Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Colombia

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Colombia's competition law and policy are usually subject to incremental changes, but 2022 was a watershed in terms of institutional change, legal reforms and cases that captured the media's attention. This blog post overviews three main developments in Colombia's competition law and policy – covering institutional, legal amendments and enforcement issues – and is not intended to be exhaustive.

New leadership in the competition agency

In June 2022, Gustavo Petro and Francia Márquez won Colombia's presidential election. Petro is Colombia's first left-wing president since Alfonso López Pumarejo who governed in two non-consecutive terms, between 1934-1938 and 1942-1945. The political agenda of President Petro and Vice-president Francia Márquez differed from previous governments with respect to their approach to the economy, the protection of the environment and human rights.

Petro and Márquez's election manifesto did not directly refer to competition law and policy, nor did the commencement speech delivered by Petro on August 7, 2022. However, as I wrote back then, the new government proposed changes in key economic policies that could affect competition policy. For example, their electoral manifesto stated that economic transformation was a central objective, aiming at transitioning "*from an extractivist economy to a productive economy*". The word "*economy*" was mentioned 118 times in the document and frequently alluded to issues such as the productivity of the economy, the inclusion of women, the "*popular economy*", and the transition from a fossil to a decarbonized economy.

In August 2022, the competition community eagerly anticipated the appointment of a new head of the agency, the Superintendency of Industry and Commerce (SIC), as this could signal the government's commitment to shaping Colombia's competition law and policy. While the president had the constitutional power to appoint the head of the SIC, a decree that dated back to 2015 stated the appointment had to be preceded by "*a public invitation made through the Internet portal of the Presidency of the Republic to those who meet the requirements and conditions to occupy the respective position*".

On December 31, 2022, no public invitation had been made by the Presidency and the SIC was

headed by a Deputy superintendent temporarily in charge. The year ended with no clear clues of who would lead the SIC during Gustavo Petro's tenure. During the first months of 2023, the concern about the future of the agency grew since several key lawyers and economists from the Directorate of Competition Protection had left for new jobs and in other cases, their contracts were not renewed by the competition authority.

Only until April 2023 did the national government appoint the new head of the SIC: María del Socorro Pimienta. Superintendent Pimienta has worked at the SIC for over two decades and previously held advisory and directive positions at the offices in charge of industrial property, compliance, and legal affairs, among others. Her main professional and academic background is related to industrial and intellectual property rather than competition law.

It is too soon to foresee how the Superintendent will steer the SIC's ship in the next years, but in the next months, we will probably have a clearer picture of the new agenda pursued by the first Superintendent of Industry and Commerce appointed by a left-wing government in Colombia.

Competition law reform reversed by the Constitutional Court

Law 2195, enacted on January 18 2022, introduced significant modifications to Colombia's competition system. The law amended the leniency program (Article 66) and reformed the fines that may be imposed on those who breach competition law (Articles 67 and 68).

The Colombian leniency program was originally established by Law 1340 of 2009. Law 2195 introduced several key changes aimed at strengthening the confidentiality of the identities of applicants, the evidence provided to comply with the program, and the negotiations between the SIC and the applicants. Furthermore, Law 2195 aimed at limiting the liability of the applicant: "*Whoever, within the framework of the program… obtains total or partial exoneration from the fine to be imposed by the Superintendency of Industry and Commerce, shall not be jointly and severally liable for the damages caused by the anticompetitive agreement and, consequently, shall be liable in proportion to his participation in the accusation of the damages to third parties generated by the anticompetitive conduct*".

Regarding administrative fines, Law 2195 increased the maximum fine that the SIC can impose on undertakings and natural persons who breach competition law. For example, the Law established that the agency could impose fines on undertakings based on any of the following four systems (whichever yields the higher cap):

"*1.1. The operating income of the offender in the fiscal year immediately preceding the year in which the sanction is imposed. In this event, the sanction may not exceed twenty per cent (20%) of such income.*

1.2. The patrimony of the offender in the fiscal year immediately preceding the year in which the sanction is imposed. In this event, the sanction may not exceed twenty per cent (20%) of the value of its net worth.

1.3. An amount in terms of current legal monthly minimum wages payable by the offender. In this event, the penalty may not exceed one hundred thousand legal monthly current minimum wages [in 2023, approximately 25.6 million USD].

1.4. The value of the state contract in cases of restrictive business practices that affect or may affect public procurement processes. In this case, the fine may not exceed thirty per cent (30%) of the value of the contract."

Furthermore, Law 2195 included new factors that the agency should take into account to calculate the level of the fine.

