EXECUTIVE SUMMARY

COMPETITION POLICY IN THE DIGITAL AGE: LATIN AMERICA AND THE CARIBBEAN

A Practical Handbook

Executive Summary

This booklet reviews the telecommunications regulation and competition law frameworks in 18 countries in Latin America. It concludes that the following five inter-related features are hallmarks of 'best practice' in competition policy (see Figure 1):

Figure 01: Five features of best practice in competition policy

1. A **properly functioning competition authority** and **a properly functioning regulator**, i.e., thar are independent of government, properly staffed and resourced.
2. Economic regulation must address **market failures**, based on evidence from up-to-date market reviews. Regulators must be clear about the reasons for, and impact of, regulation in all cases.
3. Ideally, c**ompetition law should be enforced by a competition authority.** If the regulator has **sectoral competition law powers**, the need for cooperation between agencies is greatest.
4. Both competition authority and regulator understand **the interplay** between their respective jurisdictions and **work together** to adress the issues identified.
5. There is appropriate, **meaningful cooperation** between competition authorities and regulators at the supranational level too.

Below, each of these characteristics is analysed, "on the ground" in the specific context of each individual market reality. In a nutshell, advanced societies in Latin America tend to have the characteristics described in Figure 1, approaching regulation cautiously, mindful of the potential risk of over-regulation (**Feature 2**). Some Latin American countries, such as **Brazil**, are world leaders in the application of competition rules to the digital economy (**Feature 1**). In some countries, such as **Mexico, Panama, Peru, Uruguay, Costa Rica, Nicaragua** and **Bolivia**, there is a movement towards exclusive application of the competition rules by the sectorial regulators (**Feature 3**). If transition and emerging digital societies are considering the adoption of such a system, then policymakers need to be extra-mindful of the need for cooperation between the competition authority and the regulator (**Feature 4**). Finally, cooperation across borders could be improved in Latin America (**Feature 5**).

Feature 1: A properly functioning competition authority and a properly functioning regulator

On average, the 18 countries surveyed have had competition authorities for 20 years. Only one, Guatemala, has not established a system of competition law. Providing adequate resources for the competition authority can be an issue in some countries. The situation, however, has improved in recent years and **Brazil, Colombia** and **Chile** have an established and active competition authority, as well as a solid telecommunications regulator.

The countries that belong to the **Andean Nations Community (CAN)** have adopted a centralised system of application of the competition rules, with mixed results. All 18 Latin American countries surveyed have active regulators, but the regulators do not always seek to impose regulation after a proper market analysis, leading to potential distortions in the competitive landscape. The boundaries between competition law and regulation appear to be blurred in a number of countries, which can impair a proper understanding of the respective roles of the competition authority and the regulator. Establishing guidelines or protocols, or signing Memorandums of Understandings between local authorities, could serve to address these concerns.

Cross-border cooperation can deliver better outcomes for the economy as a whole, by ensuring that there is alignment of the decisions taken at a national level and that the system can, over time, evolve towards a one-stop shop for merger control.

Building on the results of the analysis, the report makes the following recommendations (see Figure 2) for policymakers, regulators and competition authorities.

Figure 02: recommendations for policymakers and agencies

POLICYMAKERS — NATIONAL	POLICYMAKERS — CROSS-BORDER
• In the context of digitization of the economy, ensure that all market players (traditional operators and new players such as OTTs) are considered when defining the relevant markets. • When assessing the need for regulatory regime change, consider the interplay between competition law and regulation. Can the legislative framework clarify the respective roles? This is particularly important for merger control. • If there is no properly functioning competition authority, consider introducing it. • When allocating resources, consider the positive impact that a competition authority can have on the wider economy. Ensure a fair allocation of resources between the regulator and the competition authority. • *Ex ante* regulation, should include a regulatory impact assessment analysis to avoid negative effects in the market. Regulation should not have political purposes that may distort the way rules are applied and negatively impact the competitive landscape.	• Consider how existing cross-border bodies can apply competition law and regulation more effectively in cross-border cases. • If setting up a cross-border competition authority, consider how it will operate in conjunction with the national agencies. What are the boundaries of the respective jurisdictions? How will the cross-border body carry out investigations? What enforcement tools are or can be made available? • Consider the interplay between competition law and regulation at the cross-border level too.
REGULATORS AND COMPETITION AUTHORITIES — NATIONAL	**REGULATORS AND COMPETITION AUTHORITIES — CROSS-BORDER**
• If the legal system doesn't address how regulators and competition authorities should cooperate, consider informal MoUs. • Consider secondments of employees between agencies. • Always assess whether competition law is better suited than regulation to address a specific issue. • Cooperate on market assessments for regulation. • If there is no competition authority, the regulator must be even more vigilant against the risk of over-regulation.	• Recognise that existing cross-border organisations have the potential to extend their mandates beyond capacity building, best practices and know-how, into cooperation for consistent cross-border decisions. • Consider how best to use resources across borders to avoid duplication and to increase efficiency. The business community would benefit greatly from the quicker adoption of decisions by agencies, and decisions that are aligned across different countries.

