco. After carrying out an exhaustive analysis of the conditions imposed, Coltabaco decided that the strategic and financial objectives on which the purchase was based in the first place could not be met.

Cartels and other Anticompetitive Practices

The SIC ordered the Colombian Society of Pediatrics and Child Care (Santander branch) and the Colombian Society of Pediatrics to immediately suspend the mechanism that they had been using for price fixing. The aforementioned mechanism consisted in a manual that set the scale of prices to be charged by pediatricians, and also specifies the methods to ensure compliance therewith.

According to the SIC, entering into an agreement establishing the obligation to implement rate schedules for its members to be eligible in different schemes of recruitment available would be considered anticompetitive, and therefore the SIC ordered an injunction prohibiting those associations from setting minimum prices for providing pediatricians' services. The measure seeks to stop the alleged anticompetitive behavior and to remove the effects that such conduct may have had in the field of health services.

In Colombia, agreements whose object or effect is the direct or indirect fixing of prices are deemed to be contrary to free competition and illegal. In the health sector, there is specific legislation aimed at associations or scientific societies and professionals, which prohibits and considers illegal any decision or domestic policy whose object or effect is to impede, restrict or distort free competition in the provision of health services.

³ Decision 54253, October 4, 2010 in Case 09-77242. available in Spanish at http://docsrodas.sic.gov.co/ConsultaActos/NavegacionDocsIxf/VerDocsInternet.php?tipo_doc=R&nume_radi=54253&ano_radi=2010&Consultar=Consultar.

The SIC is currently conducting an investigation into this matter and will issue a decision as to whether the conduct in question violates the antitrust rules or not. The final decision falls to the Superintendent.

Court Decisions

Nullity actions against decisions issued by the SIC may be submitted for judicial review to the Administrative Court

of Cundinamarca and subsequently appealed to the State Council, which are able to review not only substantive but also procedural aspects of the SIC's decision.

There have been no judicial review proceedings concerning recent SIC decisions. In fact, since 2002 only four decisions have been appealed.

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