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

A Practical Handbook

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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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Foreword

The technological progress resulting from digitization has generated enormous benefits for users throughout the world, and Latin America is no exception. By mid-2018, there were 442 million unique mobile subscribers across Latin America and the Caribbean. As the primary way to access the internet, mobile technologies and services generated 5% of GDP in Latin America, a contribution that amounted to US$280 billion of economic value added in 2017. This means that Latin America has the unique opportunity to adapt its regulatory frameworks and competition laws in an ambitious and comprehensive manner. This allows it to understand all the dynamism of the phenomenon of digital technological convergence and, in turn, to bring clear benefits for its citizens and businesses, which increasingly demand greater connectivity.

In this context, the interaction between sector-specific regulation and competition law is crucial for the future of the regional digital economy. Evidence shows that smart competition policy and sectorial regulation, based on proper economic analysis and market assessments, can be a driver of digital inclusion and social transformation.

This booklet, a regional companion to the general GSMA Competition Policy Handbook, together with the chapters from Sub-Saharan Africa and Asia, looks at the common thread throughout these matters in Latin America. Ultimately, its objective is to clarify uncertain issues and identify regulatory trends, setting the ground to promote a constructive dialogue of the new dynamics propelled by digitisation.

This calls for a thorough understanding of those competition principles involved in competition policy and sectorial regulation. For example, all the countries surveyed in this report, except one, have an established system of competition law and all of them have functioning telecoms regulators. As a consequence, even though there is a trend towards exclusive application of competition rules by the sectorial regulators throughout the region, cooperation is still of utmost importance for a coherent implementation of all the relevant rules (both antitrust and regulatory). Cooperation, moreover, is crucial to achieve an effective, common understanding of the competitive forces that are shaping the digital economy.

As the voice of the mobile industry in Latin America, the GSMA can provide unique insights on how traditional telecommunications categories are shifting and how this shift should influence and ultimately shape digital policy-making. Looking at the 18 surveyed countries, there is a persistent trend on regulatory asymmetries between different sectors that provide similar services. Static regulation, moreover, tends to be prescriptive, applied *ex ante*, and therefore usually unable to fully address market failures.

In order to accompany the growing environment of the digital ecosystem and maximize the socioeconomic benefits of a thriving mobile industry, Latin American countries must advance towards a “future proof” regulation, in which competition principles are integrated between the different agencies that have the task to enforce them. This does not entail the absence of regulation, but on the contrary, embedding regulatory frameworks of general principles that are complemented by *ex post (rather than ex ante)* intervention on the basis of proper market analysis. Relying on competition law and principles, when possible, is crucial to avoid the risks of over-regulation.

The Competition policy considerations hereby included are therefore general in scope, and take in consideration the strong competitive dynamics evinced in Latin America in the past years. Nonetheless, the suitability of such recommendations will depend on the structural features and specific conditions of each market.

Ultimately, this Latin American Chapter of the GSMA Competition Handbook, looks objectively at the regional issues, recent case-law and precedents and aims at representing a framework of reference for practitioners, policy-makers, regulators and competition authorities. Hopefully, this document will help them derive conclusions and guide them as digital transformation drives economic progress and social development in Latin America.

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 funtioning 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 the competition authority and the regulator understand **the interplay** between their respective jurisdictions and **work together** to address 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 does not 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. The Ecuadorian Telecoms law approved in 2015 considers the introduction of SMP regulation based on a list of predefined markets; however, regulatory rules required to identify those 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.

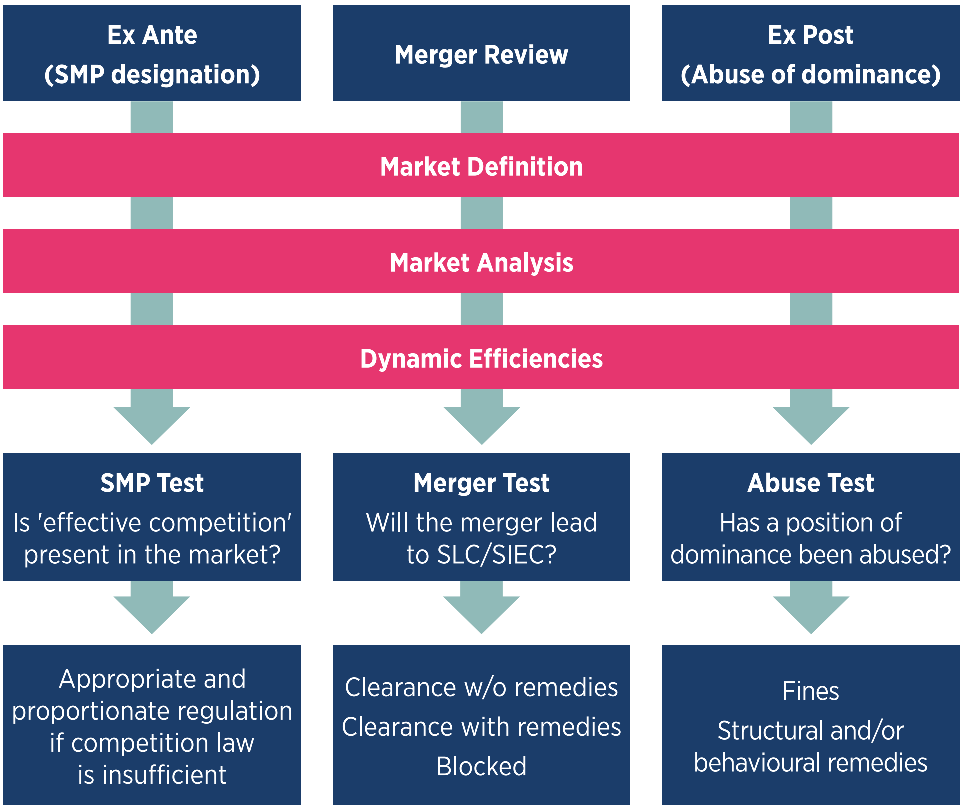
This requirement is a hallmark of advanced digital societies. However, the situation is very heterogeneous. In some countries, in fact, either there is no competition authority or it has been created quite recently. In some other, on the contrary, the telecommunications regulator is in charge of monitoring 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 the 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 importance 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 the Superintendence of Commerce is the entity in charge of applying the competition rules, the telecoms regulator has competence, when applying the 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).

