

# Colombia

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### Legislation and jurisdiction

#### 1 Relevant legislation

What is the relevant legislation and who enforces it?

The relevant legislation is set forth primarily in Law 155 of 1959, Decree 2153 of 1992, Law 1340 of 2009 and Decree 2896 of 2010. These rules apply in conjunction with Decrees 4886 of 2011. Colombian legislation makes no reference to ‘cartels’ but to ‘anti-trust agreements’. When this type of conduct is investigated, it must be determined whether the agreement restricts or has the aim of restricting competition.

The agency in charge of investigating cases related to cartels is the Superintendency of Industry and Commerce (the SIC), through the Office for the Protection of Competition (the OPC). The SIC is the sole authority in Colombia in charge of enforcing competition rules and is a public entity belonging to the government who has administrative and financial autonomy.

#### 2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

The last substantive change made to the competition regime was Law 1340 of 2009 and Decree 2896 of 2010. Law 1340 of 2009 updated the competition regime and introduced substantive changes to the procedure of antitrust investigations, particularly those related to the term within the investigation for offering remedies by the investigated parties in order to terminate the investigation without penalties, and introduced the leniency programmes to fight against anti-competitive agreements that are regulated by Decree 2896 of 2010. It is important to highlight that leniency programmes were not in place before Law 1340 of 2009.

#### 3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartel conduct is determined based on the existence of restrictive agreements described in article 47 of Decree 2153 of 1992. This provision forbids agreements whose purpose or effect could be:

- direct or indirect price fixing;
- sales or marketing conditions that discriminate against third parties;
- market allocation between manufacturers or distributors;
- assigning manufacturing or supply quotas;
- assigning, distributing or limiting supply of productive materials;
- limiting technological developments;
- making the supply of a product conditional on accepting additional obligations that by their nature do not constitute the objective of the negotiation;

- abstaining from producing a good or product or affecting its production levels;
- colluding in public tenders or contests, distributing awarded contracts, or fixing the terms of the proposals; or
- preventing any third parties from accessing markets or marketing channels.

Likewise, articles 1 of Law 155 of 1959 set forth a general clause prohibition in regards to those agreements that directly or indirectly aim at to restrict or limit the production, supply, distribution or purchase of raw materials, products or services.

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#### 4 Industry-specific offences and defences or antitrust exemptions

Are there any industry-specific offences and defences or antitrust exemptions?

There are no industry-specific offences and defences. Nevertheless, Colombian legislation considers the agricultural sector as an industry that requires special attention and therefore, the government can in specific cases regulate the internal market of agricultural products, and the supply chain agreements in this sector.

Likewise, the law establishes that when the SIC has knowledge of cases that involve sectors under surveillance or are regulated by other entities (for instance, public utilities), it should inform the sector-specific regulatory and control entities of the facts it has knowledge of in order for those entities to issue a technical opinion referring to the matter in question. This does not affect the possibility of intervening during the investigation by the regulatory or control entity. The opinions issued by such entities are not binding for the SIC.

Also it is important to point out that according to article 1 of Law 155 of 1959, the government may approve or authorise agreements that restrict competition but aim to stabilise a significant sector of the national economy.

Furthermore, Decree 2153 of 1992 set forth three kinds of agreements between competitors that are deemed permitted. These agreements are the following:

- cooperation agreements for research and the development of a new technology;
- those related to the compliance of standards or rules not considered mandatory by the competent authority, always provided that it will not limit or restrain the entrance to the market for potential competitors; and
- those referring to proceedings, methods, systems or ways for using common facilities.

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#### 5 Application of the law

Does the law apply to individuals or corporations or both?

Antitrust laws apply to any person who performs an economic activity or affects its development, regardless of the form or legal nature

that the alleged offender has. Hence, antitrust laws apply to both, individuals and corporations engaged in an economic or commercial activity. It covers, for instance, corporations, partnerships, trade associations, joint ventures, individuals operating as sole traders, state-owned corporations and non-profit-making bodies.

