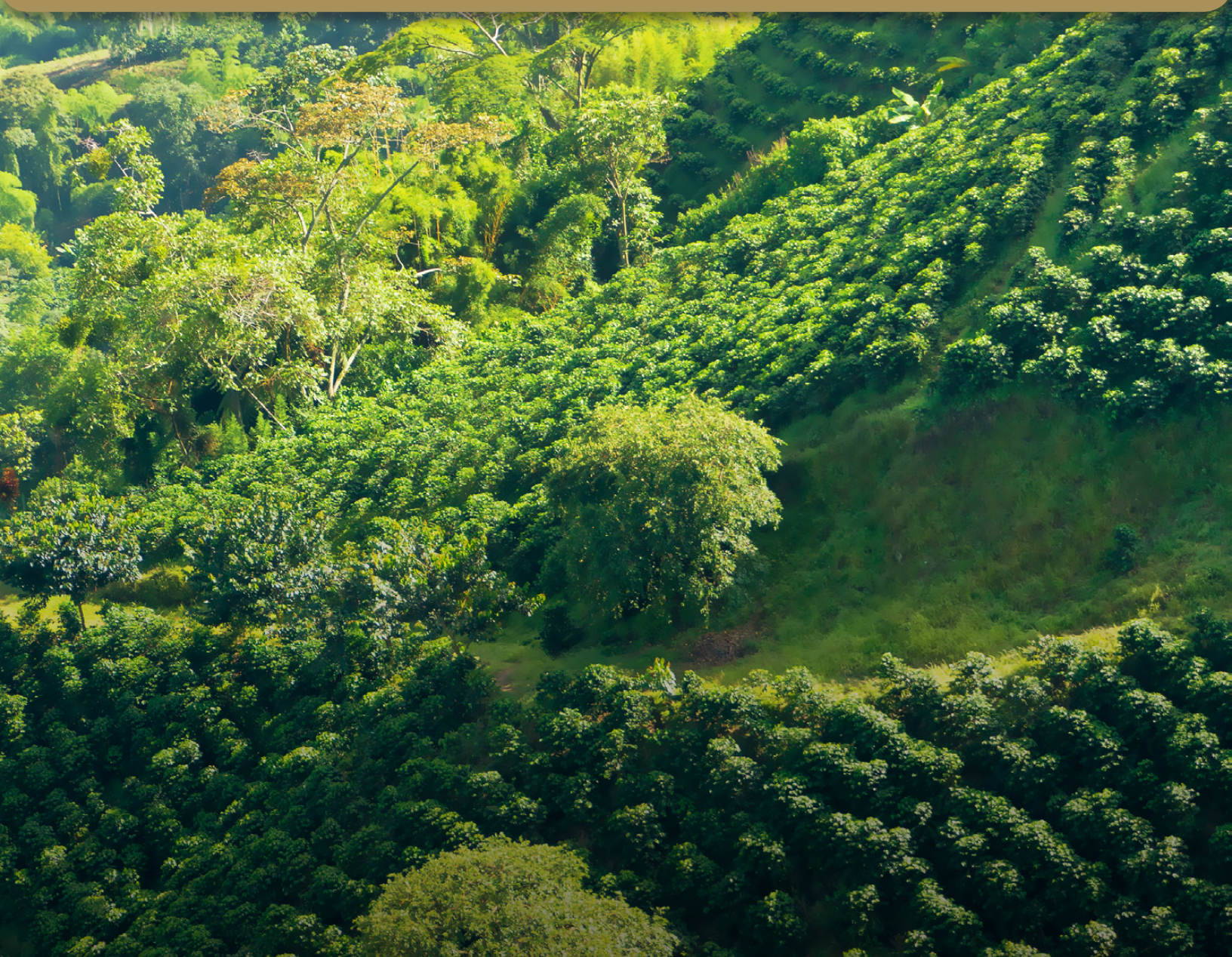


ANTITRUST ENFORCEMENT AND GOVERNMENT INTERVENTIONS IN AGRICULTURAL MARKETS – CASE STUDY OF COLOMBIA



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I. INTRODUCTION

In 2003, the National Milk Producers Federation of the United States developed a plan to reduce the amount of cattle and to limit the participation of its members on the milk market for a year.² As a result, half a million cattle were sacrificed and 10 thousand millions of liters of milk were not produced.³ This strategy increased the price of milk and raised the revenues of the dairy producers by 9.6 billion dollars. The illegality of this conduct in the United States became clear in 2012 when a court held that the conduct had violated antitrust laws and that it could not be justified by the Capper-Volstead law.