Introduction

A diverse region, Latin America is characterised by a varying degree of socioeconomic and digital development. However, on average, the region is digitising more rapidly than other parts of the world. Across Latin America and the Caribbean, smartphone adoption climbed to 68% of total connections by June 2018. Smartphone adoption is consistently high across the region and is accelerating in many countries, such as Chile, Colombia, Argentina and Peru. In the region's largest market, Brazil, there were 171 million smartphone connections in mid-2018, accounting for 40% of the region's total installed base. Smartphones represent three quarters of total mobile connections in Brazil, a figure that will rise to 86% by 2025, according to GSMA Intelligence. Across the region, a further 189 million smartphone connections are set to be added between now and 2025, boosting the adoption rate to 78%.

GSMA Intelligence estimates 4G accounted for 35% of total connections in the region in mid-2018 and was on course to overtake 3G by the end of the year, before climbing to 64% of the total base by the end of 2025. With 4G investments still underway and with consumers' adoption of the technology in its infancy, most mobile operators in the region view 5G as a technology for the medium to long term. The majority of 5G launches in Latin America and the Caribbean are likely to occur in the middle of the next decade, after Release 16 of the 3GPP standards, prompted by significant improvements in the economies of scale of devices and infrastructure. GSMA Intelligence expects 5G connections to exceed 62 million by 2025, equivalent to 8% of total connections in the region.[21]

Compared with developed regions, Latin America is still relatively unconnected, with unique subscriber penetration (which measures mobile usage on a per-person basis rather than per-SIM-card basis) of 68%, compared to more than 84% in North America and 85% in Europe. While subscribers' growth in Latin America and the Caribbean has slowed in recent years, the region still has substantial room for growth and will account for 10% of all new subscribers globally between now and 2025, according to GSMA Intelligence.

There are also wide variations in mobile market maturity across the region (see Figure 06). In general, the "southern-cone" countries (**Argentina, Chile** and **Uruguay)** are already fully saturated, with a unique subscriber penetration level above 90%.

At the other end of the spectrum, the **Dominican Republic**, **Guatemala, Nicaragua** and **Honduras** have penetration rates below the regional average of 70% and well below saturation level; these will see significant growth through to 2020. Other large countries, such as **Brazil, Mexico, Paraguay** and **Colombia** have penetration rates near the regional average, leaving considerable room for growth; hence these countries will represent the majority of subscriber growth through to 2020.

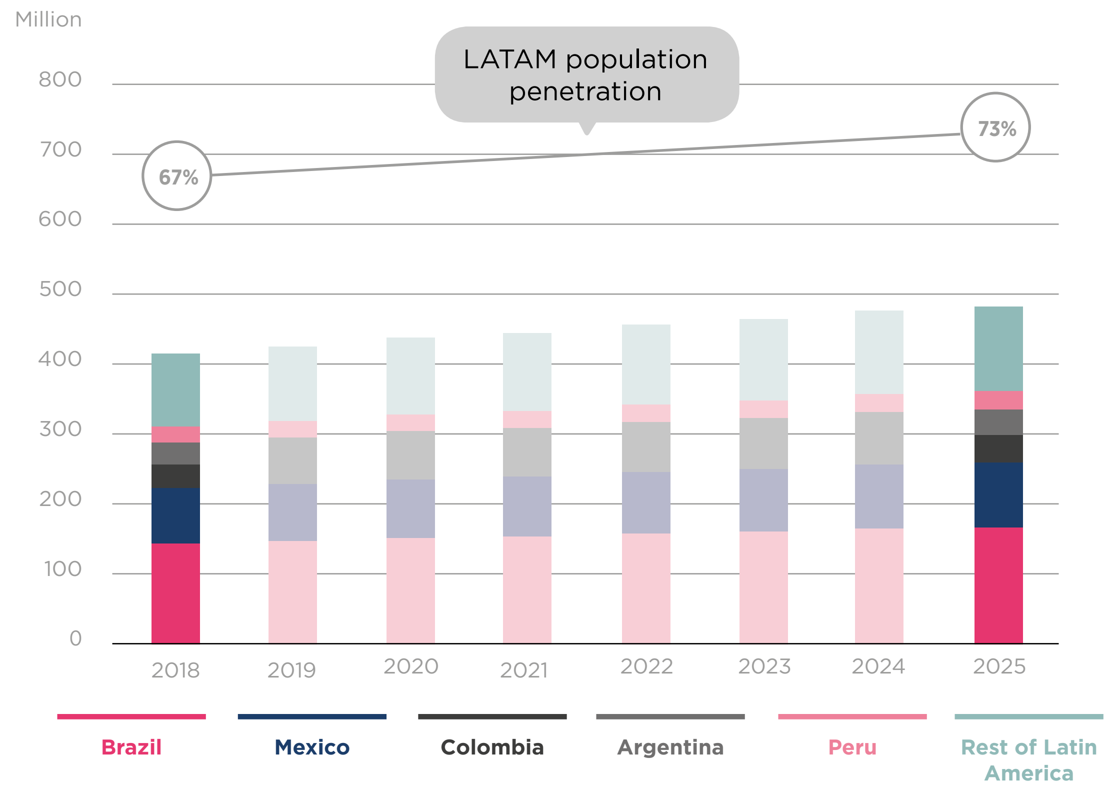
The internet, and particularly mobile broadband, has become a key enabler of social and economic development in Latin America. Digital inclusion – defined as the expansion of connectivity and mobile internet adoption – can deliver broad economic and social benefits by bringing communications services to previously unconnected populations. This in turn can help reduce poverty, improve infrastructure and services, and further increase internet access and usage. Unconnected and underserved communities risk falling further behind, widening the digital divide, if the barriers to digital inclusion remain unaddressed.

Despite considerable progress in building out mobile broadband networks over recent years, 6% of the population in Latin America still has no access to a mobile broadband network (see Figure 07).[22] Although this is a relatively small number compared to other developing regions, the coverage gap will not close without a significant rethink in approach, regulation and policy.