Feature 2: Economic regulation addresses market failures and the regulators are clear about reasons to regulate and the effects of regulation

In most countries, the liberalisation of the telecoms market has led to the application of both competition law and a specific set of rules comprising telecommunications sector-specific regulation. In terms of competition policy, mobile operators are generally subject to Significant Market Power (SMP) economic regulation, which is a system of regulation, usually enforced by a telecom-specific regulator, whose jurisdiction is limited to the telecommunications sector. This approach involves periodic market reviews at the end of which certain players are designated as having SMP, and, under some conditions, regulatory obligations are imposed upon them. It is generally understood that an operator has SMP when it enjoys a position equivalent to dominance that allows it to behave to an appreciable extent independently of competitors, customers and consumers.

When properly applied, SMP regulation uses economic analysis to assess the extent to which markets are competitive. Regulators will then decide whether regulation should be introduced, removed or applied to a lesser or greater extent. If a regulator concludes that an operator has SMP in a given market, it must then identify remedies to ensure that effective competition is restored, provided that competition law remedies are not sufficient to address the issue. Thus, SMP regulation should be imposed when there is a persistent market failure and competition law alone is not effective.

Figure 03: Status of adoption of competition law and market power regulation in Latin America

Countries	Regulation based on market power[1]	Competition Law
Argentina	•	•
Bolivia	•	X
Brazil	•	•
Chile	X[2]	•
Colombia	•	•
Costa Rica	•	•
Dominican Republic	X[3]	•
Ecuador	•[4]	•
El Salvador	X[5]	•
Guatemala	X	X
Honduras	•	•
Mexico	•	•
Nicaragua	X	•
Panama	X	•
Paraguay	X[6]	•
Peru	•	•
Uruguay	X[7]	•
Venezuela	X[8]	•

1. An earlier example of a table bringing together the application of competition law and regulation in different countries was in Figure 10 of the Competition Policy Handbook. Please note that neither Argentina nor the Dominican Republic have conducted SMP studies as of July 2018, even though their regulators are entitled to do so by their legislative frameworks. Also, it is possible that in countries where there is no formal system of market power regulation, such as SMP regulation, (marked with a cross), the regulator still applies SMP principles, as a matter of best practice.

2. In Chile, the competition authority applies economic analysis. Chilean legislation establishes that in the event that existing market conditions are not enough to hold the regime of free tariffs, the sector-specific regulator may establish the tariffs of a service qualified as non-competitive.

3. The regulatory framework establishes that the regulator can apply *ex ante* regulation, even though it is not applied systemically. Departing from the SMP model, based on identifying relevant markets and SMP players, Dominican regulation is based on a list of telecommunications services defined in the legislation.

4. Ecuadorian Telecom law approved in 2015 considers the introduction of SMP regulation based on a list of predefined markets; however, regulatory rules required to identify the markets in the list have not been issued yet.

5. In El Salvador, it is the competition authority that evaluates the presence of SMP operators and eventually, assesses necessary steps and obligations.

6. Even though Paraguay does not engage in SMP analysis, its regulator has declared its interest for engaging in such reviews in REGULATEL. *See below* the section dedicated to Paraguay.

7. In Uruguay, the legal framework does not require SMP assessment and ex ante regulation is implemented only with regard to interconnection, through symmetric obligations imposed on all agents. It is up to the executive to decide on asymmetric obligations.

8. As in El Salvador, in Venezuela, the competition authority assesses the presence of SMP operators.

In Latin America, 9 out of the 18 countries[9] listed in Figure 03 recognise formally that the regulator should apply economic regulation only after a proper market assessment and only to address issues that have been clearly identified, and conduct periodic reviews.

