Colombia

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Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

Vertical restraints in Colombia are governed by the general competition regime: Law 155 of 1959, Decree 1302 of 1964, Decree 2153 of 1992 and Law 1340 of 2009. There also exists a specific regulation concerning exclusive-dealing arrangements in Law 256 of 1996 (unfair trade practices).

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Colombian law does not specifically refer to vertical restraints, except in the clearance of vertical mergers, in which case they are referred to as operations between two companies that participate in the same value chain. The antitrust authority in Colombia, the Superintendence of Industry and Commerce (SIC), as well as legal scholars, have understood that vertical restraints mainly encompass (i) resale price maintenance (RPM), (ii) vertical allocation of customers or territories, and (iii) exclusive-dealing arrangements.

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

Colombian law establishes that the SIC must protect the free participation of enterprises in the market, consumer welfare and economic efficiency. There are, however, a few exceptions, such as Law 590 of 2000, which protects small and medium-sized businesses by banning illegal interference with a competitor's entry into a market. It can also be argued that the prohibition against price discrimination protects small companies in certain circumstances.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The national antitrust authority in Colombia is the SIC. It is an administrative entity of which the head, the Superintendent of Industry and Commerce, is freely appointed and removed by the President of Colombia. The Superintendent has an advisory council that is made up of five members, also appointed and removed freely by the President of Colombia.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

Colombian antitrust law is applied to any conduct that has effects within Colombian territory, regardless of where it takes place. This means that extraterritorial application of Colombian antitrust law is possible. Even though there has been no internet antitrust enforcement by Colombian antitrust authorities to date, internet transactions are also subject to Colombian antitrust law as far as they produce effects in Colombian territory. It must be borne in mind, however, that decisions by the Colombian antitrust authority are administrative acts and not judicial decisions, which makes them very difficult to enforce abroad.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

It applies to the extent that they are acting as market participants and not as administrative authorities.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Specific regulations exist for certain sectors such as public utilities and the financial sector. The general regime also applies in each sector, specific regulations notwithstanding.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

Colombian law does not establish market share thresholds below which vertical agreements are permissible. It does, however, limit the antitrust authority's jurisdiction to antitrust violations that are 'significant', a requirement that excludes low-impact conducts from antitrust scrutiny. There is, however, no objective criteria by which to determine whether the impact is such that it warrants antitrust scrutiny.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Colombian antitrust law defines an 'agreement' as any contract, understanding, concerted or consciously parallel practice. This is a broad definition intended to include any kind of meeting of minds, as well as conscious parallelism in the case of horizontal relationships.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

There are no formal requirements to engage the antitrust laws concerning vertical restraints. An unwritten understanding is sufficient.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Colombian antitrust law does not directly address the issue, but under Colombian merger law, a merger or economic integration between related companies is exempt from clearance, as the law understands that they are already integrated (related companies are understood to be those in which one controls the other or both are subject to common control). In our opinion, it follows from this that related companies are a single entity for antitrust purposes and therefore agreements between them should escape antitrust scrutiny – this interpretation is, however, not settled law.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Agent–principal agreements are subject to general antitrust law. An agent in Colombia does not purchase for resale, so RPM provisions do not apply. Other antitrust provisions regarding vertical restraints, such as those regarding territorial and customer allocations, do apply, however.

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

Agent–principal agreements are subject to general antitrust law, as pointed out in question 14. The qualification of a market participant as an agent is a matter of general commercial law in Colombian, not antitrust law.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

No.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Colombia has walked away from the per se illegality of vertical restraints, with RPM arrangements being the last ones to make use of an effects-based or rule of reason-like approach, in 2012. The criterion for legality, however, varies depending on the type of agreement.