One of the first cases decided by the Colombian antitrust authority in an agricultural market was very similar to the case mentioned above. The *Superintendencia de Industria y Comercio* (the "SIC" or the "authority"), established that between 1996 and 1997 some companies and cooperatives, with the support of a business association, had agreed to create mechanisms to help them reduce supply in the market for eggs. The authority concluded that the mechanism was illegal and compelled the companies to refrain from implementing it.⁴

Over the last 25 years, the SIC has actively enforced the antitrust regime in the agricultural sector. A significant proportion of the antimonopoly cases analyzed by the authority involved companies that operated in different stages of agricultural value chains. Moreover, the SIC is the antitrust authority in Latin America that has prosecuted the largest number of cases in agricultural markets.⁵ Additionally, the SIC has used its competition advocacy tools to address competition concerns in agricultural markets. Between 2000 and 2015, the SIC conducted 11 studies (65 percent of the total studies it has undertaken) to understand the structure of and anticompetitive pressures affecting these markets.

However, just as in other Latin American countries, in Colombia the objectives of antitrust laws sometimes clash with the objectives pursued by government interventions in agricultural markets.⁶ Indeed, the enforcement of competition law has directly collided with governmental mecha-

² John M. Connor, *Antitrust Developments in Food and Pharma*, Annual Review of Resource Economics 7 (2015): 375-398.

³ *Id.*

⁴ Superintendencia de Industria y Comercio, Resolución número 29305 (2000).

⁵ See Juan David Gutiérrez (2009). "Tacit collusion in Latin America: A comparative study of the competition laws and their enforcement in Argentina, Brazil, Chile, Colombia and Panama," in E. M. Fox & D. D. Sokol (Eds.), "Competition law and policy in Latin America," (pp. 205–251). Oxford: Hart. Juan David Gutiérrez (2012). "Competition Law Goals in Agricultural Markets: A Latin American Perspective." In D. Zimmer (Ed.), *The goals of competition law* (pp. 450–475). Cheltenham: Edward Elgar.

⁶ Juan David Gutiérrez (2012). "Competition Law Goals in Agricultural Markets: A Latin American Perspective," in D. Zimmer (Ed.), *The goals of competition law* (pp. 450–475). Cheltenham: Edward Elgar.

nisms used to intervene these markets.⁷ These include price stabilization funds, parafiscal funds for agricultural development, minimum guaranteed prices, value-chain agreements, safeguard systems, and price controls.

This article traces the tensions between antitrust law and agricultural policies in Colombia, discusses how government agencies addressed these tensions, and identifies the most common competition concerns in agricultural value chains discussed in SIC decisions. The cases decided by the SIC between 1994 and 2015 are classified in terms of the types of anticompetitive practices at issue, the relevant markets affected, the role played by business associations, and the (alleged) links between the investigated conduct and the policies and instruments employed by the Colombian government to intervene in agricultural markets. This research does not aim to study other factors related to the competitiveness of agricultural markets, such as the insufficient provision of public goods by the Colombian government and the lack of access to the credit market as a result of market failures.

This article is divided in five sections, including this introduction. The second section briefly explains the main government intervention mechanisms used in the Colombian agricultural markets. The third section overviews the evolution of the SIC's position regarding the conflict between the antitrust enforcement and government interventions in agricultural markets. The fourth section analyzes the types of anticompetitive practices investigated by the SIC and the roles played by companies and business associations in each stage of the agricultural value chains. The last section summarizes the main findings of the research.

II. GOVERNMENT MECHANISMS TO INTERVENE IN AGRICULTURAL MARKETS

The Colombian government has an array of market intervention mechanisms that are specifically tailored for the agricultural sector. Most of them are enshrined in Law 101 of 1993, the general agricultural and fishing statute. The five main instruments that have been used by the Ministry of Agriculture to intervene in Colombian markets are the following:

1. Price stabilization funds: Special accounts intended to provide a certain level of income for producers, which regulate national production and exports by stabilizing prices paid to national producers of agricultural and fishery goods.⁸
2. Parafiscal funds for agricultural development: Payments imposed by the law on economic agents that are part of the value chain in order to benefit a specific agricultural or fisheries subsector.⁹ The resources obtained through this mechanism must be invested in the agricultural or fisheries subsectors supplying them, subject to the following objectives: (1) research or technology transfers, and technical advice and assistance; (2) adequacy of production and sanitary control; (3) organization and development of marketing; (4) export promotion and promotion of consumption; (5) support for the regulation of supply and demand to protect producers against abnormal price fluctuations and to provide them with a remunerative income; (6) Economic, social and infrastructure programs for the benefit of certain subsectors.¹⁰
3. Minimum guarantee prices: The minimum purchase prices are set by the Ministry of Agriculture, justified through a reasoned decision, which consider international market prices, the margin of protection granted by the tariff system, the port costs and the storage costs of national harvests.¹¹
4. Agreements in agricultural value-chains: The Ministry of Agriculture supports agreements among members of an agricultural value-chain that aim at: (1) improving productivity and competitiveness; (2) market development of goods and chain factors; (3) reduction of transaction costs between different agents in the chain; (4) development of different types of strategic alliances; (5) improve the information available for the agents of the chain; (6) linking small producers and entrepreneurs to the chain; (7) Management of natural resources and environment; (8) training; and (9) research and technological development.¹²

⁷ For example, the market intervention mechanisms established by Law 101 of 1993 (General Law of Agricultural and Fishing Development).