21. GSMA, The Mobile Economy Latin America and the Caribbean 2018, available here: https://www.gsmaintelligence.com/research/?file=26d3b58c5ef4fa27930c973feff2d9ff&download

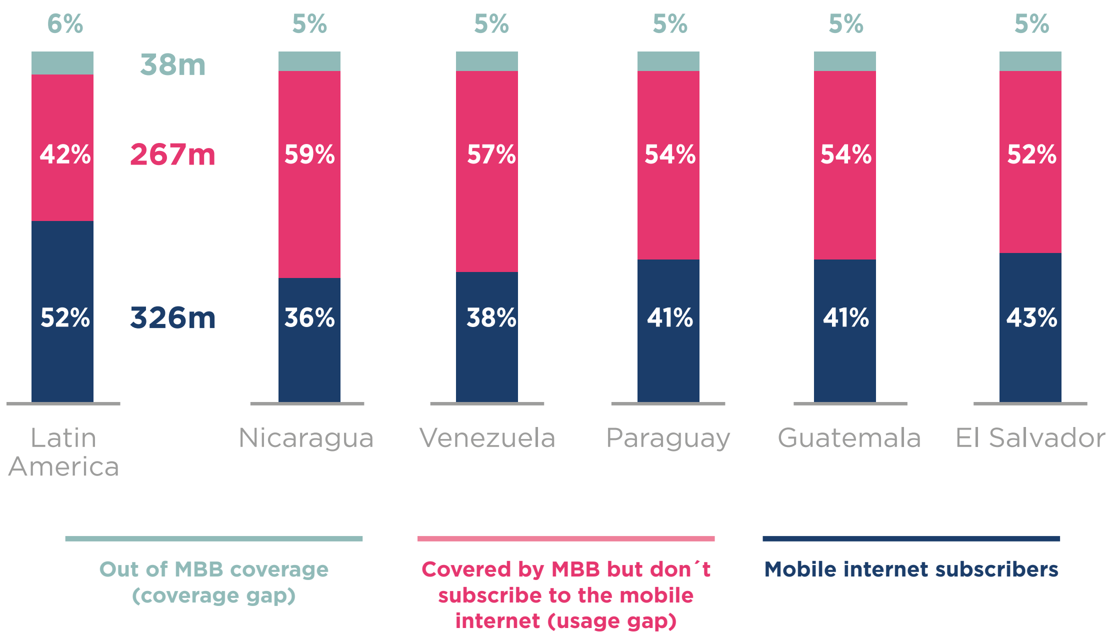
22. GSMA, The Mobile Economy Latin America and the Caribbean 2019.

Figure 06: Subscriber penetration in Latin America (2018 – 2025)



Source: GSMA The Mobile Economy – Latin America and the Caribbean 2019

Figure 07: Coverage to total population in Latin America



The role of regulation and competition law in supporting the expansion of the digital economy

The system of regulation and competition law has an important role to play in promoting investments and innovation, and ultimately connecting the whole continent. But, as the World Bank's Telecommunications Regulatory Toolkit[23] says: "*Regulation is not a panacea. While it may address market power concerns, regulation comes with costs. [....] Where regulation is necessary, regulatory forbearance is the key to good outcomes. Regulatory forbearance is about focusing regulation to where it is needed, and withdrawing regulation in those parts of the market where it is no longer necessary.*"

Government and regulatory intervention, even when well-intended, can result in market distortions.[24] Distortive interventions include:

- arbitrary and opaque rules that do not allow for transparency;
- rules that discriminate in favour of home-grown companies, or state-owned companies;
- rules that effectively discriminate against one sector;
- application of blanket provisions imposing excessive and unrealistic goals for quality of service, leading to uniform provision of services and extra costs;

In a digital and convergent economy, many of these distortions may affect incentives to invest. As GSMA has previously analysed, digital markets are characterized by recurrent waves of investment and innovation that lead to technological progress, where market shares can be frequently higher than those found in other sectors, due to the need of massive, recurrent investments. This investment may be discouraged if those specific characteristics are not properly considered.

To minimise the risks of distortionary effects, policymakers can ensure that regulatory intervention adheres to common guiding principles. Even in the absence of changes to the legal system, regulators themselves can already apply regulation in a way that minimises distortions, by considering the effects that the remedies they seek to impose will have on competition.

At the same time, the application of competition law to the digital ecosystem is also vital to ensure its development. Competition policy enforcement should involve proper consideration of the potential that competition law has when dealing with issues that arise when some market players enjoy market power. This can only happen if the necessary legal, policy and operational frameworks are in place. Allocating resources to the application of competition law across all sectors of the economy has been demonstrated to have deep effects for welfare gains, with the lowest income population benefiting the most. Figure 08 provides an overview of studies that show the positive effects of removing policy and regulatory obstacles to competition.[25]

In both instances, i.e. regulatory intervention and competition enforcement, any obligations should only be imposed where necessary and after a proper assessment. They should be based on sound principles, and be proportionate. The GSMA's Competition Policy Handbook has a good analysis of the best practices in this area.[26] Public authorities responsible for competition policy should also ensure that the rules, and their application to the digital economy, reflect the latest developments and challenges in the digital ecosystem. The 2016 GSMA study on *Resetting Competition Policy Frameworks*[27] looks at the economic, legal and institutional issues arising in today's digital economy, and provides a good reference point to consider these issues. More recently, the GSMA study on the *Data Value Chain*[28] analyses the effects of data-driven business models on the digital ecosystem, where the interplay between trust, security, network effects and market power has important effects on the competition dynamics.

The scope of this report

This report provides a comprehensive overview of the current status of regulation and competition law frameworks in Latin America. It first reviews the institutional and regulatory frameworks that apply to the digital ecosystem in Latin America, before considering a selection of regulatory interventions from the recent past. The subsequent sections look at the institutional and competition law framework across the region, and the report concludes by presenting a selection of competition law enforcement case studies.

23. *Telecommunications Regulatory Toolkit*, 10th Anniversary edition, quoted, pp 31 and 32

24. World Bank Group, *Breaking down Barriers – unlocking Africa's potential through Vigorous Competition Policy* (WBG African Competition Policy Report), available at: http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-Africa-Competition-Report-FINAL.pdf, page 108.