In the case of exclusive-dealing arrangements the law adopts a standard of market foreclosure and specifically bans exclusive dealing when it can result in restricting the access of competitors to the market or distribution channels, or in the monopolisation of the distribution of products or services. We take this to apply to partial requirements contracts as well as full exclusive-dealing agreements. One exclusive-dealing arrangement precedent is Resolution 23890 of 2011, in which the SIC determined the existence of a vertical restraint between the only company that carries out studies of television audience measurement, two television channels and an association of advertising agencies and media centres. In this case, the SIC established that an exclusive-dealing arrangement between the aforementioned parties regarding audience measurement studies – which is basic information for the TV advertising market in Colombia – which created the following restrictions on competition: (i) an entry barrier to participation in the market for advertising agencies and media centres that were not party to the agreement; and (ii) limiting or eliminating competition from any other agent in the advertising market.

Another precedent is Resolution 3361 of 2011, in which the SIC exonerated a company that supplies beer to its distributors, finding that its conduct (exclusive-dealing arrangements between the latter and some restaurants) did not generate any restrictive effects on competition. The SIC established in this case that not every exclusive-dealing arrangement constitutes a vertical restraint; on the contrary, it stated that in order to affect competition, an exclusive-dealing arrangement must have such scope to limit market access to potential competitors, and restrict the participation of actual competitors. Certainly, the appropriateness of the conduct in order to be restrictive is determined, inter alia, for the existence of alternative sources of supply, entry barriers, duration of the exclusive-dealing arrangement and dominance. For the case in question, the SIC found that the exclusive-dealing arrangements between the beer company and the restaurants were justified for positioning a new trademark in the market; additionally, it determined that this conduct did not have the scope to restrict or limit the participation of actual and potential competitors.

The case of RPM is rather complex under Colombian law. Resolution 48092 of 2012, issued by the SIC, essentially eliminated the previous per se illegality of the conduct and established an effects-based or rule-of-reason-like approach. In keeping with the antitrust law of the United States and several other countries, the SIC considered that intra-brand restrictions could have pro-competitive effects or, in other words, could stimulate inter-brand competition. It adopted, however, a more cautious approach than that of other countries. In order to establish the legality of the conduct, the SIC will review:

- the structure of the market, including entry barriers, upstream and downstream market concentration and how widespread RPM is in that particular market;
- characteristics of the upstream agent, especially whether it possesses significant market power and whether the same result can be achieved in a less restrictive manner;
- the nature of the goods and the brand, by which the SIC means to establish whether the goods that are being resold are luxury goods and whether they require pre-sale or post-sale services, how long they have been in the market, as well of the level of standardisation required by the brand;
- the contractual relationship, in terms of which party possesses greater contractual power as well as who bears the risk of the sale and the relationship with customers; and
- long-term effects, especially in terms of whether pro-competitive effects will be generated by the conduct.

Finally, regarding allocation of territories as a vertical restraint, the SIC has determined in the *Motor* case, Resolutions 367 and 1187 of 1997 that such restrictions must be analysed under the 'rule of reason', rather than a regime of per se illegality. This is not only because of the fact that these practices can generate pro-competitive effects and promote inter-brand competition, but also considering that the rule that describes this conduct provides that it is per se illegal only in horizontal restraints. This view was reiterated in two subsequent decisions: Resolution 48092 of 2012 and Resolution 76724 of 2014.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Given that individual vertical restraints are assessed by the SIC in the light of their potential effects on competition, the market power of the supplier and the competition level of the market are reviewed carefully. The SIC is bound to inquire about not only the market power of the supplier, but also upstream and downstream market concentration, price elasticity of demand of the products or services, and entry barriers. In this context it must be borne in mind that although SIC does not necessarily establish a direct relationship between market share and market power, the latter is usually considered, at least, evidence that the latter exists (in the events of high market shares). It follows that a restriction imposed by a company with relatively small market share will probably be accompanied by a prima facie assumption that it is not restrictive.

Finally, it is important to point out that both the conduct of other suppliers and the extent to which certain restraints are used in the market is considered by the SIC as one of the determining factors for establishing the potential anti-competitive impact of the conduct and, therefore, its legality under antitrust law.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

The response to the previous question also applies to buyer market power.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

No, there is no quantifiable criterion upon which companies can rely to establish the legality of a vertical restraint. The SIC has, however, been very conservative in prosecuting exclusive-dealing agreements and territorial or customer allocations. The rule concerning the legality of RPM agreements, as we explained above, is new, complex and relatively murky.