## 6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what legal basis does the authority claim jurisdiction?

No, antitrust law does not apply to actions taking place abroad, only to actions taking place in Colombia or with effects in Colombia. Antitrust laws are only applied with regard to conduct that has or might yield total or partial effects in the national markets regardless of the economic activity or sector.

## Investigation

### 7 Steps in an investigation

What are the typical steps in an investigation?

The investigation starts at the OPC through a preliminary investigation. The preliminary investigation is not a formal investigation itself, but just a prior step performed by the OPC to clarify if there is enough merit for opening a formal investigation. It is important to highlight that within the preliminary investigation, the investigated parties do not participate or intervene due to the fact that such step is confidential. Should the OPC deem that there is enough merit, then the investigation starts through a formal decision that will be notified to the investigated parties. The OPC is in charge of carrying out the investigation, producing the evidence and will then recommend whether or not to sanction the investigated parties. It is important to bear in mind that the OPC does not make the decision about imposing sanctions or not on the investigated parties. The decision will be made by the superintendent of industry and commerce.

The typical steps are indicated as follows:

- the process of investigation into a cartel starts by official initiative or by formal complaint filed before the SIC by any third party. Due to the creation of the leniency programmes, the formal complaint may be also filed by one of the parties involved in the cartel. There is no special format in which the formal complaint could be filed;
- a preliminary investigation takes place to determine the need to carry out an investigation;
- if the OPC finds out that the conduct is producing a significant effect in the market, and there are merits in investigating the matter, it will start an administrative investigation;
- the parties under investigation are notified and may provide evidence for their defence;
- the opening of the investigation notice will be published in a newspaper announcing the beginning of the investigation;
- any competitors, or those who can prove a direct interest in the investigation, may be part of the proceedings as interested third parties and can intervene during the 15 working days following the publication of the newspaper notice by providing any comments or evidence they possess;
- before starting the evidentiary step, the investigated parties have the opportunity to offer certain assurances or remedies aiming to close the investigation in advance. The remedies should be offered before the term given to provide the evidence expires. If the remedies are accepted, the Superintendence will specify the conditions for compliance and will determine mechanisms for verification. Should the accepted assurances not be fulfilled, this would be an infringement of the antitrust regulations, and therefore, sanctions may apply;

- if the SIC does not accept the remedies or the investigated parties do not offer remedies, the OPC will conduct the evidentiary step.
- after the evidentiary step, the OPC will draft a report in which the OPC will provide recommendations to the superintendent of industry and commerce on imposing or not sanctions or penalties. The investigated parties and any interested third parties are then informed of the report;
- the SIC can order, as a precautionary measure, the immediate suspension of any conduct that may be considered against the regulations; and
- if no assurances or remedies are offered and the investigation ends with a resolution against the investigated parties an appealing motion to set aside the resolution can be brought before the superintendent.

Should the superintendent confirm his or her decision, the investigated parties may challenge it before the administrative courts.

### 8 Investigative powers of the authorities

What investigative powers do the authorities have?

The SIC executes the procedure through the OPC. The SIC is allowed to:

- officially initiate any investigation or give course to the claims filed by any third party.
- request information from subjects under investigation, competitors and non-competitors, and third parties, as many times as it considers necessary;
- collect any kind of information;
- grant the legal terms to the parties that exercise the right of a defence;
- direct and conduct the investigation in general;
- order precautionary measures to cause immediate suspension of the conduct, as described in question 7;
- impose pecuniary sanctions; and
- accept any assurances to end the investigation.

## International cooperation

### 9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Among the state members of the Andean Community, Colombia, Peru and Bolivia, cooperation for investigations may occur between the national antitrust authorities, according to what is established in the Andean Community 608. Hence, the national antitrust authorities of the state members may exchange information through the general deputy of the Andean Community.

On the other hand, after the signature of the Free Trade Agreement between United States and Colombia, a working group composed of officials of the SIC and the FTC is expected to be set up with the purpose of enforcing cooperation for antitrust matters.

Beyond what was already mentioned, there is no international cooperation agreement to carry out investigations or to receive information. There have been some international cooperation agreements to train the SIC officials on investigation techniques.