25. T. Bengazo and S. Nyman, *How Competition affects the Distribution of Welfare*, World Bank Group, at: http://documents.worldbank.org/curated/en/662481468180536669/pdf/104736-REPF-Competition-and-Poverty.pdf

26. GSMA, *Competition Policy in the Digital Age*, (2015) pp. 25-34, https://www.gsma.com/publicpolicy/resources/competition-policy-digital-age

27. GSMA, *Resetting competition policy frameworks for the digital ecosystem,* (October 2016) https://www.gsma.com/publicpolicy/resources/resetting-competition-policy-frameworks-for-the-digital-ecosystem

28. GSMA, *The Data Value Chain June* (June 2018) https://www.gsma.com/publicpolicy/wp-content/uploads/2018/07/GSMA_Data_Value_Chain_June_2018.pdf

Regulation

A regulatory regime that supports change and innovation is a precondition for a level playing field in the digital economy. In cases where competition law is sufficient to deal with the issues identified, regulatory forbearance, limiting regulation to instances of market failure, reduces the risks of over-regulation. The most advanced societies in Latin America have predictable, fact-based, systems of regulation and a way for the competition authority and the regulator to cooperate and coordinate sectorial interventions. More international coordination would help to ensure that operators that work across countries are faced with similar substantive rules, and can easily interact with all the regulators involved in any cross-border investigation.

National laws

The following countries have a system of regulation based on the market power of the operator:

Argentina: A comprehensive telecommunications law was passed in 2014, establishing a new regulatory framework, after almost thirty years of little change. In 2016, the new law was modified and integrated by a Decree of Necessity and Urgency,[29] which among other important modifications, allowed to correct important asymmetries. The telecommunications-specific regulator was merged with the media regulator. Now, the National Communications Entity (ENACOM) acts as a sector-specific convergent regulator.

ENACOM is tasked with the regulation and promotion of competition and development of telecommunication services, including the management and monitoring of networks and spectrum resources, granting or withdrawing licenses and authorisations, managing and developing universal service programmes, intervening in interconnection, authorisation and spectrum allocation issues. Moreover, ENACOM has powers to analyse the existence of significant market power players and set conditions to guarantee competition in each market and assess the necessity of asymmetric obligations to significant market power operators.[30]

As a result, the regulatory framework has been reformed through a series of decrees and resolutions on different topics. These include infrastructure-sharing, spectrum use, licensing and consumer protection, and quality of service, among others.

Figure 09: Artificial Barriers to Convergence in Argentina

Historically, Argentina had separate legislation and regulators for broadcasting and telecommunications services. Among other things, the regulatory framework established several barriers to convergence by prohibiting network operators from being broadcasters or providing satellite broadcasting services, which were traditionally excluded from ICT regulations.

To promote convergence, Argentina should consider its objectives on mobile broadband penetration, diversity of mobile services, competition and investment. To that end, regulation should be based on general flexible principles and be technology neutral, adopting an ex post approach that better suits the digital age. The elimination of artificial barriers to convergence will lead to greater competition, through more provision of services that are identical or substitutes. The result will be an increase in consumer welfare through lower prices and better quality.[31]

29. Decree of Necessity and Urgency (DNU) 267/15.
30. *See* Argentina Telecommunications Law 27078 (2014) including modification by Decree 267/2015.
31. For more information, see, GSMA, *Claves para la modernización de la regulación del ecosistema digital en Argentina* (2017).

Bolivia: The telecoms regulatory framework and sectorial institutions are relatively young in Bolivia. The General Law of Telecommunications, Information Technology and Communications was passed in 2011, while the general regulation implementing it was approved in 2012 and a regulation for the development of ICTs was signed in 2013.

The Bolivian regulator, the Authority for Regulation and Control of Telecommunications and Transport (ATT), is part of a system of Bolivian regulators established in 2009 throughout different sectors the Audit and Social Control Authorities.[32] ATT has powers to publish tariffs and duties and authorise, regulate and monitor telephony services; it also publishes, controls and monitors retail prices.[33] Another competence of ATT is that of declaring that a provider has a SMP position in a relevant market when it has the largest share of gross revenues, in a period of twelve previous consecutive months. However, the provider's market share needs to be, on average, above 40% and the difference in market share to the second competitor equal to or greater than 10%. When an operator is declared as having a SMP position, it is subjected to a tariff regime oriented to costs.[34]

Brazil: In the early 1990s, state-owned companies under the jurisdiction of Telebrás composed the telecoms sector in Brazil. However, since 1997, when the General Telecommunications Law (LGT) came into force, almost all public telecommunications operators have been fully privatized. The LGT provided the legal structure for telecoms services, defines the general principles governing telecoms services, and has created the Brazilian Telecoms Agency (Anatel).[35] A year after its foundation, the agency established the regulations that formed the basis for the privatisation of the companies that were formerly part of the Telebrás system.[36] As explained in Figure 10, after many years of discussion, in 2019 Brazil passed a new regulatory framework.

Anatel had established a General Plan of Competition Objectives (PGMC, in Portuguese), which introduced rules for wholesale markets and ex-ante asymmetric regulation. These obligations were issued on the basis of predefined relevant markets – established on the basis of product and geography - to identify SMP agents in each of these markets. In 2018, Anatel reviewed the operators' SMP designations (after a review in 2017). Operators designated as having SMP must comply with the same asymmetric obligations previously established by Anatel in seven designated markets: leased lines, passive infrastructure, fixed and mobile telephone network interconnection, national roaming, access networks and data capacity transport. This determination establishes guidelines for classifying markets by differentiating them into 4 levels of competitiveness, taking into account the offers of wholesale capacity and retail services for each municipality, with the following levels: competitive; potentially competitive; few competitive; not competitive. This SMP designation is part of a broader methodology review of market assessments, which also included a definition of "small supplier" as one that belongs to a group that has less than 5% of the national market share in each retail market in which it operates.[37]

Figure 10: **Bill 13.879 and the importance of updated regulatory frameworks to incentivise investment**

A bill of law approved in October will redesign the Telecommunications Act as an effort to further deregulate the sector.[38]

Among other points, this new regulatory framework allows the conversion of concessions into authorisations (a private regime). Such conversions will not be granted under payment. Instead, Anatel will decide on the fulfilment of specific requirements, such as the provision of service in areas without competition, the assumption of investment commitments and warranties for continuity of the contracts.

This bill also incorporates the concept of "investment commitments". The former Telecommunications Act required that authorisations for the use of radio frequencies were granted for up to 20-year terms that could be extended once for up to further 20 years under the payment of a public price. The bill permits successive extensions of up to 20-years term and the conversion of the public price into investment commitments. Also, the modernisation of the regulatory framework allows operators to migrate their concession titles to updated licenses for their operations for the following years, thus providing proper incentives and legal certainty for investments.[39]

32. Bolivia, Supreme Decree 71/2009, art. 1.
33. Bolivia, Supreme Decree 71/2009, art. 17 and Law 164/2011, art. 14.
34. Boliva, Supreme Decree 1391 of 2010, art. 123.
35. Brazil, Law 9472 of 1997.
36. Brazil, Decree 2338 of Oct. 7, 1997
37. Brazil, Anatel Regulation N ° 694, de 17 July 2018.
38. Brazil, Law 13.879/2019.
39. For more information on this, see GSMA, What should the public policy of the next president include, to integrate Brazil into the digital economy? (2018).