Also, there is a block exemption established in article 1 of the Law 155 of 1959, applicable to any restrictive agreements – including vertical restraints – this is, the government can authorise a restrictive agreement only in the event that it protects the stability of agriculture.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

For the general regime of RPM, please refer to question 15. In general terms, it can be said that the SIC's position with respect to this conduct allows us to conclude that maximum RPM is permissible in virtually all cases, as it benefits consumers, whereas fixed and minimum RPM is subject to higher scrutiny under a balancing approach of their anti-competitive impact as compared with possible medium or long-term competitive benefits. This rule applies to any of the conditions of the sale, such as rebates, financing and others. For several years the SIC has been relatively active in prosecuting RPM schemes as they were seen as being akin to horizontal collusion. Since the decision in 2012 in which the SIC adopted a rule-of-reason-like approach to assessing the conduct, the prosecution of RPM schemes has dropped dramatically.

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

Not specifically, but these types of conduct are usually exempt from antitrust sanction because they tend to lack at least some of the building blocks of an antitrust offence. The launch of a new product or brand will probably happen in a context where such product or brand lacks market power, whereas trying to prevent a product from being used by a retailer as a 'loss leader' could be seen as legal if the market for that product is competitive.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Decisions dealing with RPM have raised concerns that it can be used to conceal cartel arrangements or as a tool for market foreclosure by overpaying distributors into not dealing with competitors' products. There also exists a concern that, even in cases where there is scarce inter-brand competition, they can be used to transfer upstream market power to lower levels of the chain.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Decisions concerning RPM have pointed to the following possible efficiencies: (i) limiting the distributors' margin, thereby increasing the number of goods available to consumers; (ii) stimulating non-price competition; (iii) eliminating the possibility of free-riding; and (iv) maintaining a stable distribution network.

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

We believe that these types of 'pricing relativity' agreements would be seen as unjustifiably limiting price competition.

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

A supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer would probably be considered legal, not only because discriminating under certain conditions would be illegal but because this arrangement would tend to keep prices lower in the specific market. The supplier agreeing not to supply third parties on more favourable terms, assuming the supplier is allowed to discriminate in the specific case, would tend to keep prices high and would probably be held to be illegal under the prohibition of influencing others to raise or not to lower prices.

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

This conduct would be reviewed first under the prohibition of price discrimination. If price discrimination rules were to allow different pricing on the two platforms, the conduct would be legal if it had the effect of decreasing one price to the level of the lower one, and illegal in the event of the opposite result.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

There is no rule or precedent in this regard, but we believe that it would be illegal under consumer protection law.

27 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

Buyers are free to commit to not purchasing contract products elsewhere, provided that the requirements for legal exclusive dealing are met. An agreement to meet higher prices of purchase would be illegal under the rule that prohibits one party from influencing another to raise prices or refrain from lowering them.

28 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Territorial restrictions in vertical relationships have received little scrutiny in Colombia. The statute that prohibits territorial allocations is very clear in limiting the prohibition on horizontal relationships, which means that vertical territorial allocations are subject to the general prohibition of restricting competition. The SIC has recently held, in Resolution 76724 of 2014, that territorial restrictions are subject to an effects-based analysis under antitrust law under criteria that are similar to those under which RPM is assessed.

29 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

There is no specific rule in this regard. We believe it should be reviewed with the same antitrust logic as vertical territorial allocations.

30 How is restricting the uses to which a buyer puts the contract products assessed?

We believe it would be viewed as an illegal restriction on competition.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

There is no specific rule or precedent in this regard, but restrictions imposed for resale would be analysed under an effects-based approach and could be found to be legal in many cases.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

There is no specific rule in this regard. We believe it would be reviewed under the rule for exclusive dealing. As for publishing the criteria for selection, we believe that Colombian law does not demand that such information be made public or that rules for selection even exist.

34 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

We do not think that the type of product would influence the legality of any agreement.

35 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There is no rule in this regard.