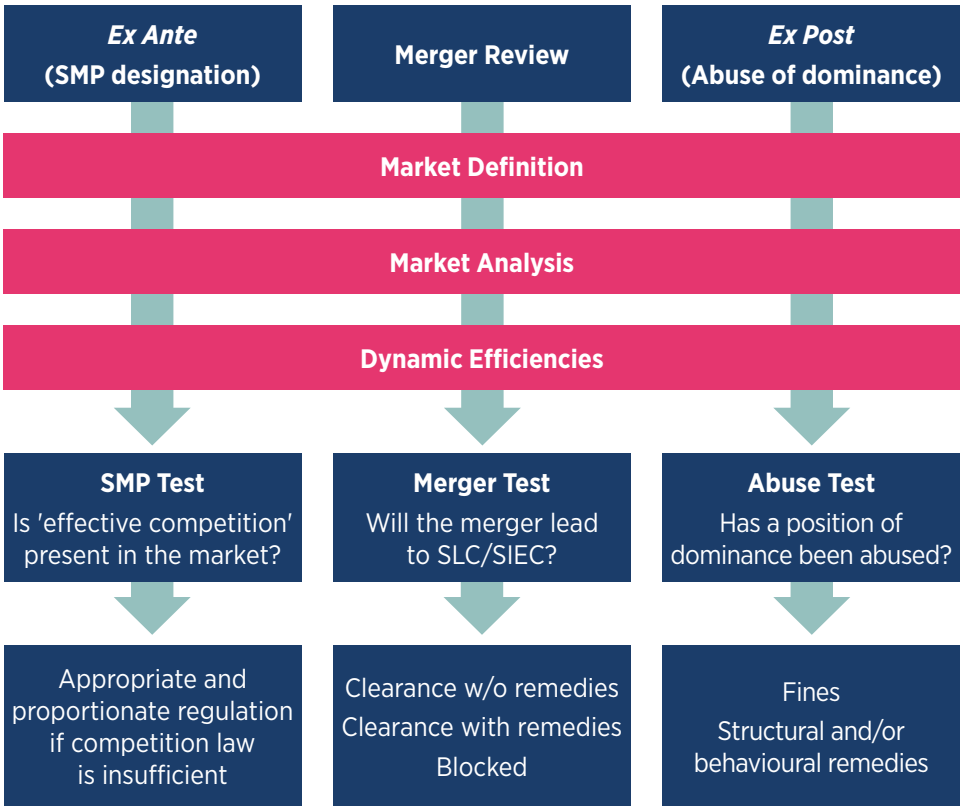
This requirement is a hallmark of advanced digital societies. However, the situation is very heterogeneous. In some countries, in fact, either there is no competition authority or it has been created quite recently. In some other, on the contrary, the telecommunications regulator is in charge of monitoring and promoting competition ex ante, either in conjunction with a competition authority or on a standalone basis.

The countries surveyed in this report, as shown in Figure 03, fall into two basic groups:

- Those that apply a framework for *ex ante* SMP regulation, based on economic analysis of the markets. Such analysis is in turn based on the use of economic tools, such as market definition and SMP assessment, which are also used in the ex post application of competition law rules.

- Those that base their ex ante regulation on different predefined markets (and therefore do not make a case by case assessment) or intervene ex post on the basis of competition law altogether.

Figure 04: Market definition and market assessment in competition law and in SMP



As shown in Figure 04 above, SMP review requires a clear allocation of competences between the different authorities and regulators for the definition and assessment of the relevant markets, the designation of a particular player as holding SMP, and the imposition of appropriate and proportionate regulation, where competition law is not sufficient. With some exceptions, SMP powers lie with the regulator that holds the competences to apply all of the mentioned tools. For example, in **Bolivia**, it is up to the Public Services Ministry to define and assess the relevant markets, while the regulator designates SMP operators and identifies specific obligations. Some countries, such as **Costa Rica** and **Colombia**[10], have a predefined list of relevant markets, even though this does not mean that these markets are subject to SMP regulation. As

9. Based on an analysis of sector-specific and competition legislation in each of the 18 countries included in this report, as of April 2018.

10. It is worth noting that the regulator in Colombia can also define new relevant markets where there has been a change in market conditions i.e. the regulator defined a new market called mobile services corresponding to a bundle of voice and data in 2018.

of October 2019, **Ecuador** is in process of adopting a similar regime, pending the issuance of a regulatory framework for the definition of the relevant markets.

Once SMP has been identified, the measures commonly imposed include, among others, obligations to provide access, to establish separate accounting, and to functionally separate a company. Most of the surveyed countries adopt principles similar to those that underpin European regulation for the application of SMP obligations, namely objectiveness, transparency, proportionality (with periodic review) and non-discrimination[11]. Note, a formal system of SMP regulation is not generally a feature of emerging and transition digital societies.