Further, the Internet Act (*Marco Civil do Internet*), together with its regulatory decree,[40] establishes principles, guarantees, rights and duties for the use of the Internet in Brazil, as well as guidelines for state-oriented action with respect to such matters (see Figure 11).

Anatel is charged with implementing the national telecommunications policy, regulating the provision of telecommunications services, managing and monitoring radio-spectrum and satellite orbit use, certifying and homologating telecommunications terminal equipment and controlling and preventing economic abuse in the telecommunications sector, including the analysis of concentrations, without prejudice to the power of the national competition authority.[41]

Brazil is the only country, amongst those surveyed for this report, which has enacted a comprehensive regulatory framework for digital players across the ecosystem.

Chile: Part of the Ministry for Transport and Telecommunications (MTT), Subtel acts as both regulator and policymaker in the telecommunications sector within the framework of the General Telecommunications Law (LGT)[42], which after two major reforms, is still in force.

Subtel is responsible for upholding the principle of free and equal access to telecommunications services, a classification of telecommunications services, a general regulatory framework for the installation, operation and exploitation of such services, as well as licencing provisions, price regulations for some services and spectrum fees. Subtel proposes and develops sector-specific policies in Chile, which must then be approved by the President.[43] Note, Subtel does not directly apply economic analysis linked to competition law, meaning that it does not define relevant markets nor dominant players, since these are the responsibility of the competition authority.

During the nineties, Chile was at the forefront of telecommunications policy in Latin America, with one of the better regulatory systems in the region. However, in the past decade, a lack of vision with respect to convergence regulation, as well as an over-regulation, have seen this development stall (see Figure 12 for an example of this stagnation). Furthermore, recent spectrum-related decisions have imperilled the future of the digital economy in Chile, ahead of the arrival of 5G in the region. These decisions are covered in the section on spectrum matters.

A rigid approach to digital ecosystem regulation can distort the market and restrict technological and commercial innovation, which results in loss of consumer welfare. An example of this is Subtel's opposition to zero-rating offers (see Figure 13). In contrast to what happened in Brazil, where CADE is analysing zero-rating offers from an economic perspective (see Figure 22), Subtel ordered internet providers to stop "sponsored data" plans in 2014 under a net neutrality law.

Figure 11: Internet Law in Brazil

In 2014, Brazil passed an Internet Law (better known as *Marco Civil do Internet*), which is the first of its kind in the region, regulating several issues relating to the internet and users' rights, including intermediary liability, data protection and net neutrality, and encompassing digital players. In 2016, the government issued the regulatory decree to the Internet Law, after a public consultation.

The Brazilian telecoms regulator, Anatel, along with the antitrust and consumer protection agencies are charged with enforcing the decree, following guidelines issued by the Brazilian Internet Steering Committee, which is a multi-stakeholder entity in charge of overseeing the management of the ".br domain and other internet governance initiatives.

The Internet Law had initially caused some controversy by including provisions on the mandatory storage of data in data centres located in Brazil, including the liability of entities in charge of handling personal data. These were excluded from the final text.

The decree also provided more details on the net neutrality rules applicable to broadband access, exempting specialised services from the scope, and establishing guidelines for zero rating offers.

40. Brazil, Law 12965 of 2014; Decree 8771 of 2016.

41. Brazil, Decree 2338 of Oct. 7, 1997; Anatel Res. 612/2013.

42. Chile, Law N° 18,168 of 1982.

43. 31 For more information, see, "Regulación de las telecomunicaciones en Chile: Potestades normativas, tradición divergente y desafíos de la convergencia", Lucas Sierra (2008) https://www.academia.edu/1308487/Regulaci%C3%B3n_de_las_telecomunicaciones_en_Chile_Potestades_normativas_tradici%C3%B3n_divergente_y_desaf%C3%ADos_de_la_convergencia

Figure 12: Minimum speeds in Chile

In 2017, Chile's Senate passed a law allowing Subtel to set minimum internet speeds and quality of service (QoS) indicators for broadband services on the following basis:

- Internet Service Providers (ISPs) must guarantee a minimum (further unspecified) fixed and mobile internet speed offered commercially, for both "national" and "international" connections;
- ISPs must enable end users to access a tool to monitor speeds and other technical parameters; and
- Operators must clearly inform users about the expected speed of national and international connections.

An independent body financed by operators will perform measurements of broadband QoS. Consumers will be able to also monitor compliance with the new obligations by measuring parameters established by Subtel. Subtel must decide on the technical parameters to implement these obligations, differentiating between monitoring of national and international connections. There is currently a draft Technical Plan proposed by Subtel to implement this, which has not been approved as of July 2018.

This kind of static regulation of QoS is counterproductive. A dynamic regulatory context would recognise the ever-changing necessities, demands and circumstances of each user and business. Also, QoS regulation should be focused on transparency and information publicity, taking into account technical restrictions and circumstances that are not controlled by operators. Absolute QoS parameters are inefficient, as is the use of QoS as a means to achieve differentiation from competitors and other market players.[44]

Figure 13: Zero-rating offers in Chile

In 2010, Chile approved a restrictive net neutrality law[45] and, in 2011, Subtel published a set of regulations for the implementation of this legislation.[46]

In 2014, the regulator ordered mobile operators to cease their offers of "free social networks", mainly comprised of plans that enabled companies to sponsor the data usage for certain social networks, allowing certain mobile subscribers to make use of these apps without impacting their monthly data allowance. Such offers were deemed to be non-compliant with the principles included in the net neutrality legislation and its regulations. Subtel argued that such offers entailed arbitrary discrimination and traffic management, which had negative effects in the mobile social network market.[47]

Such restrictive decisions and regulations ignore the fact that consumers demand an increasing amount and variety of mobile content. Since they have limited network capacity, mobile operators need the flexibility to differentiate between types of traffic to provide an optimal consumer experience. In this context, Subtel's regulations and decisions risk hindering the development of innovative services by imposing a blanket prohibition on prioritised service delivery models. Limiting operator's flexibility to manage networks, and offer a variety of service models, restricts innovation and reduces consumer choice.

