7th Competition Forum Colloquium

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On November 20th 2015, the city of Pilar played host to the 7th Colloquium Competition Forum, attended by representatives of 11 countries in the region including: Chile, Colombia, Brazil, Mexico, Uruguay, Paraguay, Argentina, the United States, Spain, Peru and the UK. The delegations included members of various sectors such as business, legal scholars, administrators and regulators, prosecutors, academics and members of the judiciary.

The day was filled throughout with conferences on the most important topics of the times, events filled with insightful debate regarding different aspects of the national contexts, tendencies and views of the future in each region. Roughly, the day's events were divided into four main panels: (I) The efficiency of Market Conditioning; (II) Vertical Restrictions and Distribution Contracts; (III) New Trends in Institutional Design; and (IV) Cartel Testing Methodology.

The conferences shared a single format, consisting of a main presentation of 20 minutes, followed by two, ten-minute commentaries. The issue would then be opened for debate, ending with a final contribution from each panelist. The Colloquium began promptly at 9 am, ending 10 hours later, with perfect punctuality.

As a general review of this 7th installment, it may first be worth highlighting the high levels of agreement among Latin American countries regarding the essential role played by the Right to Defense of Competition in allowing for the development of overall economic welfare, as well as the importance of cooperation between countries. The event lent importance to the development of competent advocacy policies, including market studies and a close knowledge of society and their responses to the investigations carried out by authorities. Each panel also discussed particular aspects of each of these themes, which will be presented below.

In the first panel on the Effectiveness of Obligations, panelist Marcelo Calliari (Tozzini Freire, Brazil) presented his argument on (i) the choice and design of remedies, navigating the pull between the principles of proportionality and effectiveness (defined as the survival of the buyer and the evolution of market share and prices) and the more flexible analysis appropriate for each case; (ii) implementation and monitoring with the intervention of well-organized third parties, through the use of trustees for example; and (iii) assumed obligations of trans-national operations. The panel's first commentator, Oriol Armengol (Pérez Llorca, Spain) opined that the European Commission has shown a clear preference for structural conditions over behavioral obligations and, by his analysis, allowed proportionality to overcome the viability of remedies. Likewise, he said, enjoined companies rarely implement the conditions set for them for various reasons: a short statute of limitations, within which it may be hard to prove any errors from the authority in terms of appreciation. Furthermore, should such errors be detected, the judicial framework provides for retroactive effects, even when dealing with the approval of a merger. The second commentator was Alberto Delgobbo (Chief Economist, CNDC, Argentina), who spoke of the evolution of local authorities in their analysis of obligations, which tend to favor compromises that will be technically viable in order to restore market conditions to their point before the merger, even if these are less than satisfactory.

Delgobbo was clear in that, while he considers these remedies to be useful complements to regulation, these cannot however replace structural conditions favoring horizontal collusion or prevent wrongdoing.

The debate then dove into the authority's role, when designing remedies and compromises, in considering the previous and current state of the relevant markets. In principle, it was agreed that authorities should limit themselves to restoring previous conditions, without trying to actively improve the market and undertaking the role of a sector regulator. The importance of allowing for quick conflict resolution and a periodical review of existing commitments was also mentioned.

The first panel moderator was Mr. Luis Barry.

The Second panel, dealing with vertical restrictions in distribution agreements, began with a presentation by Mr. Gaston Palmucci (Chief Investigator for Chile's FNE). His presentation explained how restrictions in distribution agreements between independent actors can be explained by factors such as pricing or other issues – such as exclusivity, territories, bundling-. These conducts don't pose concerns for the defense of Competition when this involves self-distribution or intra-brand competition. However, these restrictions may eventually lead to high entry barriers or the exclusion of competitors, causing more serious inter-brand conflict. This should be investigated, he said, once a company's market share exceeds 35%, if a 'hoarding' effect takes place within the market, or if re-sale prices become fixed. Comments were offered first by Lucía Ojeda (SAI Consulting, Mexico), who shared some of Mexico's experience in this subject. There, she remarked, regulators invoke a Rule of Reason and only worry about actual displacement of competitors, while price fixing is not a *per se* infraction. The second commentator, Mr. Miguel Del Pino (Marval, O'Farrrel & Mairal, Argentina) spoke of the Argentine experience, where the fixing of 'minimum' sales prices is often allowed, as long as no collusion is present – There is no single list of admissible and inadmissible discounts, and no effort has been made to analyze retroactive discounts.