Further, it is particularly important that **spectrum assignments** are underpinned by a proper market assessment. Failure to do so may result in a country having too many mobile operators, and being caught in a situation where: (i) too many operators are licensed and they find it difficult to compete; (ii) the government pushes for consolidation; (iii) mergers are often complicated by the need for multiple approvals and, sometimes, over-licensing of operators results in the withdrawal of licences. The cases of **El Salvador** and **Panama** provide an illustration of the relevance of understanding the importance of competition policy in spectrum assignment in the context of mergers (see Figures 37 and 38). The case of **Chile** shows the importance of using competition policy to achieve optimum and efficient use of spectrum, rather than imposing low and absolute spectrum caps.

Spectrum assignments, when decided in the absence of a thorough understanding of the market, may lead to undesirable consequences: in some cases new mobile operators find that they cannot meet the price of the spectrum (and all other regulatory requirements), as was the case in different auctions in **Peru** and **Chile** (Figure 40). Setting unrealistically high spectrum prices has also had a detrimental impact in **Mexico** (Figure 39).

Feature 3: Ideally, competition law should be enforced by a competition authority

In most of the countries surveyed, there are two agencies with separate powers of application of the competition rules and regulation. The pros and cons of the different regimes are summarised in Figure 05. Overall, whenever there are two agencies, there will be a need for coordination and cooperation.

Policymakers considering this model should be aware of the potential for the divergent application of competition rules to the telecom sector, compared with the rest of the economy, as well as of the risk that resources may be diverted from the competition authority towards a sector-specific regulator. This could limit the benefits that would arise from the proper enforcement of the competition rules for the economy as a whole.

Policymakers considering an overall competition system review, may also consider a model where sectorial regulators could be integrated within competition authorities. This model has been adopted in New Zealand and in some European countries (Estonia, The Netherlands and Spain).[12]

Feature 4: The competition authority and the regulator understand the interplay between their respective jurisdictions and work together

In Latin America, the level of cooperation between competition authorities and sector-specific regulator varies from country to country, even though most countries reviewed in this survey aspire to some sort of coordination between these two authorities. In **Costa Rica, Colombia, El Salvador, Ecuador** and **Venezuela**, the two authorities have entered into a MoU or are in the process of doing so. In **Costa Rica**, **Colombia**, **Argentina, El Salvador** and **Chile,** the competition authority must require the regulator's non-binding opinion, and/or vice versa in specific situations or disputes. In some cases, such as the **Dominican Republic** and **Paraguay**, requesting the regulator's opinion is not mandatory, but the competition authority may do so. In some cases, the regulator may ask the competition authority to issue guidelines on competition matters related to the telecoms sector, as is the case in **Panama**, or it may instruct it to decide in competition cases, as it is the case of **Brazil.** Sometimes, consultations are informal, as in **Uruguay**.[13]

The need to cooperate is greater in cases of **merger control** where a lack of clarity and the overlapping jurisdictions of the regulator (usually on spectrum issues) and of the competition authority can lead to confusion and contradictory outcomes. For example, in **Argentina,** the competition authority must ask for the regulator's non-binding opinion or a report on mergers affecting the telecoms market. If the regulator does not respond, it is understood that the regulator does not object to the merger. Conversely, in **Costa Rica**, the regulator must request the non-binding opinion of the competition authority.

11. For more information, see REGULATEL in "Modelos de Regulación en el Sector de las Telecomunicaciones y su Relación con la Defensa de la Competencia en los Países Miembros de Regulatel" (2016).

12. Different possible models of institutional arrangements, including the integration model, are considered in detail in the GSMA, CEG report, *Resetting Competition Policy Frameworks for the Digital age*, quoted, Table 1, page 43.

13. As per these countries' declarations to REGULATEL in "Modelos de Regulación en el Sector de las Telecomunicaciones y su Relación con la Defensa de la Competencia en los Países Miembros de Regulatel" (2016).

Feature 5: There is appropriate, meaningful cooperation between competition authorities and regulators at the cross-border level

With the exception of the Andean Nations Community, there is no regional or sub-regional organisation in Latin America vested with adjudication powers in competition policy. A few smaller organisations and working groups deal with competition affairs at the regional level, but these efforts have yet to be translated into the creation of supranational legislation or entities. Nonetheless, the emergence of large, illegal price cartels in the region, such as the much publicised Lysine cartel[18], the Liquid Oxygen cartel[19] and the Cement cartel[20], have prompted some degree of collaboration between competition authorities: See below the section on 'Latin America – International Organisations'.