Colombia: The institutional landscape in Colombia is granular and dispersed, comprising a traditional telecommunications regulator, the Communications Regulation Commission (CRC), and the National Spectrum Agency (ANE), which work in the framework of the Information and Communication Technologies Ministry. The CRC has powers to promote the development of telecommunications in the context of convergence and the broader concept of an information society. For example, in 2019 it published a report analysing the disruptive impact of over-the-top players in a convergent context: it concluded that digital video platforms would be monitored, as well as their substitutability or complementarity between new and traditional services.[48]

44. For more information on recommended institutional reforms in Chile, see GSMA, "Claves para la Modernización de la Regulación del Ecosistema Digital en Chile" (2017), available at https://www.gsma.com/latinamerica/wp-content/uploads/2017/11/RegModCHILEesp.pdf

45. Chile, Law 20453 that establishes the Principle of Net Neutrality.

46. Chile, Regulatory Decree 368 of 2010 the Features and Conditions of Net Neutrality in the Access to Internet.

47. Chile, "Subtel: Ley de Neutralidad y Redes Sociales Gratis", 27 May 2014, available at https://www.subtel.gob.cl/ley-de-neutralidad-y-redes-sociales-gratis/

48. https://www.crcom.gov.co/uploads/images/files/ESTUDIO-OTT-COLOMBIA.pdf

In the past decade, Colombia has also moved towards a comprehensive, pan-ICT sector regulation, which calls for CRC to promote competition and investment, protect the rights of users, regulate telecommunications networks' use and access, as well as interconnection issues and the definition of essential facilities. However, the OECD has pointed out that the institutional fragmentation within the ICT sector has resulted in high transaction and regulatory costs, as well as unnecessary overlap between institutions.[49] There have been different proposals to modify the institutional landscape (see Figure 14).

The CRC is charged with powers to "adopt necessary measures with the objective of preventing abuses of dominance, being able to adopt differentiated regulation in accordance with the position companies hold in the market, provided a market failure has been previously evidenced".[50] Thus, the Colombian regulatory framework includes economic analysis as a tool to determine relevant markets and agents holding SMP. As long as a market failure has been evidenced, the implementation of asymmetric measures is temporary and proportional to the level of competition achieved in such market.[51] To do so,

Figure 14: Towards a new institutional design in Colombia

In June 2019, the Colombian government passed bill that updated the regulatory framework with the objective of simplifying the institutional ICT design and creating incentives to increase investment in digital services, which entered into force in July 2019. This law merged the telecoms and media regulators (CRC and ANTV), whereas ANE's functions and competences remain unchanged. However, the new regulator's internal governance includes separate Commissions: one is the Audiovisual Content Commission, which will attend issues related to information pluralism and audiences' rights; and the other is the Communications Commission, which will be in charge of the technical and market regulation of the sector.

This law also seeks to simplify authorisation regimes and improve spectrum use, by extending the time limits on spectrum licenses and employing efficiency benchmarks to set spectrum prices (leaving aside any short-term fund collection criteria). This legislative reform also establishes legal mechanisms to multiply and facilitate infrastructure investment to allow wider access to digital services.[52]

Overall, the law is a positive step:

- A convergent regulator will allow for future-proof regulation, based on principles and objectives that extend beyond existing technologies and don't limit innovation towards new and better services.
- The updates to spectrum regulation will help maximise social welfare, while providing network operators with the certainty and predictability necessary to sustainably invest in infrastructure deployment. Particularly, spectrum licenses are now extended from 10 to 20 years, with the possibility of swift renewal. The intention of this reform is to incentivize investments to connect rural areas.
- The new regulator will maintain the possibility of applying SMP regulation, but it now adds, expressly, the condition of performing a market assessment that proves the existence of market failures.
- The universal service funds for telecoms and broadcasting services will be unified in a single fund. This fund will be used to create incentives that synergize private and public sectors and their initiatives, with the objective of accelerating investments for the effective closing of the digital divide, which includes connecting all Colombians and promote technological appropriation.

It remains to be seen how, in the application of this law, the spirit and objectives are reflected in the decisions that implement this new regulatory framework. This includes more efficient auctions (that provide certainty regarding the renewal of licenses), the use of the new single fund to achieve tangible connectivity goals, and the incorporation of the "maximization of social welfare" paradigm into the implementation of the law to eliminate barriers to infrastructure deployment. If this is the case, legal certainty will increase investment, which will ultimately result in benefits for all citizens, competitiveness and productivity.

49. OECD, Review of Telecommunication Policy and Regulation in Colombia (2014).
50. Colombia, Bill 142 of 1994 and Bill 1341 of 2009.
51. Colombia, CRC Regulation 2058 of 2009.
52. Colombia, Bill on the Modernization of the ICT Sector.

Figure 15: Colombian regulator removes 25% of its regulation

In January 2019, the CRC announced the removal of 203 rules that it considered obsolete, to simplify its telecoms regulatory framework. Identified together with the Superintendence of Commerce (the competition authority), these measures constitute the first phase of a regulation simplification roadmap proposed by the CRC.

The aim is to avoid duplication, transitory or out-dated rules, thus incentivising competition and investment, along with new business models. The removed rules include articles on text messaging, public phones and operator services.

Subsequent phases will include the revision of rules regarding equipment reported as stolen, information reports, user protection, essential facilities, infrastructure sharing, among other measures.[53] These steps entail periodic revisions until 2023, which will include regulatory impact analysis performed by the National Planning Directorate.

This decision is a positive first step towards levelling the digital playing field and placing the right competitive incentives for competition and investment. The plan for regulatory simplification means that regulatory interventions are only likely to take place in businesses or markets with clear evidence of market failure, that threaten competition or the proper functioning of markets, thus setting a best practice for the rest of the region to follow closely.

legislation establishes that the CRC must periodically review the effect of such obligations and adopt additional measures or remove them, as necessary.[54]

The CRC has a pre-defined list of six relevant markets susceptible to regulation and has the competence to carry out a SMP analysis that considers concentration and market share indicators, as well as a prospective market evolution analysis. In this regard, the CRC will consider a "dominant position" as that which provides a player with the possibility to determine, directly or indirectly, the conditions of a market, with complete independence from the rest of the market competitors.[55] The CRC has undertaken market assessments, applying different indexes, which have led to more innovative analysis of bundled services in the mobile market. Since 2017 the CRC is carrying out a SMP analysis, but has not come to some conclusion yet.

