

# Colombia

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## 1 General

### 1.1 Please identify the scope of claims that may be brought in Colombia for breach of competition law.

The claims that may be brought for breach of competition law can either take place under the Unfair Trade Practices Law (“UTP”) or the Antitrust Law. The former allows the filing of either a judicial or administrative claim, whereas, in the latter, such breaches are conceived in the law as administrative offences. Administrative claims for UTP are very unusual; those claims are usually filed as judicial, adversarial claims. Notwithstanding the foregoing, nothing in Colombian law prevents the seeking of damages arising out of a breach of antitrust law, by way of an ordinary tort claim. There are, however, no precedents in this regard.

### 1.2 What is the legal basis for bringing an action for breach of competition law?

In the case of UTP the legal basis is Law 256 of 1996, which is the Unfair Trade Practices Law in Colombia. For certain cross-border cases, regulations from the Andean Community may apply. For antitrust actions, Law 155 of 1959, Decree 2153 of 1992 and Law 1340 of 2009, as well as sector-specific regulations, apply.

### 1.3 Is the legal basis for competition law claims derived from international, national or regional law?

It is mainly national law, with the exception of regulations from the Andean Community which apply to certain cross-border cases.

### 1.4 Are there specialist courts in Colombia to which competition law cases are assigned?

The Superintendence of Industry and Commerce (“SIC”) is a specialised administrative body that hears cases regarding antitrust violations as well as administrative claims for breach of the UTP Law. It can also act as a trial court for judicial UTP cases, although in those events the appellate courts are the ordinary courts, which are not specialised in competition law. Ordinary civil courts, which are not specialised, may also act as trial courts in such cases, at the plaintiff’s discretion.

### 1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

The initiation of administrative proceedings on the grounds of a violation of either the UTP Law or the Antitrust Law requires no standing and may be carried out by any person or by the SIC of its own volition. Judicial proceedings for UTP must be initiated by someone with standing, who may be: (i) the injured party; (ii) consumer associations with respect to conduct that affects consumers; and (iii) the National Attorney’s office (*Procuraduría General de la Nación*) with respect to conduct that affects the public interest in the maintenance of free competition. In addition to the foregoing, there is no restriction in the law for the use of class actions in competition cases where members of a group may have suffered injury by a violation of the UTP law or the Antitrust Law. Finally, constitutional collective actions (*acciones populares*), intended to prevent or remedy violations of collective rights by ways other than monetary compensation (such as injunction-like remedies), are possible for the preservation of free competition and do not require standing in order to be initiated.

### 1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The SIC has jurisdiction to conduct administrative proceedings regarding antitrust violations that have an effect on Colombian markets, regardless of the place of their occurrence or the nationality or residence of the breaching parties. The SIC and local courts have jurisdiction to conduct judicial actions under the UTP Law over any conduct having its main impact in the national territory.

### 1.7 Does Colombia have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

There is no particular trend in this regard, other than the fact that certain local claimants sometimes seek the protection of local competition law *in lieu* of foreign contractual fora or international arbitration tribunals, for instance, by attempting to portray contractual disputes as competition issues.

**1.8 Is the judicial process adversarial or inquisitorial?**

The judicial process is adversarial, while the administrative process is inquisitorial.

**2 Interim Remedies****2.1 Are interim remedies available in competition law cases?**

Yes, both under the UTP Law and the Antitrust Law.

**2.2 What interim remedies are available and under what conditions will a court grant them?**

Under the UTP Law, a court may order a party to modify its conduct and may order any other interim remedy it feels is warranted. In antitrust investigations, the SIC may order the suspension of the party's conduct. A court will grant interim remedies if *fumus boni iuris* is established and, if requested by a party or required by statute, when security is posted by the requesting party, if the SIC or the court so orders.

**3 Final Remedies****3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.**

Administrative proceedings under both the Antitrust Law and the UTP Law allow for the imposition of a fine and the order to a party to modify its conduct. The SIC will apply these measures if it finds that a conduct that is prohibited has been incurred, regardless of whether damage was effectively caused. Also, economic integrations (mergers, acquisitions and other kinds) may lead to a reversal of the operation if they fail to obtain the required legal clearance and are subsequently found to be restrictive. Fines imposed in antitrust cases run up to approximately US\$30,000,000 per violation for companies and approximately US\$600,000 for individuals.

**3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?**

Damages arising from UTP in Colombia are governed by the same rule applied in tort liability. Only direct damages which constitute *lucrum cessans* or *damnum emergens* may be awarded. Exceptionally, moral damages may be awarded although they must be proven, which is a challenging endeavour in the context of competition law. Exemplary damages are not available.

**3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?**

No, they are not.

**4 Evidence****4.1 What is the standard of proof?**

Colombian law does not refer to a standard of proof (degree of certainty) as such.

**4.2 Who bears the evidential burden of proof?**

In claims for damages the burden of proof is on the claimant, whereas in administrative proceedings the administrative authority bears the standard of proof.

**4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?**

There are no limitations on the forms of evidence. Expert evidence is admissible.