### 10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

In Colombia, the SIC has exclusive jurisdiction for administrative investigations regarding competition. Since Law 1340 of 2009 came into effect, it is clear that in investigations that include sectors under

surveillance or regulated by other entities (eg, public utilities) the SIC will inform these regulatory or controlling entities so that they may issue a technical opinion, which is not binding on the SIC. In any case, the legislation allows these entities to intervene at any moment during the actions of the SIC.

### 11 Adjudication

How is a cartel matter adjudicated?

The superintendent of industry and commerce is in charge of adjudicating all cartel matters.

### 12 Appeal process

What is the appeal process?

As previously explained, the OPC carries out the investigation, but the superintendent makes the final decision. A measure to set aside final decisions of the superintendent may only be brought before the superintendent.

Nevertheless, the parties can turn to the administrative courts to request the annulment of the final decision, but to do so they must have exhausted all measures before the superintendent. Also, it is important to bear in mind that turning to the court does not suspend the investigated party's commitment to pay the fines that could have been imposed by the SIC.

### 13 Burden of proof

With which party is the burden of proof?

The OPC has the burden of proof. For such, it may request or collect evidence from the investigated parties, competitors or any interested third party.

## Sanctions

### 14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

In general terms antitrust violations do not trigger criminal sanctions. However, cartels aiming to collude in public tenders or contests, distributing awarded contracts, or fixing the terms of the proposals are considered a crime and therefore, imprisonment from six to 12 years may be imposed as well as the prohibition to participate in public biddings or execute contracts with public bodies for eight years.

### 15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

According to the Antitrust Regime, the sanctions are of administrative nature.

Law 1340 of 2009 substantially increased the amount of fines.

#### Fines against individuals

Up to 2000 monthly minimum legal wages.

#### Fines against corporations or others

Up to 100,000 monthly minimum legal wages, or 150 per cent of the revenue obtained from the antitrust infringement.

### 16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

For collusion in public tenders both kind of sanctions (criminal and administrative) may be imposed. However, the OPC is not entitled to impose criminal sanctions, which in any case will be subject to a criminal proceeding before a criminal court.

The sanctions described in Law 1340 of 2009 are of an administrative nature. Therefore, should a cartel cause damages to third parties, civil claims may be filed with the civil courts in order to obtain an indemnification.

### 17 Private damage claims and class actions

Are private damage claims or class actions possible?

This possibility is not foreseen under the antitrust regulations and therefore, within the antitrust investigation damages could not be determined. Nevertheless, the possibility cannot be ruled out that after determining any antitrust conduct resulting from a cartel, an offended party can structure remedial actions against the offender, which would usually be done through the civil courts. Class actions may also proceed.

### 18 Recent fines and penalties

What recent fines or other penalties are noteworthy?

After the decision regarding the chocolate cartel, the sugarcane cartel and the cement cartel, the SIC has been very active in conducting investigations and recently has imposed fines against the health-care institutions cartel, the TV channels Caracol Televisión SA and RCN Televisión SA, and the oxygen cartel, among others. The fines imposed are described as follows:

#### Health-care institutions cartel

Through Resolution No. 46111 of 2011 the SIC imposed fines for US\$500,000 against 14 health-care institutions and the medical association ACEMI and US\$50,000 against the individuals who have the legal representation of such entities. The charges against the investigated parties were based on the supposed existence of an agreement addressed to affect the benefits that should have been granted to the users and the attempt to fix prices of health insurances.

#### Oxygen cartel

The SIC imposed a fine of US\$1.6 million against the companies Aga Fano, Oxicol and Cryogas due to the supposed existence of an agreement aiming to set strategies to block the entry into the market of competitors.

#### TV channels cartel

Though the Resolution No. 23890 of 2011 the SIC imposed fines against TV channels Caracol Televisión and RCN Televisión for more than US\$500,000 and more than US\$50,000 for the individuals who had the legal representation. Also the sheltered measurement firm IBOPE and the Advertisers Colombian Union (UCEP) were fined. According to the investigation, the agreement between the TV channels, UCEP and IBOPE by means of which IBOPE agreed to carry out a study to determine the level of advertising in the national TV channels as well as in the cable television, was restrictive of competition, due to the fact that third parties have no access to the study carried out by IBOPE and Caracol Televisión, RCN Televisión and UCEP who determine the conditions for having access to the study.