It is also worth noting that, as mentioned above, in May 2019 and after public consultations, CRC published a report on the role of Over the Top services (OTTs) in the communications sector. This report analysed the impact of mobile voice, audio-visual, and messaging services through different quantitative and econometric modelling, to measure the possible substitutability of OTTs and traditional broadcasting and telecommunications services. This report concluded that the financial impact of OTTs would only increase in the following years and become an important element in Colombia's consumer habits.

There report mentions the existence of persistent structural factors however, (such as the existence of unlimited mobile voice services) that impede OTT platforms to completely displace the communications services offered by mobile operators.[56]

Costa Rica: Costa Rica passed its General Telecommunications Law in 2008, together with a series of sector-specific norms and regulations aiming at strengthening and modernising the telecommunications sector. The Telecommunications Superintendence (SUTEL) is the sector-specific regulator in charge of implementing telecommunications policy and legislation, with powers to impose access and interconnection obligations, approve retail tariffs and contracts with end users. Notably, SUTEL has explicit powers to determine when operations based on foreign soil may impact effective competition in the Costa Rican market.[57] SUTEL has adopted SMP methodology, included in its Regulation on the Telecommunications Competition Regime in Costa Rica. This Regulation defines "important operators or providers" as those that have the capacity to materially affect the terms of participation in relevant markets as a result of controlling essential facilities or making use of its market position, having due consideration of prices and offers.[58]

In November 2012, SUTEL published new guidelines and criteria to review the definition and analysis of 18 relevant markets, which had been previously

53. Colombia, Regulation 5586 of 2019.

54. Colombia, CRC Regulation 2058 of 2009.

55. Colombia, Regulation 2058 of 2016, art. 10.

56. Colombia, CRC Report "El Rol de los Servicios OTT en el Sector de las Comunicaciones en Colombia", see above note 47.

57. Costa Rica, General Telecommunications Law, art. 52.

58. Sutel, *Reglamento del Régimen de Competencia en Telecomunicaciones*, (adopted on October, 6 2008), Article 21.

defined in 2009, including the definition of operators with SMP and the analysis of competitive conditions. In 2016 and 2017, SUTEL reviewed and updated the list of relevant markets, modifying and eliminating some of the markets originally included in the list. This process was designed to substitute the mechanism through which SUTEL defines tariff caps for telecommunications services. This resulted in a series of administrative and judicial proceedings described in Figure 16.

Dominican Republic: The Dominican regulatory framework is comprised of the General Telecommunications Law and the rules and regulations enacted by the Dominican Telecommunications Institute (INDOTEL), which oversees the telecoms market and enforces such legislation. INDOTEL is also responsible for securing a sustainable, fair and effective competition regime and overseeing efficient use of spectrum.[59]

INDOTEL has been granted powers to state that there is "significant market power" when a player "has the possibility to impose conditions due to lack of alternative in a market or when products and services are not provided in an effective market environment". This regulation also asserts that there is dominance when a provider owns an essential facility, which is economically impossible to reproduce, or when there is a monopoly on products or services. As yet, no market has been singled out as subject to dominance. But there are general provisions applicable to all

Figure 16: Fair use policies and the deregulation of the retail mobile services market in Costa Rica

In April 2014, SUTEL authorised operators to establish a fair use policy to temporarily reduce download speed of mobile users that reached a monthly data cap, which was re-established at the beginning of a new billing period. In 2017, consumer associations challenged SUTEL's decision in Costa Rica's Supreme Court, stating that allowing the application of fair use policies affected users' right to access the mobile internet, to access information and their freedom of speech. The Supreme Court decided to allow fair use policies, under the condition that it was SUTEL, and not the mobile operators, that established a minimum speed for mobile users, which is reviewed periodically.

However, in September 2017, after a thorough review process, SUTEL decided to deregulate the retail mobile services market, concluding that there is effective competition in this market. This goes hand in hand with the powers handed to SUTEL in the General Telecommunications Law, which establish that retail prices must be regulated unless SUTEL considers market conditions are sufficient to ensure effective competition. The deregulation of prices means that Costa Rican mobile operators are now able to commercialise their offers freely, even though they still have to comply with transparency and QoS obligations, which had been previously imposed in July 2017. Some of the conditions that led SUTEL to this decision were the fact that:

- Retail prices had decreased to a level significantly below the regulated tariff, having decreased by 19% from 2014 to 2016
- The Herfindahl-Hirschman Index (HHI), a common tool used to determine market concentration,[60] had been decreasing since 2010, reaching 3,891 out of 10,000 points in 2016.

Taking into consideration that this decision allows operators to create flexible charging arrangements, such as charging per MB downloaded (a practice that was forbidden under the price regulation regime), the decision mitigated the need for fair use policies. As a result, SUTEL decided to eliminate its 2014 ruling allowing for the application of fair use policies.[61]

The outcome of these proceedings is ambiguous. On the one hand, it has allowed operators to innovate commercially by providing better offers that are better targeted to users' demands. However, the imposition of a minimum speed can have counterproductive effects as it increases operators' costs up to a level that makes it almost impossible to sustain quality parameters for the long term. This is due to the limited technical capacity available and/or the fact that the price of mobile services cannot reflect the increase in costs (i.e., prices below average costs). With regard to this point, a recent report by the GSMA shows how establishing quality regulations can impact average speed over 4G networks.[62]

59. Dominican Republic, General Telecommunications Law No. 153-98

60. The Herfindahl-Hirschman index (HHI) is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in a market and then summing the resulting numbers. It can range from close to zero to 10,000.

61. Costa Rica, Resolution declaring effective competition in the mobile retail market (2017), available at https://sutel.go.cr/sites/default/files/rcs-248-2017_revision_mercado_minorista_telecomunicaciones_moviles_en_costa_rica.pdf

62. GSMA, Assessing the impact of market structure on innovation and quality: Driving mobile broadband in Central America (2018).

participants regardless of their competitive position, such as those on accounting separation, mandatory interconnection and non-discriminatory prices, among others.[63] While INDOTEL had already pre-defined a list of relevant markets, which include fixed and mobile telephony, interconnection, internet access, among others, in February 2017, it announced it would study the competitive situation of these markets to assess whether new measures are necessary or not.[64] It concluded that even though legislation refers to the definition of relevant markets and dominant positions, these tools may only be implemented ex post in the framework of competition law assessments. Thus, in principle, INDOTEL does not have SMP powers.[65]

Ecuador: The regulatory authority for the telecoms market in Ecuador is the National Telecommunications, Regulation and Control Agency (ARCOTEL). It is responsible for regulatory oversight of the sector in general, including the granting of licenses, the monitoring of spectrum use and compliance with telecommunications services provisions. Adopted in 2015, the General Telecommunications Law serves as the regulatory framework. Among other things, it established new regulations for operators with significant market power, new penalties based on their gross incomes, as well as additional fees also based on an operator's gross income and market share (see Figure 17).

