The Independence of Colombia's Competition Authority: Still a Pending Task

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1. Introduction

On May 14, 2020, the Fifth Section of Colombia's Council of State issued a ruling, by which it declared the partial unconstitutionality of Decree 1817 from September 15, 2015, with which the Government of Colombia had disposed, with regard to the Financial, Corporations, and Industry and Commerce superintendents, the following: (i) that they would be named via prior public consultation; (ii) that they would serve for a fixed term, coinciding with the Presidential term; (iii) that in order to be removed from their post the President of the Republic would have to motivate the decision; and (iv) established terms and conditions for their replacement.

The measures included in the Decree, several of which were declared unconstitutional, were adopted in the hope of granting the above-mentioned superintendents a certain independence from the Government.

In this regard one should bear in mind that, in Colombia, the Superintendent for Industry and Commerce is a third-tier official within the structure of the executive branch of public government, who can be freely named and removed by the President of the Republic, a situation which has been criticized for decades, as it is felt that the authority's independence from the government must be one of the characteristics of a competition authority.

To better understand the above, we will next show the rising evolutionary process of Colombia's Competition Law, which holds important similarities with the progress made by these public policies in other Latin American countries.

2. Summary of the Evolution of Competition Law in Colombia

The evolution of Competition Law in Colombia can be generally divided into three main stages:

2.1.1 First Stage: 1959 to 1992

The first stage mentioned begins with Law 155 from 1959, by which the first structured regulation was published dealing with Competition Law, until the Special Decree 2153 in 1992. During this stage there were no major developments in Competition Law, perhaps because of the influence of the Development Model based in the teachings of the Economic Commission for Latin America and the Caribbean – ECLAC, a protectionist or import substitution model that did not favor the application of pro-competition policies.

2.2 Second Stage: 1992 to 2009

The second stage spans from the issuing of Special Decree 2153 in 1992 up to Law 1340 in 2009. During this stage we see the start of applied competition policy, after the Political Constitution of 1991, as elsewhere in Latin America following the so-called *"Washington Consensus"* in 1990, enshrined Competition Law, for the first time in Colombian history. The law granted the President of the Republic the power to issue Decree 2153 in 1992, with which the Government laid out types of anticompetitive conduct across several categories, including a general prohibition, anticompetitive agreements, anticompetitive acts, and abuse of dominance conducts.

At this stage, the application of public policies for free competition began, during a period characterized by the release of various sector-specific regulations and the creation of several

competition authorities, which began making effective public policy and laid down the conceptual foundations for further development of the issues.

2.3 Third Stage: 2009 to the Present

The third stage began with the publication of Law 1340 on July 24, 2009 and continued until the present day, a period which included the publication of that law and other major regulations, the application of which has been of great relevance to competition policy.

2.3.1 Main Characteristics of Law 1340 from 2009

The most important aspects of this law, stemming from a Parliamentary initiative, are the following:

- It established the Superintendence for Industry and Commerce (henceforth SIC) as the Only Competition Authority, to which it granted the exclusive power to bring forward administrative investigations regarding practices that restrict competition and administrative unfair competition, in all economic sectors.

Additionally, the SIC is the authority that decides on mergers in all sectors of the economy, with the exception of the mergers in the financial sector and the aeronautical sector, which are decided by the Financial Superintendence of Colombia – SFC, and the Civil Aeronautics administration, respectively.

- It harmonized the General Free Competition Regime with the Special Regimes (for specific economic sectors), so that the SIC, as the sole competition authority, can apply these special competition regulations and fill their gaps with the General Regulation.

- It strengthened competition advocacy and coordination among state entities in matters of competition.

- It modified the procedure of the settlement mechanism with the authority, for the early termination of investigations related to anti-competitive practices.

- It increased the possibilities for third-party participation in investigations related to anti -competitive practices, and merger control proceedings.

- It established the leniency program, which is considered worldwide to be the most effective tool for fighting business cartels.

- It notably increased the SIC's sanctioning capability, which now ascends to up to one hundred thousand current monthly legal minimum wages (100,000 SMLMV), approximately USD $24.000.000, or up to 150% of the profits gained through the anticompetitive conduct in the case of legal entities[2], and up to two thousand current monthly legal minimum wages (2,000 SMLMV)[3], approximately USD $480.000, in the case of natural persons.

- It increased the statute of limitations for the SIC's powers to sanction, which before this law was of three (3) years, and is now five (5) years.

- It established special State intervention mechanisms in the agricultural sector, which will eventually allow for special conducts and situations to be exempted from the application of competition rules.

Following Law 1340 of 2009, some additional regulations have been issued which, while not being as notable or important as the abovementioned law, have introduced interesting modifications that are worth pointing out.

2.3.2 The Anticorruption Statute and the Criminalization of Competition Law

The year 2011 saw publication of Law 1474, better known as the Anticorruption Statute. Article 27 of said law refers to "*Agreements Restricting Competition"* and makes crimes out of collusive anticompetitive agreements in bidding or public offerings, which are explicitly labelled as anticompetitive under numeral 9 in article 47 of Decree 2153 of 1992, and are considered as criminal whenever State contract processes are involved.

