

Cartel Regulation

Contributing editor
A Neil Campbell



2019

GETTING THE
DEAL THROUGH 

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Contributing editor
A Neil Campbell
McMillan LLP

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Preface

Cartel Regulation 2019

Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Cartel Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, A Neil Campbell of McMillan LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
November 2018

Colombia

Danilo Romero Raad and Bettina Sojo

Holland & Knight

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Article 1 of Law 155 of 1959 establishes a general prohibition on competitors from entering into agreements that cause a restriction on competition in Colombia, and Decree 2153 of 1992 is the principal statute for cartel regulation. In addition, Law 256 of 1996 prohibits unfair methods of competition, and Law 1340 of 2009 establishes procedural aspects regarding investigations for restrictive competition practices, and benefits for competitors that cooperate with investigation and prosecution authorities.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Law 1340 of 2009 appointed the Superintendency of Industry and Commerce (SIC) as the national authority for the investigation and prosecution of cases regarding infringement of competition regulations, including cartel matters.

In addition, since 2011 the prosecution authorities have been empowered to investigate and penalise participants in bid-rigging cases.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Bill 038 of 2015 was the most recent proposal for change that was submitted to the Colombian Congress. This proposal suggested changes to the business concentration and unfair competition regimes, the SIC's investigative and prosecution powers and the immunity regime for infringers of the competition regulations that cooperate with the authorities. The bill did not pass into law.

Bill 083 of 2018 was recently submitted to the Colombian Congress, suggesting an amendment to Law 80 of 1993 (Public Procurement Act) directly related to the competition regime. In fact, article 8 of Law 80 of 1993 establishes different situations that constitute inabilities for individuals to enter into agreements with public entities or to participate in public tenders. Bill 083 of 2018 suggests the inclusion of an additional situation of inability directly related to the infringement of competition regulations. In this sense, the proposal is to establish that individuals declared responsible by the SIC of conducts prohibited by the competition regime in Colombia will not be allowed to enter into agreements with public entities for a period of 20 years. At the same time, this inability will be extended to the corporations to which this individual was a part at the moment of performing the prohibited conduct as legal representative, manager or member of the board of directors.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 1 of Law 155 of 1959 establishes a general prohibition on competitors from entering into agreements that cause a restriction on competition in Colombia.

More specifically, Decree 2153 of 1992 prohibits the following types of competitor agreements, among others:

- price fixing;
- determining selling conditions or discriminatory marketing practices;
- market allocation within producers or within distributors;
- allocation of production or supply quotas;
- allocation or limitation of input sources;
- restriction to technical developments;
- tied selling;
- refraining from producing goods and services on the market or affecting their levels of production;
- bid rigging; and
- restraining competitors from accessing new markets or commercialisation channels.

These conducts are considered per se violations of article 47 of Decree 2153 when they are effectively perpetrated by competitors, but also when competitors have the intention of performing them. The simple intention of generating a restrictive effect among competitors will be sufficient for a finding of liability.

The intention or the effect of the conduct in the market may be determined from different perspectives, as agreements among competitors do not need to be formal or in writing. Agreements may result from repetitive conducts that have not been agreed among competitors, but that have the intention of generating a restrictive result on competition.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific infringements, defences or exemptions regarding cartel conduct.

According to article 2 of Law 1340 of 2009, legislation regarding protection of competition in Colombia comprises regulations applicable to commercial restrictive practices, more particularly agreements, acts and abuse of dominant market position, and the business concentration regime; these regulations are applicable to anyone who performs an economic activity in the Colombian market, or to anyone that affects or may affect the development of this economic activity regardless of the economic sector where this activity is performed.

Notwithstanding the above, article 1 of Law 155 of 1959 states that the government is entitled to allow agreements that, despite restricting competition, have the purpose of defending the stability of a basic sector of the economy. Article 2.2.2.29.5.1 of Decree 1523 of 2015 regulates this, defining 'basic sectors' as all economic activities that will have an

essential importance in future in order to rationally structure the country's economy. With this in mind, Decree 1523 states as basic sectors the production and distribution of goods aimed at satisfying the needs of the Colombian population in nutrition, clothing, healthcare and housing, as well as the provision of banking, educational, utilities and transport-related services.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 2 of Law 1340 of 2009 states that legislation with regard to the protection of competition in Colombia applies to anyone who performs an economic activity, or to anyone that affects or may affect the development of this economic activity, regardless of its legal form. With this in mind, law applies to both individuals and corporations.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

No, the regime applies to conduct that occurs in Colombia.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

No, as stated in article 1 of Law 1340 of 2009, the applicable laws in Colombia related to the protection of competition are intended to protect and enable free competition in the national territory.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The SIC may initiate an investigation:

- voluntarily and based on information that the SIC possesses;
- relying on information received by a third party who submits a complaint before the SIC; or
- based on a reference made by another authority.

