Navigating the Globe: Cartel Enforcement Around the World

Chapter 16: Colombia & Peru

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Presenters

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Discussion Outline

• Legal Framework
• Enforcers
• Cartel Regulation
• Cartel Enforcement
• Leading Cartel Cases
• Recent Developments
• Cooperation with other jurisdictions
**Basic legal provisions**: Article 333 of the Constitution (competition as a collective right), Law 155 of 1959, Decree 2153 of 1992 and Law 1340 of 2009

**Scope of the law**:
- **Conduct**: restrictive trade practices (agreements, acts and abuse of dominance); ii) *ex ante* merger control. Conduct must have effects in the Colombian market
- **Applicable to**: whoever performs economic activity of may affect such performance, regardless of its legal nature, whatever the economic sector
  - includes public entities (competitive neutrality) and trade associations
  - includes all economic sectors (the case of agricultural, aeronautic and financial sectors)

**Competition Advocacy**: the competition authority issues opinions on regulations that may affect competition in the market
COLOMBIA
Institutional Framework

• **Administrative System:**
  – Competition Authority (Superintendence of Industry and Commerce –SIC)) performs the investigation and imposes sanctions up to 30 M USD
  – Different teams within the agency perform the investigation and judgment
  – Parties may request judicial review before courts

• **Superintendence of Industry and Commerce:**
  – Agency from the executive
  – Headed by the Superintendent of Industry and Commerce who is appointed and removed at will by the President
  – It has Deputy Superintendence’s : Competition, Consumer Protection, IP, Data Protection, Legal Metrology, Jurisdictional Matters

• **Procedure**
  – Deputy Superintendence for Competition performs investigation: opens and conducts the investigation;
  – Deputy Superintendent issues a report on the results of the investigation to the Office of the Superintendent;
  – Office of the Superintendent performs a de novo analysis and calls an advisory council of five experts. Then it issues the decision
COLOMBIA
Parallel Behaviour

Colombian Legal Framework

• Art. 1 Law 155/59 - General Clause of Competition.
• Art. 45 Decree 2153/92 – “Agreement: (…) concerted practice or consciously parallel practice between 2 or more enterprises”.

Application issues

• The term consciously parallel practice generates serious interpretation issues:
  – The sole parallelism is not per se anticompetitive: the conscious element is mandatory.
  – How to determine the presence of the “conscious” element?
  – Theory of additional factors.

• The Competition Authority considers these situations as “Additional Factors”:
  – Commercial relations in foreign firms
  – Frequency and timing of meetings
  – Information exchange in trade associations
  – Existence of Purchase Committees

  Do these factors have an unequivocal explanation? Not necessarily

• Throughout different cases, the Competition Authority has considered any kind of contact between investigated parties as a proof of the “Conscious” element.
COLOMBIA
Parallel Behaviour

Wood Pulp case
• 1984: European Commission found that there had been an infringement of Art. 81 of the Treaty by concerted on prices.
• 1993 - European Court of Justice annulled the decision: ¿Does the evidence constitute a firm, precise and consistent body of evidence of prior concertation?

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<tr>
<th>Findings of the EC*</th>
<th>Findings of the ECJ</th>
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<tr>
<td>System of quarterly price announcements</td>
<td>Announcing prices in a quarterly basis and in the same currency is a practice adopted by wood pulp produces to assure transparency in the market.</td>
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<tr>
<td>Simultaneity or quasi-simultaneity of the announcements</td>
<td>Concerted practice is not the only explanation; other market features could explain the situation.</td>
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<td>Announced prices were identical</td>
<td>It could be a sign of the competitive behavior in an oligopolistic industry.</td>
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**Conclusion:**
“concertation is not the only plausible explanation for the parallel conduct”


Issues
• **Additional Factors:** ¿Are those factors feasible? ¿How are they analyzed? ¿Can they be misinterpreted?
• What if concerted practice is not the only explanation but is the **most likely**?
COLOMBIA
Administrative Fines

- Fines
  - Legal cap of USD 32,9 MM* per party per breach or 150% of profit
  - Legal cap of USD 660 K* against officers (even advisors)

- Discretion of the SIC
  - How to calculate?
  - Dilemma on calculation on fines on individuals

- Doctrine on fine calculation
  - No confiscatory fines
  - Up to 10% of turnover of the Parties
  - Abusive behaviours – each one counts (“Claro”)
  - Cartels – one per market (?)

* approximate values, at current exchange rates
COLOMBIA
Leniency Programs

• Available to legal entities and individuals in a cartel
• Not available for ring leaders
• Application before Deputy Competition Superintendent
• Full immunity to whistle blower
• Fine reductions
  – Up to 70% to second participant,
  – Up to 50% to third participant
  – Up to 30% to other participants
• Continued cooperation and quality of evidence
Peruvian Legal Framework

• Article 61 of the Peruvian Political Constitution ("Peruvian Constitution"); and,

• Legislative Decree No. 1034, Repression of Anticompetitive Behaviour Act ("Antitrust Act").
Enforcers


- Agency for the Supervision of Private Investment in Telecommunications (“OSIPTEL” after its Spanish acronym).
Cartel Regulation in Peru

Definition

- Horizontal Collusive Practices: All kind of contracts or agreements, arrangements or combinations; decisions and recommendations (in the case of business unions) between competitors which the purpose or effect of restricting or rigging competition.