As a result of this rule being issued, Colombian Competition Law has delved into the realm of criminal suppression of anticompetitive conducts, with all the consequences this entails.

2.3.3 The Anti-paperwork Law

Law Decree 019, known as the "*Anti-Paperwork"* Law, was published in 2012 with the general goal of facilitating the activities of both natural and legal persons, to which end it suppressed or reformed the unnecessary formalities, procedures, and regulations found within public administration. The Decree is based on the terms of articles 83 and 84 of the Political Constitution, which hold, respectively, that the actions of individuals and public entities must adhere to the principles of good faith and, whenever a right or activity has been regulated in a general manner, authorities may not establish or demand any additional permits, licenses or requirements for their application. This law introduced some reforms to the Competition laws, related to service of process, publication of the decisions of the authority and the possibility to request the clarification of the settlement proposals that the investigated companies can present to the SIC in order to obtain the early termination of the investigation.

3. The Competition Authority Must Be Independent from the Government

Without a doubt, based on the modifications introduced to Competition regulations during the last stage reviewed above, the SIC has been able to bring forward cases of the utmost importance for the country, which have stirred the interest of both the media and the citizenry due to the size of the penalties, the importance of the companies under investigation, and the potential effects on the economy and on consumer welfare. All of this is positive since, as said before, free competition is an extraordinary tool for protecting consumer welfare within the framework of a social market economy, and it is very convenient for the population to understand its true dimension and scope.

It is important, however, to move forward with the institutional development of competition policy in Colombia. To this end, it has been proposed that the Competition Authority should be a collegiate body, and also that it must be independent from the Executive branch, among other needed reforms.

Indeed, the authority should be a collegiate body, and not a personal position, as it is now. The authority can be structured in the form of a Competition Commission with an administrative

nature, which would add to its independence, equanimity, and allow it to better resist attempts to capture it by economic, political, or media interests, or by the State itself.

The authority should be independent from the Government, since competition policy is a State policy, but should not become a Governmental policy. Its members must be designated through a system of checks and balances, based on academic qualifications and professional experience, but must also be granted a stable term in office and not as officials freely appointed and removed by the President of the Republic.

Although academics and practitioners of Competition Law have been demanding these and other reforms for decades, the political will for working towards the Competition Authority's independence only materialized once it became evident that this characteristic would be indispensable for Colombia's admission to the OECD, completed only a few months ago.

This is what led to the Government of Colombia issuing Decree 1817 of 2015, through which, as mentioned above, it established the following: **(i)** The Superintendent to be named following an open call; **(ii)** for a fixed term, to coincide with the Presidential term; **(iii)** to be removed from the position, the President of the Republic must motivate the decision; and **(iv)** set terms and conditions for their replacement.

It is obvious that the measures adopted by this decree, despite being geared towards granting the SIC with greater independence from the President, are at most cosmetic and insufficient for guaranteeing the Competition Authority's independence from the Government, since what is required is a real institutional reform that will grant the Authority with true independence.

As a result of the Ruling of May 14, 2020 issued by the State Council, this cosmetic sketch of independence has been destroyed since, as we shall show next, the Competition Authority remains (as it always has been) under the Government's thumb.

4. Consequences of the State Council's Ruling

As a consequence of the above-mentioned ruling, the President of the Republic will designate the Superintendent for Industry and Commerce following a public call for applications, which may be answered by all those who meet the set requirements and conditions for holding said position.

The Superintendent of Industry and Commerce will not enjoy a "fixed term," and nor will it coincide with the "respective presidential term."

The Superintendent, being a *"Free appointment and removal"* position, may be removed at the President of the Republic's discretion, without the requirement for the latter to issue a "motivated decision."

However, the decision to remove any Superintendent must follow the criteria of rationality, reason, and proportionality. It is possible for the President to designate an "acting" Superintendent, whenever this is necessary due to the main holder's absence. Still, this would also require a previous open call to be issued, under the terms established in Decree 1817 of 2015.

The Competition Authority's independence is part of a set of reforms that have been proposed with the aim of improving the institutional framework and application of Competition Law in Colombia. It is imperative to take on this still-pending task as soon as possible.

The establishment of a Competition Authority that is independent from the government is also consistent with the OECD's recommendations, in the sense of granting the Competition Authority greater independence and qualified personnel.[4]

To conclude, the ruling's analysis reveals, as has been stated before, that the Colombian government had performed a cosmetic attempt to make it appear to the OECD that Colombia's Competition Authority has a degree of institutional independence from the Government it does not in fact have, as the constitutional and legal foundations for it do not exist.

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[2] Prior to this law, the maximum penalty was of up to two thousand current monthly legal minimum wages (2,000 SMLMV, approximately USD $480.000).

[3] Prior to this law, the maximum penalty was of up to three hundred current monthly legal minimum wages (300 SMLMV, approximately USD $72.000).

[4] *"COLOMBIA POLÍTICAS PRIORITARIAS PARA UN DESARROLLO INCLUSIVO ENERO 2015":* http://www.oecd.org/about/publishing/colombia-politicas-prioritarias-para-un-desarrollo-inclusivo.pdf.