During the debate session, participants delved into the question of supermarkets' market share; the role of authorities in establishing or improving competition within a market (competition authorities vs. industrial development agencies), as well as the underlying legal frameworks of each country. The importance of considering the current situation and legal particularities around Latin America was highlighted, while at the same time sharing common experiences between the countries and reinforcing the technical basis that underpin this branch of Law practice, as separate from Common Civil Law.

The panel was moderated by Mr. Walter Cont.

Next, attention turned to the issue of new Institutional trends with the valuable contribution by Mr. William Kovacic (Visiting Professor, King's College, UK). Speaking of all 135 competition authorities around the world, Prof. Kovacic took on the topic of system building

and, particularly, the continuing process of reform and adaptation that many countries' agencies are involved in. For Latin America Prof. Kovacic singled out the steady growth shown by Brazil, Chile, Mexico and Colombia.

In order to achieve each country's objectives in terms of antitrust and competition regulation, each jurisdiction should utilize a variety of instruments, coordinated by the individual systems, in order to advance competition as a whole. Among the instruments proposed by Prof. Kovacic are:

- Applying the law and exercising their legal powers
- Harmonious co-existence with other public policy/advocacy agencies
- Education, both of economic agents and society in general, about the benefits of competition laws
- Research
- Drafting and releasing public reports

Prof. Kovacic then mentioned the degree of independence possible when agencies are created without direct links to government ministries and congress. However, from his speech (and that of many other speakers) it becomes evident that most Latin American agencies do indeed depend on their government ministries. Turning to governance schemes, the speech presented two existing models often found globally. The first is a Unitary system where the agency has a single Boss. The second scheme involves leadership through a collegiate body. Occasionally one may find hybrid situations, where the deciding authority consists of a single Executive who must consider the non-binding advice given by a collegiate technical board. The importance of good institutional design was somewhat then somewhat set aside to bring a reminder of the importance of maintaining good leadership and professional staff, even by establishing a career and seniority schemes.

In a related topic, Prof. Kovacic went on to comment on the role of Judicial Review of administrative decisions and the structure taken by these specialized or general tribunals. Several jurisdictions, he mentioned, have adopted these specialized tribunals or created special courts, manned by experts, within their own General courts. His speech highlighted the importance of defining the relationship between a Competition Regulator and other public organizations.

The next portion of the speech referred to the arsenal of fines and penalties each jurisdiction may call upon in order to properly enforce the law, strengthen their authority and prevent future violations. He highlighted the interdependence between penalties and remedies, existing Responsibility regulation, and the evidence needed to support any allegations of wrongdoing. This topic sparked vigorous debate among commentators and participants regarding different levels of rigor demanded when assessing evidence and when establishing violations and penalties.

Finally, Prof. Kovacic spoke of the important task of gathering information regarding the actors and the system's ability to do so, accessing business records in order to investigate and evaluate the facts. This point was opened to panel participants, who commented on the themes of Leniency agreements and amnesties, it's reach and limitations, but primarily on its main objective, which is to ease in gathering information in cartel situations.

Prof. Kovacic added comments on the need for maintaining clear links and efficient dialogue with other institutions, both within and outside each country, and making full use of international cooperation through its various channels.

Concluding his speech, Prof. Kovacic spoke on the importance of making a habit of continuous improvement, holding up natural evolution as an example of a process of policy experimentation, result evaluation and periodic adjustments, which all good competition systems should undertake regardless of their age and experience.

Commentators Javier Tapia (Chile's TNLC) and Paolo Benedetti (Agon, Mexico) focused their contribution on matters of institutional design and governance, as well as the value of independence and freedom, as well as some of the effects caused by the confrontation of administrative vs. penal systems (eg. Leniency during a competition trial won't affect any penal charges). Their comments were accompanied by contributions from renowned practitioners, such as Diego Povolo, former spokesman for Argentina's CNDC, and Colombia's Mauricio Velandia & Germán Coloma, both of whom offered several references to their own personal experiences and decisions taken by their local agencies, explained within the factual and political context in the region.

The panel was moderated by Viviana Guadagni.