Finally, it is worth mentioning that under appeal the SIC is currently conducting important investigations against participants

in bid rigging in public procurement, based on collusive practices addressed to define an optimal strategy that allowed them to perform a selective allocation of some of the contracts to be awarded in the selection process.

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## Sentencing

### 19 Sentencing guidelines

Do sentencing guidelines exist?

Since Law 1340 of 2009 has been in effect, one of the SIC's functions has been to establish such guidelines. For cartels, there are no specific guidelines. Nowadays the competition authority has different projects of guidelines regarding bid rigging in public procurement, mergers clearance, non-profit associations and collaboration among competitors.

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### 20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

There are no specific guidelines for cartels.

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### 21 Leniency and immunity programmes

Is there a leniency or immunity programme?

As has happened in many other countries, Law 1340 of 2009 and Decree 2896 of 2010 have introduced a leniency system applicable to any individual or corporation that participates in a cartel. Law 1340 foresees sanctions that are intimidating or drastic enough to stimulate whoever participates in the contravening conduct to denounce other parties.

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### 22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

The law does not establish any restriction with regard to the number of beneficiaries of the programme. Hence informants may be one or more subjects, including individuals. To obtain leniency for cooperating, only two elements are required, which may apply to many parties in the same case: having participated in the conduct that infringed the antitrust regulations and not being an instigator or promoter of the conduct.

The identity of informers is protected by the competition authority.

The cooperation with the competition authority is a procedural action that involves the request for leniency and the supply of information and evidence. When such benefits are requested, the facts being informed and evidence presented should be specified. The subjects under investigation are notified of the request in order that they may make their comments, request new evidence and execute their right to contradict; if the request is verbal, everything that happens should be recorded. Other subjects under investigation are also given the same opportunity to execute their right to contradict and to request evidence.

There is no guarantee that the informant will obtain any leniency, since the granting of any benefit is the responsibility of the SIC, as specified in article 14 of Law 1340 of 2009.

Leniency could take the form of partial or total mitigation of the fine, and such calculation is the sole decision of the SIC.

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### 23 First in

What is the importance of being 'first in' to cooperate?

According to Decree 2986 of 2010, the 'first in' to cooperate can be given a 100 per cent exemption from the sanction.

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### 24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

The 'second in' to cooperate can be given an exemption of up to 70 per cent of the sanction.

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### 25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity? Are there deadlines for applying for leniency or immunity, or for perfecting a marker?

Law 1340 of 2009 does not establish a procedural opportunity to request leniency in exchange for cooperation. The only reference made by the provision determines that the request can be filed 'even when the antitrust authority is already proceeding with the corresponding action'. This could imply that the latest possible time to approach the authorities when seeking leniency or immunity is before the superintendent makes its final decision, because after the final decision is made, the only right that remains is to go to appeal.

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### 26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

Law 1340 of 2009 sets forth that the SIC may keep confidentiality of the applicant of a leniency programme when the request is made on the condition of a existing risk for the applicant in accordance with the criteria of the competition authority.

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### 27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

In order for any informants to have the possibility of being granted partial or total leniency, their requests must include at least the following elements:

- evidence that they were not the instigators or promoters of the conduct;
- information about the existence of the illegal conduct; and
- information and evidence that will allow the establishment of:
  - the existence of the conduct;
  - the type of conduct;
  - the duration of the conduct;
  - the effects of the conduct;
  - the identity of the responsible subjects of the conduct;
  - the degree of involvement of the subjects under investigation; and
  - the benefits obtained by performing the illegal conduct.

The provision of this information does not guarantee leniency for the informant.

