“Competition laws contribute to countries being more prosperous”

To make markets operate effectively and fairly, the role played by competition law is vital, especially for emerging economies such as ours. We interviewed Juan David Gutiérrez, professor of the Faculty of International, Political, and Urbanistic Studies, Universidad del Rosario.

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We have all heard about business cartels, such as the toilet paper cartel, notebook cartel, diaper cartel, etc. We may have also heard about companies monopolizing a sector of the market and asphyxiating any possible competition or using their position of power to abuse users. These are the types of issues that competition law addresses: market failures that may affect our economy both at personal and macro levels.

To better understand what business cartels are and how we can defend ourselves from their actions, we talked with Professor Juan David Gutiérrez Rodríguez, an expert in competition law who recently published two studies on the topic: the chapter *Derecho* de competencia en América Latina y el Caribe: evolución y principales retos en el Anuario de derecho de la competencia (2021) [Competition Law in Latin America and the Caribbean: Evolution and Main Challenges in the Yearly Review on Competition Law] and the chapter on South America in the book Re-search Handbook on Cartels to be published by Edward Elgar in March 2023.

ADVANCES IN SCIENCES (AS): **Professor Juan David Gutiérrez Rodríguez, what is competition law?**
Juan David Gutiérrez Rodríguez (JDGR): Competition law is a set of regulations that seeks markets to operate competitively. In Colombia, it is framed by the political Constitution; Act 155, 1959; Decree 2153, 1992; and Act 1340, 2009. The Colombian constitution sets forth the right to free economic competition: the freedom that I should have, as a consumer, to approach a market and

purchase goods and services; the freedom that I should have, as a businessman, to approach the market and offer my goods and services, both in equal conditions. Competition law seeks to preserve this freedom of access to the market for both buyer and seller, a kind of freedom that is not artificially or significantly restricted by company behaviors or government regulations.

(AS): When do these behaviors become illegal?

(JDGR): The behaviors considered illegal by these regulations can be classified into two groups. The first group comprises *anticompetition agreements*, that is, agreements between competitors aimed at limiting the competition among them. For example, if we are competitors and we agree on increasing—or not decreasing—prices, distributing markets, or fixing the same production amounts, we will have higher prices than if we were competing. When we talk about these agreements, we are talking about business cartels.

The other group of illegal behaviors is called *market power abuse*. This behavior only includes the unilateral behaviors of one company that concentrates the largest part of the production of a good or service in a country or region and that does not face robust competition from any other competitor.

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"It is worth noting that competitiveness is not the same as competition. In order to be competitive, you need other things: you need public goods, railways, Internet, connection to the sea to export. You need a State that works."

(AS): How does this market power abuse take place?

(JDGR): Let's picture a company with 95 percent of participation in a market that starts selling products at a loss to take its rivals out of business. Why would they do something like that? Because if the competitors go out of business, this company will be the only player in the business and will be able to increase prices in such a way that it will recover the loss incurred while taking the rivals out and may even make a profit since there is no competition.

Market power in itself is not bad. It is normal for markets to have big, powerful companies. It becomes a bad behavior when these companies abuse this power.

(AS): How is the consumer affected by these behaviors?

(JDGR): In many ways. If companies agree to increase prices, it will affect the purchasing power of consumers. It was the case of the Medellin Public Companies (EPM) (see text box), sanctioned by the Superintendencia de Industria y Comercio (Superintendent of Industry and Commerce) 20 years ago. It affected consumers because they were obliged to buy something they did not want. It also affected companies that saw their markets closing down. In almost all cases,

anticompetitive behaviors go directly against consumers, and we are all consumers.

Companies that participate in concentrated markets have sophisticated ways to put their hands in our pockets without us noticing. The most common behavior punished by the Industry and Commerce Superintendence are agreements to fix prices.

Sometimes, agreements are just made not to decrease prices. But there are times when these agreements use sophisticated formulas to establish prices. In markets where prices vary day after day (such as retail and wholesale markets) or even minute after minute (such as tourism), companies use a common formula to fix prices and make the same variations for everybody.

Ultimately, the essence of laws that regulate competition is that a company that operates in the market must make their

"We want companies to compete independently in the market because we understand that economic competition will make companies decrease prices, seek innovation, increase quality, and improve their offers to attract clients," comments researcher Juan David Gutiérrez.

decisions autonomically; it cannot agree with their competitors to decide how to participate in the market. We want companies to independently compete in the market because we understand that economic competition will make companies

decrease prices, seek innovation, increase quality, and improve their offers to attract clients.

In Greek mythology, Sisyphus tried to carry a rock to the top of a mountain every day. When he was about to reach the top, a strange, foreign energy threw the rock back down, so he had to start over again. What competition law seeks is for businesspeople to be heirs of Sisyphus, in a way, make them go out to the market every day, and revalidate the reasons why clients choose them to acquire a good or service.

(AS): **What is Colombia's position in this topic?**
(**JDGR**): Colombia has legislation in place since 1959; we were one of the first countries in Latin America to establish this kind of regulation. But it was only after the 1991 Constitution that the necessary institutionality was generated, and this right to free economic competition was formed. Thanks to this, since the 90s, the State started researching, detecting, and frequently sanctioning companies who acted illegally.

There is an important type of consumer that can also be affected by business cartels: the State.

During the last decade, Colombia has worked quite a lot to track down cartels that want to rig public tenders.

(**AS**): **How do companies scam the State?**
(**JDGR**): Public tenders are hiring processes aimed at generating competitive micromarkets for the best bidder to win and provide goods and services to the State. In these processes, participants can agree to distribute tenders and simulate competition, although results are assigned previously.