Based on the information that it holds, the SIC may decide either to close the case and not investigate, or start a preliminary investigation. In the latter case, the SIC will collect evidence for gathering broader information, in order to decide whether to open a formal investigation.

When the formal investigation is opened, the parties investigated will be notified and will have the chance to present evidence for the analysis of the case, or to present warranties before the SIC. The offer of warranties enables the SIC to conclude the investigation, as the investigated parties submit a pledge guaranteeing the cessation of the infringing conduct.

If the investigated parties submit evidence to the investigation, the SIC will study the evidence and, based on this analysis, the superintendent appointed will prepare a report to the Superintendent of Industry and Commerce (who will issue the final decision), stating if the investigated parties have infringed the applicable laws.

The investigated parties will have access to the superintendent's report, in order to prepare their closing arguments before the Superintendent of Industry and Commerce issues a final decision on the case.

There are no strict time frames in cartel investigations.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The investigative powers of the SIC include:

- access to work devices of the investigated parties (mobile phones and computers);
- requests for information by means of office action to the investigated parties and to related parties (other competitors, trade associations or different participants in the affected market);

- inspections at the investigated parties' premises for gathering more information and evidence without previous notice (dawn raids), including head offices, branches and subsidiaries; and
- inspections of the commercial books of the company.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Yes, inter-agency cooperation is generally established in trade agreements between Colombia and other countries (see question 12). Brazil, Chile, Ecuador, Mexico and the United States are among the countries that cooperate with Colombia in cartel matters.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Rules regarding cooperation between jurisdictions are generally established in trade agreements that Colombia has entered into. Colombia has subscribed to trade agreements with the following countries, among others: Canada, Chile, Mexico, the European Union and the United States.

Cooperation and competition policies are also covered by regional organisations in which Colombia participates, for example, the Andean Community, MERCOSUR and the Pacific Alliance.

These treaties are intended to generate cooperation in the area of competition policy and coordination between the respective authorities and consequently efficiency in the investigation, prosecution and penalising of cartel activity.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel cases are adjudicated by means of a written resolution issued by the Superintendent of Industry and Commerce (see question 9). The investigated parties may appeal against this final decision.

When the investigated parties submit an appeal, the Superintendent of Industry and Commerce is the authority in charge of studying the case again, as the superintendent represents the ultimate authority in the SIC with regard to cartel cases.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

An interpretation of article 11 of Decree 2153 of 1992 indicates that the SIC has the burden of proof to sustain the charges in cartel cases. As mentioned in question 10, this entity is entitled to perform dawn raids, to issue requests for information and documents not just to the parties investigated, but also to related parties in order to gather as much information as possible.

As mentioned in question 9, investigated parties have the opportunity to submit evidence in order to prove the lack of an infringement. However, the SIC retains the burden of proof.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. As mentioned in question 4, agreements do not need to be formal or in writing.

Article 45 of Decree 2153 of 1992 defines 'agreement' as any contract, arrangement, concentration, concerted practice or consciously parallel practice between two or more companies. Cartels resulting from contracts and direct arrangements are easier to prove, as evidence is generally written.

However, concerted and consciously parallel practices result from repetitive conduct that has not been agreed between competitors, but that has a clear intention of creating an anticompetitive agreement. In these cases, circumstantial evidence is used in the investigation, as direct evidence of the actual agreement is not possible to collect.

16 Appeal process

What is the appeal process?

The investigated parties may file an appeal against the final resolution before the same officer that issued this final decision (ie, the Superintendent of Industry and Commerce).

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Bid rigging is the only restrictive conduct that is penalised under criminal law in Colombia. In 2011, Law 1474, which implemented administrative measures against corruption, introduced a new article (410A) in the Colombian Criminal Code in order to penalise cartels, but specifically restricted to bid rigging.

In bid rigging cases the Criminal Code imposes fines of between 147,543,400 and 737,717,000 Colombian pesos; and individuals may also face sanctions of between six and 12 years' imprisonment and debarment from government procurement procedures for eight years.