However, on March 2023 a press release of the Constitutional Court informed that Articles 66, 67 and 68 of Law 2195 were unconstitutional due to procedural vices. More specifically, according to the Court, during the process of approval of said articles, Congress violated "*the consecutiveness and flexibility identity principles*". These principles require that in the legislative process, the "*permanent constitutional commissions and the plenary sessions of the Senate and the House of Representatives analyse and debate all issues that are submitted for their consideration*". In the case of the articles that amended the competition law, the Court concluded that "*the matters they regulate were expressly excluded from the debates held in the First Commission and in the Plenary of the Senate of the Republic*".

As a consequence, the Constitutional Court decided to leave without effect Articles 66, 67 and 68 of Law 2195 and to reinstate the original rules that had been modified (that is, Articles 25 and 26 of Law 1340). The complete ruling issued by the Constitutional Court (C-080 of 2023) has not been published yet and it is not clear whether the Colombian government is interested in presenting a new bill to re-introduce the amendment.

Turbulent airline merger cases

Before explaining the recent airline merger cases, it is important to clarify how merger control operates in Colombia. Law 1340 established that the SIC is in charge of merger control with respect to all economic sectors with two exceptions: transactions that involve companies supervised by the Superintendency of Finance and transactions among airlines. The latter merger process is conducted by the Civil Aviation Agency (Aerocivil).

On November 4 2022, Aerocivil issued Resolution 0273, which prohibited the merger submitted by Avianca and Viva Airlines because it would generate or reinforce the market power of the new entity which would be created as a result of the merger. For example, Aerocivil found that the merged parties would reach 100% participation in 16 domestic routes in the passenger air transport markets.

Moreover, Aerocivil argued that other competitors would be limited by higher entry barriers and that consumers could be harmed to the extent that the merged entity would have more incentives and lower risks to incur in exploitative unilateral conducts (e.g., increase prices, reduce frequencies, predatory prices, hoarding slots etc.). The authority also concluded that the merger could increase the probability of coordinated effects.

Additionally, Aerocivil argued that the parties had not offered remedies to counteract the anticompetitive effects caused by the merger and that the failing firm exception should not be applied in this case because the parties did not prove that Viva's economic crisis could affect its viability in the market and that its exit from the market was imminent and inevitable. Furthermore, the authority claimed that Viva did not prove that it had explored and exhausted other alternatives

(e.g. selling to other competitors) and that the parties did not prove that the harm to competition generated by the transaction was less than the harm that would be caused by Viva's exit from the market.

Later, on December 9 2022, the SIC issued the equivalent of a Statement of Objections (*pliego de cargos*, in Spanish) against Avianca and Viva airlines, for allegedly closing a merger transaction without the clearance from the competent authority, the Civil Aviation Agency (Aerocivil).

In Resolution 87164 of 2022, the SIC argued that the investigated parties had incurred in gun-jumping. SIC claimed that in April 2022, the holding of Avianca acquired 100% of the economic rights of two Viva corporations (Rexton and Viva Perú) and that their merger authorization request had been submitted to Aerocivil on August 2022. SIC argued that the fact that the acquisition of the voting rights had been allegedly separated from the transaction did not imply that the merger's effects had not consolidated. Moreover, the SIC argued that all key administrators of the parties that were in charge of deciding how the companies would compete were aware of the definitive nature of the transaction.

The airline novella had two additional episodes in 2023 that changed the fate of their protagonists. First, on March 21 2023, Aerocivil issued a press release informing that it had reversed its initial decision with respect to the Avianca–Viva merger. Resolution 00518 of 2023 authorized the merger subject to seven remedies: (i) the reversal in the obtention of certain slots; (ii) maintaining Viva's operations as a low-cost airline for at least three years in specific routes; (iii) maintaining the inter-airline agreements between Fast Colombia and Viva Airlines Peru and eliminating their exclusivity clauses; (iv) the companies of the merged entity would subscribe to code-sharing agreements with Satena (a state-owned airline company) for a period of three years; (v) returning the frequencies of the route Bogotá–Buenos Aires for four years; (vi) protecting the passengers affected by the suspension of the operation of Viva; and, (vii) reducing in 10% the yield of the tickets sold for the routes in which the merged entity had 100% of market participation (provided that the routes had been operated by Viva by December 31 2022).

Finally, on April 21 2023, SIC published a press release informing that it would close the gun-jumping investigation against Avianca and Viva. The investigation was closed after the agency accepted the guarantees offered by the parties ("*to suspend and/or modify the anticompetitive conduct under investigation*"). The agency deemed that the commitments would "*generate greater benefits for competition and consumers compared to what would be achieved through a sanction*".

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