**4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?**

There is no pre-trial disclosure as such in judicially adversarial cases as a general rule in Colombia. However, a party wishing to submit a claim may request the court to order the other party or a third party to disclose and submit to the court certain specific documents that are in its possession and are relevant to the case. This can be done either during the trial or before the complaint is submitted, at the plaintiff's discretion. In antitrust investigations, before a formal investigation is initiated, the SIC has the authority to make administrative visits to potential investigated parties and has the authority to obtain from them documents, correspondence and testimonies. These visits are not previously summoned and are used to obtain important evidence from potentially investigated parties; especially from their emails and computer files.

**4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?**

Yes, witnesses may be forced to appear. Counsel is allowed to perform an interrogatory with no limitations other than the relevance of the questions.

**4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?**

Colombia will recognise foreign judicial judgments for enforcement in Colombia on the basis of either diplomatic or legislative reciprocity, provided they meet the requirements established in the Code of Civil Procedure, including that they do not breach Colombian international public policy. Judgments regarding competition matters are not an exception; once recognised, they are then enforceable in Colombia. The same is not true of administrative or other non-judicial decisions issued by

foreign authorities. An administrative infringement decision by a national competition authority can serve as evidence in a civil claim for damages, but does not bind the civil court or generate an automatic right to collect damages.

#### 4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Colombian courts apply local rules of confidentiality concerning commercially sensitive matters, which may lead to a party not being obligated to submit certain documents before the court at all. If submitted, confidentiality cannot be assured. In antitrust investigations, the investigated parties may request the SIC to keep certain documents under reserve, in a confidential file.

#### 4.8 Is there provision for the national competition authority in Colombia (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The national competition authority expresses its analysis on every occasion in which it renders a decision concerning a breach of competition law. One exception to this is when an economic integration is cleared, in which case the authority often refrains from explaining its reasons for clearance. If clearance is denied or granted upon the fulfilment of certain conditions, the Colombian competition authority will express its views in detail.

## 5 Justification / Defences

### 5.1 Is a defence of justification/public interest available?

No, it is not.

### 5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

A "passing on" defence is not specifically established in the law. However, if *passing on* has taken place and can be proven, Colombian courts are likely to establish that no monetary harm has taken place.

## 6 Timing

### 6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The statute of limitations for antitrust violations is five years. This means that the competition authority has five years, from the date the conduct takes place, to issue a resolution imposing a sanction. If the conduct is continuous, the five years are counted from the date the last act is committed. The statute of limitations for UTP judicially adversary claims is two years from the day the affected party was aware of the individual committing the unfair trade act and, in any case, three years from the date of the occurrence of the act. If a judicial claim for damages were to be brought for an antitrust violation, and was brought under ordinary tort law, the statute of limitations would be ten years.

### 6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

In UTP judicial adversarial proceedings, a final judgement by the SIC may take up to one and a half year approximately. In civil courts, it can take up to three years. The appellate ruling could take around one additional year. Antitrust investigations may take from one to three years.

## 7 Settlement

### 7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Not in the case of judicial (adversarial) proceedings. They simply need to notify the court that an agreement has been reached. Administrative (inquisitorial) proceedings may not be terminated by the parties.

## 8 Costs

### 8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes, in adversarial judicial UTP cases, subject to rates established by the Superior Council of the Judiciary (*Consejo Superior de la Judicatura*).

### 8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, they are.

### 8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

It is not forbidden. However, it is not customary in Colombia and, at least as public records allow to establish, has not been used in competition law cases.

## 9 Appeal

### 9.1 Can decisions of the court be appealed?

Yes, in the case of judicial claims in the context of UTP (either before local courts or SIC). Administrative decisions in the case of both UTP and the Antitrust Law may be challenged by an administrative recourse within the competition authority. As administrative acts, they may subsequently be challenged before administrative courts; they will have full force and effect unless they are either suspended or annulled by such courts.

## 10 Leniency

**10.1 Is leniency offered by a national competition authority in Colombia? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?**

Leniency is offered by the Superintendence of Industry and Commerce under the law for antitrust cases. It does not include immunity from civil claims.

**10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?**

No, he is not.

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## 11 Anticipated Reforms

**11.1 Highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that may be required.**

Some practitioners in Colombia have suggested the need for regulation of damages arising out of antitrust violations. If the country were to adopt such a regulation, it would have to address issues such as standing, nature of the damages, statute of limitations and jurisdiction (given that antitrust violations are currently adjudicated by an administrative body, it is not entirely clear whether damages would be assessed by such a body or by a court.

**11.2 Are there any other proposed reforms in Colombia relating to competition litigation?**

There has been discussion concerning the possibility of amending the rules regarding leniency. Also, some practitioners have suggested the need for regulation of damages arising out of antitrust violations, but neither the Government or Congress have hinted that this might be in their agenda.

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The firm has supported a large number of international companies doing business in Colombia, and has successfully taken part in numerous international transactions. The competition team of Cárdenas & Cárdenas has handled antitrust investigations and merger filings, as well as unfair trade practices litigation for over 15 years.