



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2016

9th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
November 2015

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ISBN 978-1-910083-71-0
ISSN 1756-1027

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Colombia

Cárdenas & Cárdenas Abogados

Alberto Zuleta-Londoño



Ximena Zuleta-Londoño



1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The general nature of cartel prohibition is administrative and, thus, engaging in cartel activity generates a fine – in favour of the antitrust authority – for the company and the individuals who participate. There is no criminal sanction against cartels – except for collusion in public bids – and civil law does not specifically refer to the matter. However, the general civil extra-contractual liability (tort) regime may be used to obtain damages caused by a cartel. There has not been, to date, an award for damages against cartel members.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 1 of law 155 of 1959 and article 46 of Decree 2153 of 1992 contain general prohibitions against anticompetitive behaviour. Article 47, numeral 1 of Decree 2153 of 1992 contains a specific prohibition against price-fixing agreements and article 47, numeral 3 specifically prohibits horizontal territorial allocation of markets. Article 47, numerals 2, 4, 5, 6, 7, 8, 9 and 10, prohibit other horizontal agreements such as allocation of production quotas, sources of raw materials, collusion in bidding processes, and others.

1.3 Who enforces the cartel prohibition?

The Superintendence of Industry and Commerce, an administrative entity at the national level, enforces the cartel prohibition.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Most proceedings for anticompetitive behaviour begin with a preliminary inquiry whose purpose is to establish whether sufficient merit exists to open an investigation. When the Superintendence of Industry and Commerce considers that opening an investigation is warranted, it will make a decision in this regard which will be served on the investigated party, who will then have twenty business days to submit and request evidence. Once the evidence has been collected, the investigated party will have the opportunity to make final arguments in an oral hearing. After the oral hearing takes place,

the Deputy Superintendent for Competition will issue a non-binding assessment of the legality of the party's conduct and, if necessary, recommend the amount of the sanction to be imposed by the Superintendent of Industry and Commerce. The Superintendent of Industry and Commerce will then issue the decision, for which it may either follow, disregard, or partially adopt the deputy's assessment.

1.5 Are there any sector-specific offences or exemptions?

The Government may grant an authorisation for the execution of anticompetitive agreements whose purpose is to stabilise a certain sector that is of interest to the Colombian economy.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Yes, as far as it has an effect on Colombian markets.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes	No
Carry out an unannounced search of residential premises	No	No
■ Right to 'image' computer hard drives using forensic IT tools	Yes	No
■ Right to retain original documents	Yes	No
■ Right to require an explanation of documents or information supplied	Yes	No

Investigatory power	Civil / administrative	Criminal
■ Right to secure premises overnight (e.g. by seal)	No	No

Please Note: * indicates that the investigatory measure requires authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

Emails, both corporate and personal, have become an important source of information and evidence. The Superintendence of Industry of Commerce sometimes uses search tools to look for specific words, such as “agreement”, “price”, “meeting”, “discounts”, and others, while searching for incriminating evidence.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are not.

2.4 Are there any other significant powers of investigation?

No, there are not.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The Superintendence of Industry and Commerce will carry out searches and they are not obligated, nor do they usually, wait for legal advisors to arrive.

2.6 Is in-house legal advice protected by the rules of privilege?

Whether in-house counsel advice is protected by rules of privilege is not settled law.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

There are none.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Obstructing an investigation may be punished with a fine that is as high as that for the infraction itself. So far, there have been few sanctions and they have not been especially steep. This is, however, becoming a sensitive subject in the eyes of the Superintendence of Industry and Commerce.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Up to 100,000 monthly minimum salaries (approximately 22,000,000 US dollars at current exchange rates) or 150% of the profit derived from the cartel, whichever is higher.

3.2 What are the sanctions for individuals?

Up to 2,000 monthly minimum salaries (approximately 436,000 US dollars at current exchange rates).

3.3 Can fines be reduced on the basis of ‘financial hardship’ or ‘inability to pay’ grounds? If so, by how much?

The value of a person’s patrimony is one of the criteria that must be taken into account by the Superintendence of Industry and Commerce in establishing the amount of the fine. In fact, during the course of the investigation, the Superintendence of Industry and Commerce requests the income tax returns of the investigated individuals.

3.4 What are the applicable limitation periods?

The limitation period for imposing a fine is five years from the moment the conduct takes place. It is not uncommon for the Superintendence of Industry of Commerce to argue that the conduct is continuous, in order to avoid the occurrence of statute of limitations.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

No, it cannot.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

There is no precedent in this regard. However, general rules of civil liability suggest that this is a possibility.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes. Companies that acknowledge their participation in a cartel and provide information regarding the product involved, participants and workings of the cartel are entitled to a reduction or total exoneration of the fine.