Figure 05: Existing models in competition policy — Latin America

	Two agencies: Competition authority and separate sectoral regulator	**Two agencies:** Regulator with concurrent powers in competition law	**Two agencies:** Regulator with exclusive jurisdiction to apply competition law to telcos	**One agency:** Only the regulator which has only regulatory powers	**One agency:** The integrated model
EXAMPLES	• Argentina • Brazil • Colombia[14] • Venezuela • El Salvador • Dominican Republic	• Chile[15] • Ecuador • Paraguay • Honduras	• Mexico • Panama • Peru • Uruguay • Costa Rica • Nicaragua	• Guatemala[16] • Bolivia[17]	• N/A
POSITIVES	Ensures that competition law is applied equally to all sectors of the economy	Ensures that competition law is applied based on a good knowledge of the sector, but competition authority retains some competences	Ensures that competition law is applied based on a good knowledge of the sector. No competition authority's involvement.	Convenience. Country complies with WTO Telecommunications Reference Paper	Properly consistent application of competition law and sectorial regulation across all sectors of the economy. Synergies
NEGATIVES	Need for the agencies to understand their roles and to cooperate	Evidence suggests that regulators tend to apply regulation more than competition law, while the competition authority defers to regulator	Risk of over-reliance on regulation of the sector. Risk that regulator uses regulatory categories when applying competition law	Only telcos are subject to scrutiny, which doesn't account for the convergence in the digital economy. This results in failure to guarantee a level playing field	If the agency is not properly resourced, risk of backlogs. Need for coordination across the different parts of the agency.

14. Even though it is the Superintendence of Commerce the entity in charge of applying the competition rules, the telecoms regulator has competence, when applying sector-specific legislation, to take the necessary measures to protect and advance competition in the telecoms sector.

15. Even though primary jurisdiction on competition matters relies on competition authorities, in some instances, the Telecommunications and Transport Ministry, at the initiative of Subtel, the regulator, is directly entitled to control and supervise anticompetitive conduct *ex post* when such conduct is expressly forbidden in the general telecommunications law or in telecommunications regulation (e.g. the general telecommunications law prohibits discrimination in the context of interconnection).

16. Of all surveyed countries in this report, Guatemala is the only one with no competition authority and competition legislation in force. Competition legislation is comprised of general principles on competition contained in the Constitution, the Code of Commerce and the Criminal Code.

17. In Bolivia, the sector-specific regulator applies provisions related to competition contained in the telecoms regulation. Even though there is competition legislation in force, it is not applicable to the telecoms sector.

18. The Lysine price-fixing conspiracy was an organised effort during the mid-1990s to raise the price of the animal feed additive lysine. A criminal investigation resulted in fines and three-year prison sentences for some executives who colluded to fix prices. The investigation yielded $105 million in criminal fines, a record antitrust penalty at the time (James M. Griffin, Deputy Assistant Attorney Gen., Antitrust Div., Dep't of Justice, The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Aug. 12, 2003).

19. The investigation of the Liquid Oxygen cartel begun in Argentina in 2001 and was prompted by complaints from hospitals that were unable to secure contracts for liquid oxygen from competing suppliers. The complaints caused the CNDC to begin an investigation. The CNDC conducted dawn raids on the four companies involved. The four respondents were fined a total of $24.3 million (OECD – "Competition Law and Policy in Latin America peer reviews of ARGENTINA, BRAZIL, CHILE, MEXICO AND PERU", page 15, Box 1).

20. In Argentina, six cement companies were alleged to have engaged in a nationwide market allocation scheme for a period of almost 20 years. An investigation, which began in 1999, probed an agreement coordinated by the industry business association, the Association of Portland Cement Manufacturers – AFCP. Its members were found to have exchanged detailed, company-specific and current information on production, shipments and sales: There was evidence that on one occasion the cartel punished a producer who was not observing the agreement. There was also some evidence of local price fixing agreements in the industry. Five of the six producers were fined a total of $106 million – a record fine under the current competition law (OECD – "Competition Law and Policy in Latin America peer reviews of ARGENTINA, BRAZIL, CHILE, MEXICO AND PERU", page 15, Box 1).

About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting more than 750 operators with almost 400 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organizations in adjacent industry sectors. The GSMA also produces the industry-leading MWC events held annually in Barcelona, Los Angeles and Shanghai, as well as the Mobile 360 Series of regional conferences.

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