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### 28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

There is no mention of plea bargaining in the regulations. The only concept that would be worth mentioning at present in both the previous and the new law is the possibility of closing the investigation in advance by offering assurances or remedies that the parties will in future guarantee free competition in the market. This offer would be allowed under the new law, before the term given to provide and request evidence expires. If these assurances are accepted, the SIC



will establish the conditions under which it will verify the continuity of compliance with the obligations by the subjects under investigation that offered them. If they are not fulfilled, this would be deemed an infringement of the antitrust law, and would give rise to the imposition of sanctions.

### 29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its current and former employees?

The only benefits can be the total or partial mitigation of the fine and its calculation depends on the SIC.

### 30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

There is no such guarantee given to cooperating parties. Nevertheless, referring to the imposition of sanctions, the procedural behaviour of the subjects under investigation is taken into account.

### 31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

In general, the procedure applicable to cartel investigations is the standard procedure for all antitrust cases as provided for by Law 1340 of 2009. The procedural format in dealing with the SIC is described in questions 6 and 7. The administrative law regime supports the investigation, and it is predominantly in writing, hence the subjects under investigation must also address the SIC in writing. Any evidence is submitted in an oral hearing.

It is possible for parties to attend informal interviews with the case handler or the superintendent in order to explain themselves.

### 32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

As previously mentioned, the Antitrust Law 1340 of 2009 was issued on 24 July, and applies to cartels. The next step, therefore, is to put the regulation into practice and to evaluate the results after a reasonable period of time has elapsed. Currently, no leniency programmes have been decided but it is known that there are some that are ongoing.

### Update and trends

Law 1340 of 2009 updated the Colombian Competition Law Regime. Substantial changes were introduced to the procedure for antitrust investigations. Particularly is worth mentioning that according to the Law, assurances and remedies may be offered by the investigated parties after the formal investigation starts but before the term granted for providing and requesting evidence expires. Also, Law 1340 of 2009 for the first time in Colombian legislation created the leniency programmes aiming at fighting against cartels. Decree 2896 of 2010 regulated the leniency programmes and sets forth all the requirements and conditions necessary for being a beneficiary of such programmes. No decision has been made yet by the SIC in regards to the leniency programmes.

### Defending a case

#### 33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

The same counsel may represent both the company under investigation and its employees. It is important to point out that there are no regulations that forbid it. It would, however, depend on the wishes of the subjects under investigation. In most cases, companies hire the same attorney to represent both the company and its employees.

#### 34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Yes, it is possible that the attorney would be given power of attorney to represent different persons within the same company or different companies under investigation, or a company and its employees.

#### 35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

Under the previous regulation, the possibility of this was not forbidden. With Law 1340 of 2009 in effect, in cases where individuals have collaborated, facilitated, authorised, executed or tolerated conduct that violated the antitrust regulation, the fines 'cannot be paid by or insured or in general guaranteed, directly or by an

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intermediary, by the corporation to which the individual was related when he or she participated in the conduct; nor by the headquarters or its subsidiary companies; nor by the companies that are included in the holding or are under the same control of the holding' (article 26 of Law No. 1340 of 2009).

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### 36 Getting the fine down

What is the optimal way in which to get the fine down?

Under the actual competition regime regulations, there are different criteria to evaluate the fines and to verify aggravating or extenuating circumstances. With regard to corporations and according to article 25 of Law 1340 of 2009, not only must an infringement of the law be established in the proceedings, but also the following facts: 'the impact that the conduct might have in the market', 'the dimension

of the affected market; the benefit obtained by every offender with the conduct; the degree of participation of each party implied in the act', 'the procedural conduct of the subject under investigation', 'the market share of the offender company, as well as the share of their assets and/or sales involved in the offence', and the 'net worth of the offender'. There are similar requirements regarding natural persons. It is only necessary to add some elements to be proven, such as 'the persistence in the offending conduct' and 'the repetition of the forbidden conduct'. There are similar requirements regarding individuals, but it is necessary to add some elements to be proven such as 'the persistence in the offending conduct' and 'the repetition of the forbidden conduct'. Therefore, the performance of the defence lawyer is very important to demonstrate to the SIC the circumstances that the law requires in order for it to evaluate the fine.