The final panel took shape as a discussion regarding evidence for cartels, and the way various penalties require different levels of certainty for the evidence produced. The discussion was lead by Mr. Jaime Crowe (White & Case, USA), who spoke on the difference between direct and intermediate evidence, as well as presenting the view held in the United States where, faced by possibly serious penalties including jail time, all evidence must pass "beyond reasonable doubt". This term has been considered too subjective as it lacks a solid definition. However, the consensus is that proof must be over 50% certain, if expressed this way. The US system, said Crowe, is also dominated by the legal figure of *actori incumbit probatio principio*, where the burden of proof must lie with the accuser. Finally, Mr. Crowe clarified that price-fixing is not considered a *per se* infraction for competition law.

The first commentatior, Carlos Petre (Federal Civilian and Commercial Chamber, Argentina), continued the discussion into the standards of evidence, remarking on the correlation between seriousness of the conduct (or the penalty) with the burden of proof that must be cleared. His speech touched on the Balance of Probability and the certainty that must lie

behind any penal decisions. He also expressed his unease towards the current standard of evidence needed to establish Cautionary measures.

The second set of comments came from Jorge Jaeckel (Jaeckel/Montoya Abogados, Colombia) took the stage to encourage the room to analyze global standards on evidence and responsibility schemes, highlighting the importance and relevance that should be given to such fundamental rights as the Presumption of Innocence and other basic legal concepts.

Regarding leniency and amnesty programs, he added that the US has moved forward with the penal aspect, while neglecting the civilian side. However, considering that joining this program implies confessing to a violation, civil courts have only to prove Caused Harm and, once that is done, the allocation of damages triples.

The Colloquium's guests then entered a debate on the need for greater security measures when analyzing this test, or having the flexibility needed between some serious violations to competition law, and the penalties applied as a result. The debate mentioned the way knowledge and public awareness of these processes may help promote the handing down of tougher penalties, such as reclusion, mixed and structural remedies (eg. Forced sales of assets or licensing vital to Intellectual Property rights). The speakers recognized that criminal courts tend to require higher standards of evidence, with administrative decisions backed by appropriate funding. The importance of issuing a clear decision and for the penalties to be proportional to the harm caused was also talked about.

The final panel was moderated by Mr. Agustin Siboldi.

The Colloquium concluded with contributions from Marcelo Den Toom. His speech presented, from a historical perspective, the way the Forum fits into the region's context of open exchange and efforts to develop relationships between the country's agencies which will contribute to developing local systems and allow for effective and successful enforcement of Antitrust legislation.

The event was organized by Luis Barry, Marina Bidart, Bernardo Cassagne, Marcelo Celani, Germán Coloma, Walter Cont, Miguel del Pino, Marcelo Den Toom, Viviana Guadagni, Ricardo Inglez de Souza, Julián Peña, Pablo Trevisán, Agustín Siboldi and Agustín Waisman.

In drawing conclusions from the colloquium, and in light of the great development and important changes that have happened throughout the region over the last few years, we wish to remark on the urgent need for re-thinking the current state of Argentina's Competition Defense structure. In this sense, we encourage authorities and practitioners to take on a profound review of our country's competition defense sector, the design of its legal framework and institutional structure. In Argentina the time is ripe for change, and we should expect a significant improvement in the institutional handling of free competition – a subject long neglected by the outgoing government.

We believe that Law 26.994 of 2014, which partially modifies Law 25.156, certainly fails to provide the necessary solutions and resources. Therefore, having not been implemented or regulated until now, we propose it be withdrawn and replaced by the results of the in-depth review proposed above, which should be set as realistic legislation for its public and private enforcement.

Among the most salient aspects of this review we find it of utmost importance to increase the independence and authority given to the country's competition agency, as well as greater certainty regarding legal protections and immunities. Likewise, it's important to update the procedures for notifying and denouncing economic cartels and establishing procedures for reviewing and periodically inspecting them, as well as reviewing the procedure to eliminate excessive waiting times. We recommend also approving an adequate Leniency and Amnesty process, whether total or partial, which can become a powerful tool for cartel detection; to strengthen damages payments in order to recover losses from competition violations and most of all, increase transparency and public knowledge of antitrust matters.

Argentina is aided in this by its various neighbors who – even though they all have experienced their own situations and difficulties – have already gone down this arduous path, full of effort and continuous improvement and would willingly cooperate in our own trek, while Argentina itself is full of highly-qualified professionals and academics, with the experience and powerful ideas needed to surmount this challenge.