- Need not be a formal or written agreement (in fact, it may be a non-binding arrangement or understanding).
Cartel Regulation in Peru

Absolute Prohibitions

- Any horizontal agreement related to (i) price fixing, (ii) restriction of production or distribution of products, (iii) market segmentation, or (iv) bid-rigging is considered an absolute prohibition (*per se* rule).
- Unless the agreement is accessory or supplementary to another lawful agreement (ancillary restraints doctrine).

Relative Prohibitions

- Other horizontal agreements: quality standards, refusals to deal, blocking access to organizations, etc. are relative prohibitions.
- The Free Competition Commission must prove negative effects to competition and consumer welfare.
Cartel Regulation in Peru

Administrative procedure

• The Antitrust Act establishes an administrative procedure to investigate cartels that may be initiated by the CLC’s Technical Secretariat, at the request of any party or ex officio.

• The CLC’s cartel investigation procedure is segmented in two stages:
  1. The investigation stage, during which the Technical Secretariat shall gather all elements required to sustain and determine that the illegal activities were presumably carried out, and
  2. The administrative procedure, followed in the form of a trial where the CLC acts as an administrative court and the Technical Secretariat as the prosecutor, by means of which the alleged offenders will be able to defend themselves from the Technical Secretariat allegations and findings (derived from the investigation).

• The CLC’s final decision can be appealed before Indecopi’s Special Tribunal for the Defence of Free Competition (second administrative stage), and then to the Judiciary.
Investigative stage

• During an investigation, the CLC can rely on the following tools:
  – Subpoenas.
  – Formal requests of information and documents.
  – On-site searches.
  – Public information.
  – Leniency applications.
Leniency Programme: Immunity (“Exoneración de sanción”)

• Economic agents participating in cartels (either corporations or individuals), may voluntarily confess their participation in this kind of practices and request the benefit of a full exoneration from any administrative liability (any liability for civil damages is not to be waived).

• Immunity may be requested at any time if the CLC has not already initiated a formal procedures.

• In order to obtain total immunity, a company which participated in a cartel must be the first one to inform the CLC of an undetected cartel by providing sufficient to prove the cartel existence.

• Companies which do not qualify for immunity may benefit from a reduction of fines if they provide “relevant information”.
Leniency Programme: Procedure Cessation ("Compromiso de Cese")

- Economic agents participating in cartels (either corporations or individuals), may voluntarily confess their participation in this kind of practices and request the benefit of a full exoneration from any administrative liability (any liability for civil damages are not to be waived).

- Procedure cessation may be requested until 45 working days from the beginning of the procedure.

- In order to request such benefit, the following requirements shall be fulfilled: (i) full acknowledge of the charges; (ii) the cartel in question should have not caused “grave harm” to consumer welfare; and (iii) to carry out all the necessary actions to stop its participation in the illegal conduct.

- The CLC is not bound to grant the cessation of the procedure.
Fines

The CLC can impose the following fines:

i. Fine of up to 500 Tax Units (Approximately US$ 700,000) if the infraction is mild. In any case, the fine cannot be greater than the 8% of annual revenue.

ii. Fine of up to 1000 Tax Units (Approximately US$ 700,000) if the infraction is severe. In any case, the fine cannot be greater than the 10% of annual revenue.

iii. Fine of up to 1000 Tax Units (Approximately US$ 1,400,000) if the infraction is very severe. In any case, the fine cannot be greater than the 12% of annual revenue.
Criminal penalties

The Antitrust Act repealed article 241,3 of the Criminal Code, which contemplated a penalty no greater than 3 years of imprisonment for participating in a collusion to fix prices.
Leading Cartel Cases

The former competition authority (Federal Competition Commission) initiated several investigations against cartel activity involving, among others:

- “Chicken Case”.
- “SOAT case” (mandatory vehicle insurance).
- Clinical Oxygen case.
Recently, the CLC has initiated investigations against cartel activity involving, among others:


- An investigation of a potential cartel in the ground transportation and terminals market (in collaboration with Chilean Antitrust Authority).

Also, the CLC has launched an information campaign regarding its leniency programs. There already two cases initiated through these mechanisms in 2014.
Cooperation with other jurisdictions

• In our region, there are two efforts, by the Andean Community and MERCOSUR, to create supranational competition regulations:
  
i) Andean Community: Decision 608 anticompetitive practices with effects in two or more Member States are regulated. However, the issue with this regulation is how to enforce the rulings issued thereunder given the lack of institutional arrangements and an adequate structure.
  
ii) MERCOSUR: Its competition provisions have not been applied since the anticompetitive practices prohibited domestically and cross-border have not been defined.

• Recent collaboration with Chile Antitrust Authority regarding bus station.