36 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

No.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Given that the test would be that of the competitive impact of the arrangement, the authority would probably take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

No.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Exclusive-dealing agreements such as this are generally legal in Colombia except where they may foreclose the market by increasing costs to competitors at a particular level in the chain. This rarely happens in competitive markets.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

It is assessed under the rule of possible foreclosure of the market for distribution of 'inappropriate' products. In the absence of such foreclosure, it would be a valid exclusive-dealing agreement.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

This agreement would also, as with the situation to which the previous question refers, be assessed under the rule of possible foreclosure of the market for the distribution of competing products. In the absence of such foreclosure, it would be a valid exclusive-dealing agreement.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

It is viewed as a partial exclusive-dealing arrangement (a partial requirements contract) and is scrutinised under the level to which it can foreclose the supplier's market by preventing other suppliers from selling to the same buyer. This would be illegal if those suppliers lack other potential customers and are prevented by the agreement from offering their product to this particular buyer.

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

This type of agreement is also analysed under exclusive-dealing rules and would be illegal in those instances where other buyers would be prevented from acquiring the products because of a lack of alternative suppliers.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

This is not an uncommon practice in Colombia, but it has yet to receive antitrust scrutiny. We believe it could be declared illegal when it arises from and contributes to the successful exercise of distributor market power.

45 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Vertical agreements need not be notified to the antitrust authority in Colombia.

Authority guidance

47 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

No.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Yes. Once a complaint is brought the antitrust authority will review whether it has sufficient substantive and factual merit. If so, it will open a preliminary investigation, which can lead to a full investigation. If sufficient evidence exists of an antitrust violation, the investigation will end with a fine and an order to the infringing company not to continue such conduct. An investigation like this can last between one and three years. Interested (affected) third parties are allowed to intervene in the proceedings, including in the gathering of evidence.

Enforcement

49 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

The bulk of antitrust enforcement in Colombia deals with horizontal agreements and merger clearance. Up until 2007, according to the OECD, only 2 per cent of enforcement by the SIC was directed at vertical agreements. This percentage has not increased significantly in the subsequent seven years.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The antitrust authority, being an administrative entity, may only punish the parties or the guilty party by imposing a fine, but a judge must declare the agreement void. Under Colombian law the partial nullity of an agreement does not extend to the rest of the agreement unless it is apparent that the parties would not have entered into the agreement, in the absence of the annulled portion.

51 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The SIC directly imposes the fines, although they can be reversed by the Council of State, the highest administrative court in the land. There is no established legal regime for claiming for damages arising out of antitrust offences.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The SIC has the power to conduct unannounced visits to companies, retrieve information (including computer hard drives), conduct interrogations and generally has ample means of gathering evidence. It also has the power to impose fines, issue injunction-like orders and order that certain conducts cease. The SIC does not usually request information from companies outside its jurisdiction but, rather, would use international cooperation tools for this purpose.

Update and trends

The most significant recent decision concerning vertical agreements is Resolution 76724 of 2014, where the SIC imposed a fine on a company managing an airport concession contracting for charging excessive prices and engaging in illegal vertical restrictions. The SIC redefined vertical arrangements in such a way as to encompass a broader scope of agreements, and also set out a general rule for RPM and territorial allocation agreements, stating clearly that they may be valid when they result in pro-competitive benefits, but imposing the burden on the parties of proving these benefits. It is possible that, having outlined more clearly the legal regime for vertical restraints in this case, the SIC will pursue more investigations of potentially harmful vertical arrangements that, up until now, have been the minority of investigated cases.

Private enforcement

53 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Private enforcement is possible in the sense that any person may submit a request for investigation of an antitrust violation and the SIC, if sufficient evidence for that effect is presented, is obligated to prosecute the offence. Non-parties to the agreement may request injunction-like measures, although they have never been adopted in antitrust investigations in Colombia. The remedy against antitrust violations consists of a fine of up to approximately US$30 million dollars and the order to cease in the conduct. There is no established legal regime for claiming damages arising out of antitrust offences. Scholars have suggested that the ordinary tort regime or unfair trade practices law could be used for this purpose, but this has yet to be attempted in the country.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

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