Additionally, article 410A of the Criminal Code establishes the following benefits for infringers who cooperate with the SIC during an investigation: reduction by one-third of the term of imprisonment, reduction of 40 per cent of the fine imposed and reduction of the time period of debarment from government procurement procedures up to five years.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The SIC may impose fines of up to 100,000 monthly minimum wages (approximately US\$25.4 million for 2017) to each corporation that had participated in a cartel, or if the fine must be higher, it may impose a fine up to 150 per cent of the profit derived from the cartel activity.

Regarding individuals, fines may be up to 2,000 monthly minimum wages (approximately US\$510,000 for 2017) for each individual participating in a cartel activity.

Civil penalties are currently higher as the level of fines increased in 2009 by means of Law 1340. Before this law was enacted, fines for corporations were up to 2,000 monthly minimum wages, and regarding individuals, fines were up to 300 monthly minimum wages.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to article 4 of Decree 2153 of 1992 (amended by means of articles 25 and 26 of Law 1340 of 2009), in order to decide the amount of the sanction the SIC shall take into account the following criteria, which are binding for this entity:

- for corporations:
 - the impact of the conduct in the market;
 - the extent of the affected market;
 - the benefit obtained by the infringer with the conduct;
 - the offender's degree of participation;
 - the offender's behaviour during the process;
 - the market share of the infringing company, as well as its assets and sales involved in the infringement; and
 - the wealth of the company; and
- for individuals:
 - the persistence of the conduct;
 - the impact of the conduct on the market;
 - the reiteration of the prohibited conduct;

- the offender's behaviour during the process; and
- the offender's degree of participation.

The degree of participation and the behaviour during the process are the main aggravating and mitigating factors for establishing a penalty.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is available as a discretionary sanction in bid-rigging cases. Infringers may be debarred for up to eight years.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As the SIC does not have criminal powers, in bid-rigging cases the same conduct may be pursued by the SIC from the administrative perspective, and by criminal courts at the same time in order to establish criminal sanctions. In addition, civil courts may impose civil sanctions if consumers submit a complaint for damage.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damage claims are available for direct purchasers; nevertheless, the SIC does not have civil powers in order to pronounce with regard to damage claims for antitrust infringements. This was a proposal in Bill 038 of 2015 to amend the competition regime; however, as mentioned in question 3, this bill did not pass into law.

The authorities in charge of damage claims in Colombia are the civil courts. However, damage claims for antitrust infringements have not been recurrent, and at present there is no relevant precedent regarding this matter in Colombia.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are possible regarding damage claims for antitrust infringements.

Class actions are regulated in Law 472 of 1998, and the main requirements are as follows:

- no fewer than 20 individuals in order to submit a class action;
- the class action must be submitted during the two years after the date the damage was caused, or after the termination of the action that caused the damage; and
- class actions may be presented by both individuals and corporations that have suffered prejudice individually.

There are no precedent cases in Colombia regarding class actions in cartel matters.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Yes, the Benefits for Cooperation Programme was established for the first time in article 14 of Law 1340 of 2009, and was subsequently regulated by means of Decree 1523 of 2015.

According to this programme, benefits are awarded to corporations and individuals who have participated in the infringing conduct, and decide to inform to the authority about the existence of the cartel, or to cooperate by providing information and evidence (including the identification of other parties).

In order to apply for immunity, the informer must submit its request for benefits before the time frame given to the investigated parties to submit evidence during a formal investigation (see question 27). For entering into an Agreement of Benefits for Cooperation with the applicant, the SIC will analyse the following requirements:

- if the applicant has recognised its participation in the cartel;
- if the information and evidence provided is useful in order to establish the existence, form, duration and effects of the conduct, as well as the identity of the participants, its degree of participation and the benefit obtained by means of the prohibited conduct;
- if the applicant complies with the office actions and instructions issued by the SIC during the negotiation of the agreement; and
- the commitment of the informer to cease its participation in the cartel activity.

In order to determine the informer's benefits, the SIC will take into account the following factors:

- date of filing of application, in order to establish who is the 'first in' to cooperate, and who are the subsequent cooperating parties;
- the efficiency of the cooperation in the clarification of the facts and the perpetrated conduct; and
- the pertinent time when informers submitted the information and evidence.

Benefits include the total or partial exemption of the fine, depending on the time when informers submit their application (see question 26). Nevertheless, the cartel's initiator is completely banned from benefits.

The importance of being 'first in' to cooperate is the complete exemption of the sanction (100 per cent).

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes. See question 24.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second participant applying to the Benefits for Cooperation Programme will have a reduction of between 30 and 50 per cent of the fine, depending on the utility of the information and evidence submitted.