4.2 Is there a ‘marker’ system and, if so, what is required to obtain a marker?

Yes. A marker is obtained by whomever (company or individual) presents the request to be admitted into the programme before the Superintendence in writing, via email or in person. The request must include at least succinct information regarding the product

involved, participants and the workings of the cartel. The first applicant will have a right to full exoneration, the second applicant may receive a reduction of between 30% and 50% of the fine, and subsequent applicants are entitled to a reduction of up to 25% of the fine, provided that all other legal requirements are met.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes, although a minute of the meeting is made and incorporated in the file.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The identity of the person or company providing the information will be kept confidential at the request of such party and for as long as revealing it may lead to commercial retaliations against such person or company. The documents that are disclosed are part of the file and, therefore, investigated companies and natural persons, as well as their attorneys, will have access to them. Interested third parties (and thus potential litigants) will also have access to them.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Cooperation need not be continuous except to the extent that the Superintendence of Industry and Commerce makes additional requirements during the negotiation of the leniency agreement. The extent of the company or person's cooperation in responding to these requirements will be taken into account with regard to the benefits to be obtained. Also, the party receiving leniency treatment will lose its benefits if, during the investigation, it challenges the information it has supplied to the Superintendence. Finally, a party may retire from the programme and withdraw all information it has submitted, at any time during the investigation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes. An investigated party who is not marked as the first to request leniency may obtain an additional 15% reduction in the fine regarding the contact for which it is being investigated, if it acts as the first party to provide information and requests leniency in a separate investigation.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes. Leniency programmes apply to individuals as well as companies.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Parties being investigated for antitrust violations, including cartels, may, within the 20 days within which they may file a defence, offer "guarantees" and, if accepted by the competition authority, the investigation may be finalised in advance, without the imposition of fines. These guarantees are a way of ensuring lawful behaviour in the future. In the past, many investigations were terminated in this manner. However, the competition authority has become tougher in this regard and no guarantees have been accepted in the last two years.

7 Appeal Process

7.1 What is the appeal process?

The penalty is imposed by the Superintendent of Industry and Commerce and is subject to a motion to reconsider. If the penalty is not overturned, the company may bring suit against the Superintendent's resolution before the courts.

7.2 Does an appeal suspend a company's requirement to pay the fine?

A company may post a bond, before the courts, to guarantee payment of the fine and, if the bond is accepted, will not be obligated to pay until the judicial proceedings terminate. Interest, however, will accrue between the moment of issuance of the decision by the Superintendent and the date on which payment takes place.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The process is limited to establishing the legality of the Superintendent's decision and does not permit the parties to retry the case.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Civil actions for recovering damages arising out of cartel behaviour are not regulated in the law and, therefore, general civil liability rules must be used for that purpose. Given that there are no rules regarding the matter, it is not clear whether, as a matter of law, a follow-on action is necessarily more likely to succeed than a standalone action. However, as a matter of practice, it is reasonable to assume that a decision made by a specialised competition authority such as the Superintendence of Industry and Commerce will carry a lot of weight before a civil court in terms of establishing both the occurrence and the illegality of the conduct.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes, they allow for class actions and they may be used for recovering damages arising out of cartel behaviour.

8.3 What are the applicable limitation periods?

Individual tort actions have a statute of limitations of ten years, whereas class actions have a statute of limitations of two years.

8.4 Does the law recognise a “passing on” defence in civil damages claims?

There is no specific regulation for the passing on defence. However, showing that the excess amounts derived from supra-competitive pricing have been passed on to consumers would probably effectively eliminate the possibility of the plaintiff showing that it has suffered a damage that he can recover. There are, however, no precedents in this regard.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

There are, strictly speaking, no follow-on claims in Colombian competition law. Cost rules, therefore, are the same as those established for general civil litigation.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There have been no civil actions or out-of-court settlements in Colombia regarding damages derived from cartel behaviour.

9 Miscellaneous**9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.**

The leniency programme has just undergone a complete overhaul by the issuance of Decree 1523 of 2015. It is feasible (although not certain) that in the short term, an even greater increase in penalties (they were increased in 2009) may be enacted.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There are three current cartel investigations in which the leniency programmes have been applied for the first time. There are great expectations as to how they will be resolved, for they will certainly have a severe impact on the success of leniency programmes in the future.

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