⁸ Article 36 of Law 101 of 1993.

⁹ Article 29 of Law 101 of 1993.

¹⁰ Article 31 of Law 101 of 1993.

¹¹ Article 50 of Law 101 of 1993.

¹² Article 101 of Law 101 of 1993.

5. Safeguard system: The national government can impose a restraint on international trade when the national production of agricultural or fishery goods “suffers injury” or when there is a “threat of injury” as a result of a significant increase in imports or a substantial fall in international prices. A petition for the imposition of such a measure may be filed by representatives of the sector that has been or is likely to be affected.¹³

Finally, Colombia’s first antitrust statute (Law 155 of 1959), provided for a so-called “block exemption.” This provision is not exclusive to agricultural markets, but it has been developed by decrees issued by the Ministry of Agriculture. The block exemption provides that the government can authorize agreements among market participants which, despite restricting freedom of competition, have the goal of bringing financial stability to a basic sector of production of goods or services or to the general economy.¹⁴

III. TENSIONS BETWEEN COMPETITION LAW ENFORCEMENT AND AGRICULTURAL POLICIES

Between 1994 and 2015, the SIC’s position as regards the scope of antitrust laws in agricultural markets that were subject to intervention by the government varied significantly. From 1994 to 1999, the SIC considered that these interventions substantially restricted the scope of the antitrust regime. This interpretation was backed by Ministry of Agriculture.

For instance, in 1994, the National Federation of Oil Palm Growers, producers and agroindustry companies created a mechanism to establish a minimum sale price to be charged by producers.¹⁵ Based on the application of the “block exemption” and some of the instruments established in Law 101 of 1993, the SIC decided that there was no basis to investigate the case.¹⁶ Subsequently, the SIC defended its decision before the State Council, the highest tribunal in charge of the judicial review of administrative decisions, arguing that:

at the present time the market economy could not be understood as the *laissez faire, laissez passer* of the pure capitalism, because the Constitution included the principle of governmental intervention [...] its application could not be regarded as promoting anticompetitive agreements or the abuse of the dominant position.¹⁷

At the turn of the 21st century, the SIC and the Ministry of Agriculture appeared to be less synchronized with regards to the scope of the antitrust laws. In 2000, the Legal Department of the SIC issued an opinion that questioned the legality of the agreements promoted by the Ministry of Agriculture that established price systems among the members of the milk value chain. Moreover, between 2005 and 2012, the competition agency had a special task force that focused on the investigation of antitrust breaches in agricultural markets.

The amendment of Colombia’s competition regime in 2009, through Law 1340, included an article that explicitly stated that the intervention mechanisms for agricultural markets, described in section 2 above, limited the scope of the competition rules. However, this reform did not modify the competition agency’s interpretation of the law. For instance, in the cocoa (2009)¹⁸ and sugar cane (2010)¹⁹ cases, the authority stated that the implementation of government interventions (e.g. the promotion of “value chain agreements”) did not exempt economic agents from complying with antitrust laws. More specifically, the SIC was concerned with the conduct of market agents that could exceed the authorizations granted by the government, such as price fixing schemes.

In 2015, the SIC prosecuted several sugar mills that were part of a price stabilization fund, which was managed by their business association. The SIC claimed that the mills had used the intervention mechanism for the allocation of production or supply quotas in the national market.²⁰ In this case, the authority sanctioned the sugar mills and urged the government to evaluate the way the price stabilization fund was being used.

¹³ Article 5 of Law 101 of 1993.

¹⁴ Article 1 of Law 155 of 1959.

¹⁵ Consejo de Estado, Sala de lo Contencioso Administrativo, Expediente No. 3488 (1997).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Superintendencia de Industria y Comercio, Resolución número 4946 (2009).

¹⁹ Superintendencia de Industria y Comercio, Resolución número 42411 (2010).

²⁰ Superintendencia de Industria y Comercio, Resolución número 103652 (2015).

IV. ANTITRUST CASES IN AGRICULTURAL VALUE CHAINS

Between 1994 and 1999, the competition agency only investigated two cases in agricultural markets (less than 5 percent of the total number of cases) and both of them were filed. In contrast, between 2000 and 2015, the competition authority decided 22 agricultural cases (13 percent of the total): in 12 of them the companies were found guilty of anticompetitive conduct, 7 were finalized after the parties offered guarantees, and 3 were dropped because the evidence was insufficient to prove the alleged infringements.

