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By Julián Peña[1]

In recent years, the Latin America region has seen and will continue to see a process that has brought big changes. Competition law enforcement has not been immune to this. The uncertainty that prevails over many Latin American countries has begun to take a toll on the development of their competition law enforcement efforts. While the concept of "Latin America" is overly broad, here we will focus on analyzing what has been happening in the region's principal competition jurisdictions, that is: Brazil, Mexico, Chile, Colombia, Peru, and Argentina. All of these countries have undergone important economic, political and social changes in recent years, boosted by the effects of the COVID-19 pandemic and the growing digital economy.

The combination of these factors has put the very foundations of competition law to the test in these countries, leading them towards a process of consolidation as well as flexibilization, reflected in the way the rules are interpreted, but also in the limitations placed on the independence of competition agencies.

I. Consolidation and Flexibilization of Competition Law

While the last few years have seen a very broad range of ideologies among the region's rulers, there has not been an instance where a government has spoken out against promoting competition policies, or where any official named by a former government was forcibly removed. Indeed, in Brazil, the new president of CADE had been made Superintendent in the previous administration, while in Mexico the COFECE's President was able to finish her legal mandate, which lasted halfway through the new presidential period. In cases where competition authorities have been changed following a change in government, such as Argentina or Peru, said changes came due to the respective terms coming to an end. In Chile, the Heads of the National Economic Prosecutor ("FNE") and the Tribunal for the Defense of Competition ("TDLC") will see their terms end this year, and so Chile's new president will have the option to either change, or continue working with current authorities. Something similar will happen in Colombia's Superintendency for Industry and Commerce ("SIC"), when the new president is elected and inaugurated in 2022.

Despite this consolidation, we can also find nuances that point towards the search for greater flexibility with respect to competition rules in various countries across the region. While this is mostly a consequence of increased political demands to take measures for facing the crises caused by the arrival of the COVID-19 pandemic and persistent questions over the efficacy of the standard way of resolving competition matters, the process began well before the pandemic started. Administration changes in Brazil (2018), Mexico (2018), Argentina (2019), and Peru (2021), as well as social unrest in Chile (2019) and Colombia (2021) and recent election results in Argentina (2021), Chile (2021) and Mexico (2021) reflect a fluctuating demand for change among their respective populations, as well as high levels of fragmentation and polarization regarding the paradigm that should give direction to these changes.

To this regional political landscape, not uncommon for the application of competition law, we add the political changes happening in countries where competition law is better consolidated, particularly in the United States, where shifting politics and the demand for change have increased in intensity in political, economic, and social terms. Antitrust has not, of course, escaped these currents of discontent with the situation as it stands today.

Given that competition laws tend to be rather broad in their wording, particularly regarding the goals they seek, it is in the interpretation of rules and the independence of the authority when applying them that we can find the variables and

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adjustments that can satisfy the various political demands.

A central element where flexibility can be seen is in the way that the goals of competition law are interpreted, and therefore the standards that must be used to apply the law in specific cases. Countries in this region have been inspired, to a lesser or greater extent, by what has been done in the most important jurisdictions at a global level, and particularly by what has been done in terms of antitrust by the United States. Recently, the influence of a school of thought known as "Hipster Antitrust," "Populists," or "Neo-Brandeisians" has increased, seeking to transform competition law and policy by rebuilding it at the roots in order to align it with a more egalitarian view of welfare and dissolve the power of monopolies. This line of thought has gained impulse in recent years, as a result of the growing political impact and power of the so-called "Big Tech" companies and, mostly, following the designation of some of its greatest proponents to high-ranking positions within the U.S. Government in 2021. These changes have led to rethinking the goals set by the main stance regarding antitrust over the past 40 years, which holds that American antitrust strives for consumer welfare through economic efficiency. Among the issues now being discussed that should be included within antitrust analysis we find labor issues, among others. In Europe, meanwhile, concerns over the relationship between competition and sustainability have grown.

Historically, while the countries in the region have seen cases where matters unrelated to economic efficiency have influenced decision-making in many areas, the "rigidity" of economic analysis has been the main tool used by the agencies to resolve a vast majority of cases before them, going beyond the political pressures found in specific cases. Faced with the "flexibilization" of analysis criteria, allowing the introduction of other elements for analyzing cases, such as we see in U.S. antitrust, would open up a Pandora's Box for the region. This is because, if the country where competition law was invented decides to be "flexible" regarding the criteria for interpreting the law, the path would be cleared for every country to interpret what objectives should be added to the analysis at any particular time, considering the political, economic, and social context at that moment. In other words, the impulse not to "Out-Catholic the Pope" would dominate when applying competition law. If this position prevailed, its effects on the development of competition law enforcement across the region would be significant, as it would allow for a greater "politicization" of cases, creating even greater uncertainty and increasing the costs it implies.