Information and evidence are considered useful by the SIC when they add value to the information and evidence that it already possesses, including that submitted by other applicants or informers.

In addition, third and subsequent applicants will have a reduction of up to 25 per cent, depending on the utility of the information and evidence submitted.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

According to article 2.2.2.29.2.5 of Decree 1523 of 2015, the informer must submit its application within the time frame given to the investigated parties to submit evidence and arguments during a formal investigation: 20 working days after the formal opening of the investigation by the SIC. Markers are used in order to establish who is the first applicant and who are the subsequent applicants.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

It is expected that information and evidence provided by applicants will be useful to determine the existence of the cartel and its operation, including the following: objectives, main activities, operation, identity of participants, degree of participation, participants' residence, product or service involved, geographic area affected and estimated duration of the cartel.

As mentioned in question 26, information and evidence submitted by subsequent parties are considered useful when they add value to the information and evidence that the SIC already possesses, including that submitted by other applicants or informers.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to paragraph 2 of article 15 of Law 1340 of 2009, as per the informer's request, the SIC shall grant its identity confidentiality when according to SIC criteria the informer may be exposed to commercial retaliation because of the information and evidence provided.

In addition, according to article 15, the investigated parties can request that information related to trade secrets, or any type of information classified as confidential, is kept confidential.

These confidentiality standards apply to all informers and participants, regardless of whether they are 'first in' to cooperate or subsequent cooperating parties.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

If the applicant fulfils the admission requirements of the Benefits for Cooperation Programme, the corporation or individual will subsequently submit an Agreement of Benefits for Cooperation with the SIC (see question 24). This agreement constitutes the settlement between the enforcement agency and the informer resolving liability and penalty of the latter with regard to the alleged cartel activity, and the corresponding benefits for the informer are established by means of this document.

In order to conserve the benefits settled in the agreement, the informer must refrain from the conduct listed in question 32.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Benefits granted to a corporation are extended to its current and former employees to the extent that they apply and qualify for the Benefits for Cooperation Programme.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

As stated above, the informer and the SIC negotiate and submit an Agreement of Benefits for Cooperation, by means of which the benefits for the informer are settled before concluding the investigation.

The benefits agreed in this document are granted by means of the final decision in the case; therefore, to conserve these benefits, the informer must refrain from the following conduct:

- denying during the investigation facts that were acknowledged during the negotiation of the agreement;
- obstructing the testimony of its employees or representatives;
- disregarding office actions issued by the SIC to verify information provided and facts acknowledged;
- destroying or obstructing access to relevant information or evidence with regard to the cartel activity; and
- breaching any of the obligations settled in the agreement.

The informer also loses all benefits if it is proven at any time during the process that it is the cartel's initiator.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Not currently. The most recent review of this regime was in 2015 with Bill 038 (see question 3).

This bill proposed the following amendments, among others:

- to enable the cartel's initiator to have access to the Benefits for Cooperation Programme;
- the non-disclosure of the existence of an informer, its identity and the evidence provided, information that will be disclosed by means of the final decision of the Superintendent of Industry and Commerce; and
- confidentiality of the process of negotiation of the Agreement of Benefits for Cooperation.

This bill did not pass into law.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The information or evidence disclosed to a defendant is that gathered by the SIC by its own means, and that submitted by other defendants and by informers during the investigation.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Counsel may represent both the corporation and its employees.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants to the extent a conflict of interest does not exist.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

No, employees must pay the legal penalties. They must submit their income tax return to the SIC.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Neither private damages awards nor fines are tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

When deciding the amount of the fine to be imposed on individuals or corporations the SIC does not take into account penalties imposed in other jurisdictions, and regarding private damage claims, overlapping liability for damages in other jurisdictions is not taken into account.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The level of the fine is decided by the SIC while negotiating the Agreement of Benefits for Cooperation with the informer, but the amount initially decided by the SIC may be recalled if the informer performs any of the conduct detailed in question 32.

On the other hand, regarding investigated parties that do not cooperate with the authorities, the amount of the fine imposed by means of the final resolution of the Superintendent of Industry and Commerce may be reduced if the defendant submits an appeal against this decision; however, this depends on the arguments submitted by the defendant in the appeal.

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Legal Privilege & Professional Secrecy
Licensing
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Ports & Terminals
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Private Equity
Private M&A
Product Liability
Product Recall
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Public M&A
Public-Private Partnerships
Public Procurement
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Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
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