The cases involved investigations in diverse stages of agricultural value chains: agricultural inputs and services (5 cases), production of agricultural goods (4 cases), purchase of agricultural goods (6 cases), and distribution and marketing of agricultural products (7 cases). The majority of cases related to agricultural inputs and services linked to cattle markets (2001, 2007, 2011, 2012). In all cases, the SIC assessed highly concentrated markets and, in most of them, the unilateral conduct of monopolies or monopsonies was investigated.

The cases associated with production of agricultural goods occurred in different markets: eggs and pullets, mushrooms, scallions, and sugar cane (for the production of fuel alcohol). In three of them, the market concentration was low and in one, the mushroom case, the producer had a dominant position. Additionally, in two of the cases, business associations played a dominant role in the investigated behavior: one association facilitated an anticompetitive agreement among its members (reducing production levels) and the other organized anticompetitive acts carried out by its affiliates (influencing prices).

The common characteristic of the cases linked to the purchase of agricultural goods (used as inputs in agroindustry processes) was that the markets had the structure of an oligopsony (with few buyers and a large number of sellers). Different markets were investigated by the SIC: sugar cane (twice), green paddy rice (twice), fresh milk, and cocoa. In the cocoa (2009) and sugar cane (2010) cases, the investigated parties argued that their behavior had been the consequence of the market interventions implemented by the Ministry of Agriculture. The SIC concluded in both cases that the penalized conduct was not a direct consequence of government intervention mechanisms.

Finally, the markets for distribution and marketing of agricultural products were the most investigated stage of the agricultural value chains. Diverse markets were investigated by the SIC: processed milk, commercialization of scallions (leasing of warehouses), vegetable oil, coffee, rice and sugar (twice). Furthermore, in three cases the business associations were also investigated (processed milk, coffee, and sugar), and in one of them the association was penalized for its behavior.

V. CONCLUSIONS

Between 1994 and 2015, the relationship between the antitrust regime and the market intervention mechanisms had periods of harmony and of conflict. During the initial stage (1994-1999), the SIC did not question agricultural policies implemented by the Ministry of Agriculture that had an impact on the competition dynamics in these markets.

Since 2000, the competition agency and the Ministry of Agriculture started to differ in the legal interpretation of the scope of antitrust law in markets in which the government has intervened. These tensions were mainly present in two levels of the agricultural value chain: on the market for agricultural inputs and services and on the distribution and marketing of agricultural products. The disagreements were related to the use of the so-called “block exemption” and to the limits of antitrust enforcement.

Following the enactment of Law 1340 of 2009, which explicitly (although ambiguously) mentioned the limits of antitrust in markets where government interventions were implemented, the competition agency did not modify its position. In several cases, the SIC stated that these mechanisms of intervention do not justify anticompetitive practices such as price fixing and market sharing agreements.

The investigations conducted by Colombia’s antitrust agency offered insights into the competition issues at different stages of agricultural value chains. The following table summarizes the competition concerns that were raised in the cases in which the SIC penalized the investigated parties:

Table 1 - Competition Concerns in Agricultural Value Chains (2000 – 2015)

Level of the value chain	Prevalence of collusive practices	Prevalence of unilateral conduct	Business associations involved in cases	Tensions with government interventions
1. Agricultural inputs and services	No	Yes	Yes	No
2. Agricultural production	Yes	No	Yes	No
3. Purchase of agricultural goods for processing	Yes	No	Yes	Yes
4. Distribution and marketing of agricultural products	Yes	No	Yes	Yes

First, the value chains of agricultural inputs and services were mainly affected by unilateral anticompetitive conduct. Furthermore, the government's interventions in these markets were not an issue raised in these cases.

Second, some agricultural production markets with lower levels of concentration were affected by collusive practices. Those practices aimed to increase prices by reducing market supply. In two of these cases, business associations were promoted or facilitated the anticompetitive conduct. In these cases, government intervention mechanisms were not an issue.

Third, the markets for agricultural goods were affected by collusive practices in the context of oligopsony structures. In these cases, the anticompetitive conduct aimed to decrease the prices paid by buyers at a lower level of the production chain to the sellers of the input. Conflicts regarding the enforcement of antitrust and governmental intervention mechanisms were present in two cases (cocoa and sugar cane).²¹

The last stage of the agricultural value chain had the highest number of cases investigated by the competition agency. The SIC found that firms were involved in diverse types of anticompetitive practices: price-fixing (processed milk), market allocation (storing service – scallions), blocking the entry of additional producers to the market (sugar cane), and preventing retailers from lowering the final price of the good (rice). Furthermore, as it occurred in the other stages of the value chains, the competition agency found that business associations were directly involved in the infringement of competition laws.

²¹ Superintendencia de Industria y Comercio, Resolución número 4946 (2009); Superintendencia de Industria y Comercio, Resolución número 6839 (2010).

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