Another way to increase flexibility in the interpretation of competition law is through the "politicization" of the enforcement authority's independence. In that sense, we have seen various attacks on the existing institutional framework across several countries in the region. In Argentina, for instance, the public contest for selecting the Heads of the National Competition Authority, created in 2018, was suspended following the change in government in 2019. Likewise, a Law bill was presented to "give flexibility" to the designation process. This bill was modified and passed by the Senate, adding further requirements for prospects that are not necessarily related to their suitability for the role. In Chile, a law bill would transfer the powers to begin legal action in competition law matters away from the National Prosecutors ("FNE") and to the Public Ministry, which has greatly increased uncertainty regarding, among other things, the country's Leniency Program. In Peru, the new President of INDECOPI has raised questions regarding the historical process for designating officials, which he believes led to serious conflicts of interest. Meanwhile, Peru's congress has been considering an institutional reform that would increase INDECOPI's autonomy, without the sitting government's support. In Mexico too we find a peculiar situation. While the institutional framework was designed to guarantee the COFECE's autonomy, establishing a mechanism to safeguard this system by requiring special, hard-to-reach majorities, the mechanism itself has a weak point as it failed to foresee the possibility that the President would refuse to name replacements for positions as they become vacant. Today there are only 4 active commissioners, the minimum for

reaching a quorum and making decisions, with one such commissioner being the authority's President. Therefore, should any of the commissioners be absent, or if no new commissioners are nabbed before February 2023, the institution would be unable to make any decisions as an enforcer and limited with regard to certain decisions, such as those involving market studies, that require a minimum of 5 members present.

The "flexibilization" in the application of the law has come about as a result of the need to take measures to face the political, economic, and social crises caused by the COVID-19 pandemic. This "flexibilization" was reflected in the introduction of certain price-control programs affecting specific products in some countries, while others saw greater political pressure to take a less rigid stance towards certain conducts or mergers, bringing into consideration arguments such as the so-called "Failing Firm Defense."

Lastly, and in the same vein, the exponential growth of the digital economy in recent decades has led to a growing interest from the region's competition authorities. However, unlike what we see in the United States or Europe, for example, governments in the Latin America region appear less concerned about this, mostly because these issues are less important vis-à-vis other priorities in competition policy that are more closely related to the traditional economy.

So far, the region has faced a growing number of cases, both in terms of conducts and merger operations, where the matter of the digital economy has been analyzed and some corrective measures (sometimes as a form of caution) have been applied across several countries. Special units dedicated to the subject have also been created (in Mexico, for instance), and the issue has been included in some public documents (studies or guidelines in Brazil, Mexico, and Chile) and presentations, such as those given at the latest OECD World Competition Day in December 2021 (Argentina, Brazil, and Mexico).

It should be noted that, beyond the advances we have mentioned, the position that has prevailed across the region is one of prudence towards the digital economy, as none of these countries have modified, or presented draft bills, that would address the issues related to this sector in particular that would be different from the treatment given to cases in the traditional economy. Still, we should not rule out the possibility that the growth of the digital economy will also become an additional element in applying pressure towards greater "flexibilization" of competition rules across the region.

II. New Challenges and Leniency Programs

Over the past decade, the various leniency programs in the region had increasingly been consolidated and improved, with growing success in Brazil, Mexico, Chile, Colombia, and Peru. The main engine for combatting cartels over this period have been leniency programs, which overcame initial obstacles through a number of legal reforms and a better application of fines by the enforcement agencies. However, over the last few months this process has faced new challenges in most of these countries, mostly though not exclusively due to the difficulties caused by the COVID-19 pandemic, with other new challenges arising for every country's leniency program.

One common cause is the significant drop in leniency cases involving international cartels. The growing number of damages actions in Europe has worked to disincentivize requests for leniency, as the penalties caused by these damage claims vastly exceed the fines applied to those same cases. Across every country in Latin America, international cartel cases had been the main drivers for launching local leniency programs.

Other reasons for leniency programs becoming bogged down have included legislative changes (in 2020 Peru's congress passed a law penalizing anticompetitive conducts and, as mentioned above, Chile presented a draft bill that would transfer penal actions from the FNE towards the Public Ministry), overlapping rules (in 2019 the Andean Community launched an investigation against every company taking part in a cartel, including – and later fining – a company that had had its penalties dismissed by Colombia and

Peru's leniency programs). In Argentina, the program was approved in 2018, but was never properly regulated or implemented. In February 2021 the Senate approved a bill (yet to be approved by the Chamber of Deputies) that eliminated the leniency program, considering it unconstitutional to offer benefits to those who break the law.

III. Conclusions.

Throughout these years, which have seen big changes across many different fronts (political, economic, social, and technological) and the uncertainty that they necessarily bring, Competition law in Latin America's main jurisdictions has been shown to have a considerable level of consolidation, as demonstrated by the lack of any major normative or institutional changes.

However, we notice the unequivocal signs of increased pressure to make the scope of competition policy more "flexible," whether through changing the interpretation of the rules or through the enforcement agencies' autonomy. This "flexibility" is boosted by political, economic, and social pressures that had begun to manifest across the region even before the COVID-19 pandemic. However, both the pandemic and the questioning of the interpretation criteria that has taken hold in the United States – the country-of-reference for antitrust – have boosted these effects.

Leniency programs, a tool that had grown significantly over the previous decade, has now stagnated, and it is hard to predict whether this will be a temporary phenomenon, or whether the stagnation is here to stay.

We also see a growing interest in the evolution of the digital economy, although said interest has so far been expressed as a prudent studying and monitoring of the phenomenon, and not as an impulse towards normative changes specially conceived to deal with this new economic sector. At the moment, however, this increased interest for the digital economy has not yet become a new source of pressure for greater "flexibility" in the existing legal framework.

So long as uncertainty and rapid changes continue to rule over the region, competition law will continue to face challenges that lead towards a "flexibilization" of its objectives and/or implementation. Competition law in Latin America is not immune to the world around it. However, we still see a system that has consolidated over the last few decades, while mostly resisting the ever-growing calls for greater "flexibility."