For example, at the end of 2019, the Industry and Commerce Superintendence sanc-

Cases of market power abuse

Professor Juan David Gutiérrez explains some cases of power abuse that have occurred in the country:

- "In 2005, Cadbury Adams, which had a dominant position within the chewing gum market, was fined for selling a product at a loss for over 12 months to stop the expansion of a new competitor, Tumix."
- "Several years ago, Empresas Públicas de Medellín (EPM) was the only organization that offered broadband Internet in the Medellin metropolitan area. When it decided to enter the on/demand TV market, they forced people who acquired broadband internet to also buy the television service since they could receive the on/demand TV signal via the same cable as Internet. The offer was a single contract for both services: Internet and television. Hence, several people who did not want a TV subscription were forced to buy it. EPM was sanctioned by the Superintendence 20 years ago because of this. The strategy eliminated future competitors because if consumers already received on-demnd TV because they were forced in order to have the Internet service, the other providers of the two services would find a populated market and would not have the chance to compete."

tioned six companies and five people with fines of up to a million dollars after discovering an agreement to distribute selection processes related to the school food plan in Bogota. Companies who fulfilled the requirements to participate decided not to do so for the tender to be considered deserted and force the District to change the tender terms with higher prices.

This situation may happen in other scenarios of public hiring, and it is important for the Industry and Commerce Superintendence to prevent it because public expenditure represents 15% of the total economy expenditure of the country. The value of public hiring in Colombia is close to 10% of the GDP, and collusion in hiring processes can increase prices between 10 and 30%. Thus, the State can acquire fewer goods and services due to anticompetitive agreements. This affects every person who receive State services, especially the most vulnerable population who benefit from state programs and subsidies.

(AS): As a country, we may not be the only ones to be tumbled down, right?

(JDGR): No, this is not particular of Colombia. We are one of the countries in the region who has detected more cartels in the last 20 years, only behind Brazil, who has a much bigger economy. In this period, Colombia detected 72 cases; Chile detected 29 cases; and Argentina detected 10 cases. This does not necessarily mean that it happens more frequently in Colombia but that we have a better detection capacity.

(AS): How are cartels detected?

(JDGR): Two tools have proved to be very important in the last decade to detect business cartels. The key to uncover the diaper, notebook, and toilet paper cartels was the "Programa de beneficios por colaboración" ("Collaboration Benefit Program"), which aims at motivating any person participating in a cartel to inform about who the other participants are in exchange for a benefit that may include total exoneration of the fine.

With the diaper cartel, there was an informant. A company said: "I have been part of a cartel for several years, here is all the evidence." They gave the evidence of all communications and meetings among businesspeople to agree prices or refrain from lowering them.

The second tool is the ability to collect and process digital and electronic evidence. In the analogic era, the Superintendence literally sat to review physical documentation and see if they found anything. It was like looking for a needle in a haystack.

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"Before 2009, sanctions were small and not deterrent; it was almost a good deal to break the law, pay the fine, and go on as if nothing had happened. But that year's Act 1340 significantly increased sanctions, fixing fines of up to 100,000 current minimum wages (SMLMV by its acronym in Spanish), which is a lot of money for almost every company."

Currently, the Superintendence only requests access to the company's computers and mobile devices. They can find evidence of the existence of a price cartel by applying forensic informatics to preserve the integrity of information.

(DC)**: Do these sanctions imposed really have a deterrent effect on these behaviors?**
(**JDGR**): This is a very good question. Before 2009, sanctions were small and not deterrent; it was almost a good deal to break the law, pay the fine, and go on as if nothing had happened. But that year's Act 1340 significantly increased sanctions, fixing fines of up to 100,000 current minimum wages (SMLMV by its acronym in Spanish), which is a lot of money for almost every company.

In other jurisdictions, such as the European Union (EU), in the framework of digital economies, they are discussing whether sanctions are enough because some technological giants are unaffected by fines: they keep breaking the laws, integrating this behavior in their business model, and as long as they can still operate, they'd rather pay the fine. That's why the EU wants to enforce different, more structural solutions that include the possibility of fractioning big companies to favor market competition.

(DC): **Then, does competition law favor competitiveness?**
(**JDGR**): Notably, competitiveness is not the same as competition. To be competitive, you need other things: you need public goods, railways, Internet, connection to the sea to export. You need a State that works. Competitiveness occurs because of the levels of economic competition as well as by all the environmental factors that allow a company to thrive. Thus, economic competition is just a small piece in the history of competitiveness.

In general, countries with competition law systems that are more robust in terms of effectiveness to detect these behaviors and sanction them are more prosperous countries. As they are more prosperous, they have a more effective State that can detect more cartels.

What is actually true is that business cartel operation has a big impact not only on a country's economy but also on its social conditions.

(DC)**: How do they affect society?**
(**JDGR**): In a country plagued with cartels, the poorest consumers are more affected because this phenomenon increases poverty and inequality. It is true that, for there to be more equality, the State needs to work well. But if markets do not work well, such as when there are business cartels in operation, poverty may increase because consumers may be able to buy less for each peso they receive as their salary.

In the case of the school food plan cartel in Bogota, the purchasing power of the State had reduced because of a dishonest behavior of the offerors: the State bought fruit at a more expensive price because of an anticompetitive agreement, which meant it had fewer resources to offer public services.

As another example, if competitors agree to increase the price of diapers, this will affect poorer people more. Proportionally, low-income people spend more on food or essential goods than middle- or high-class people if diapers see a 10 percent increase in their price. For this reason, some Latin American countries, including Colombia, are more focused on chasing after cartels in basic markets, such as farming and food businesses.

Countries such as Mexico have betted on tracking cartels operating in the health industry since it is an essential good. Moreover, people with the lowest incomes spend a higher percentage of their income on health. The same happens with education. In general, a better market operation may lead to better life conditions for the poor.