Figure 17: Concentration tax in Ecuador

In 2015, the Telecommunications Act, and then its presidential decree, in Ecuador established specific rules on the calculation of the concentration tax that private telecommunications providers have to pay. The tax ranges between 0.5 and 9% of annual turnover, depending on market share (based on numbers of users). This tax, which is peculiar to Ecuador, represents an additional cost for operators who have a market share of over 30%.[66]

This represents a distortive government intervention that restricts investment and competition. A report by the GSMA has concluded that a 50% reduction of this tax would lower costs for mobile operators – reducing prices for subscribers - and also incentivise increased investment, while driving growth in mobile data usage.[67] This is also evidence of a strong link between taxation and competition policy. Harmful tax policy leads to an inefficient allocation of resources in an economy, and thus negatively affects competition and growth. Moreover, this concentration tax is a specific example of the distortive effects of asymmetric obligations on telecom operators vis-à-vis other players of the digital economy, underlining the need to level the playing field.

Since this tax and other regulatory charges were imposed in 2015, the telecom sector has underperformed, reaching negative growth rates in 2016 and 2017 according to Ecuadorian Central Bank.[68] According to public reports made to the Ecuadorian Companies Superintendence, private mobile operators income has stagnated and reported profits have diminished in more than 30%. As this contribution depends on market share per number of users, according to ARCOTEL data, some operators have tended to focus their new coverage investments on urban / more profitable areas.

In October 2019, the Executive presented a draft bill that no longer calculates the concentration tax on the basis of market share, but instead on the basis of the market share of annual income. This tax ranges from 45% of share of annual income up to 75%, which can reach a payment due of 4.5% of the total annual income of a company. Again, this proposal would entail an even deeper barrier to growth and development of Ecuador's digital economy, impairing operator's long-term investment in infrastructure and producing negative impacts to growth and business sustainability.[69]

63. Input from INDOTEL to Modelos De Regulación En El Sector De Las Telecomunicaciones Y Su Relación Con La Defensa De La Competencia En Los Países Miembros De Regulatel. https://docplayer.es/74834559-Modelos-de-regulacion-en-el-sector-de-las-telecomunicaciones-y-su-relacion-con-la-defensa-de-la-competencia-en-los-paises-miembros-de-regulatel.html

64. https://www.indotel.gob.do/noticias/consejo-directivo-del-indotel-autoriza-estudiar-situacion-de-competencia-en-mercados-de-las-telecomunicaciones-del-pais/

65. Input from INDOTEL to Modelos De Regulación En El Sector De Las Telecomunicaciones Y Su Relación Con La Defensa De La Competencia En Los Países Miembros De Regulatel. https://docplayer.es/74834559-Modelos-de-regulacion-en-el-sector-de-las-telecomunicaciones-y-su-relacion-con-la-defensa-de-la-competencia-en-los-paises-miembros-de-regulatel.html

66. Ecuador, Executive Decree 864 of 2015.

67. GSMA, Reforming mobile sector taxation in Ecuador: Unlocking economic and social benefits through tax reform in the mobile sector (2018).

68. This information can be accessed in the website of Ecuador's Central Bank https://sintesis.bce.fin.ec/BOE/OpenDocument/1602171408/OpenDocument/opendoc/openDocument.faces?logonSuccessful=true&shareId=0, allowing to see the performance of different taxes. In this particular case, it is possible to compare Ecuador's GDP with the GDP of the "Postal and Communications" sector. Out of this comparison, accessible on Ecuador's Central Bank website, it can be observed that the country's GDP growth has been steady, whereas the "Postal and Communications" GDP had negative growth rates both on 2015 and 2016.

69. Ecuador, Draft Bill on Economic Growth (2019)

ARCOTEL is set to define relevant markets every two years, and has the power to define dominant or preponderant players via a SMP process, which is similar to Mexican regulation. Dominant players are those that are "capable to influence the market by acting independently from competitors, users and providers, and when they effectively control, directly or indirectly, the prices in a market, a market segment, a geographic area or network interconnection". A preponderant player is that which "has more than 50% market share in a specific market or service".[70] ARCOTEL is set to approve a "Markets Regulation" establishing the conditions and methodology to determine market players with SMP.

El Salvador: The regulatory framework in El Salvador was updated in 2016, with the passing of a new Telecommunications Law that places the Superintendence of Electricity and Telecommunications (SIGET) in charge of oversight of the telecoms sector. SIGET has the power to enforce regulations for the telecoms sector, approve regulated prices, issue standards applicable to telecoms players, solve disputes between operators and inform the competition authority of practices likely to hamper free competition.[71]

As a product of DR_CAFTA[72], obligations have been introduced for an "important provider" of fixed telephony that has "the capacity to materially affect, having due consideration of process and supply, the terms of participation in the relevant market, as a result of controlling essential facilities or making use of its market position". In order to prevent anti-competitive practices by an important provider in its territory, SIGET will collaborate with the Superintendence of Competition for the purpose of taking the corresponding measures.

Guatemala: As part of its liberalisation process, Guatemala passed its General Telecommunications Law in 1996, which established the Telecommunications Superintendence (SIT) as its sector-specific regulator. SIT is responsible for managing and supervising the use of spectrum, managing the telecommunications registry and resolving disputes between operators.[73] Accordingly, the Guatemalan regulatory framework does not include any SMP review powers. In any event, the regulatory framework only entitles SIT to intervene in the event of disputes between market players and only in cases related to essential resources and at the initiative of an involved party.[74]

Honduras: The National Telecommunications Commission (CONATEL) oversees the telecoms sector, enforcing and applying the Telecommunications Sector Framework Law, passed in 1995 and updated in 1997, and its subsequent regulatory decrees from 2011 and 2013.

CONATEL can assess whether a market player has SMP status, which is "an economic position of such force that allows its behaviour to be independent from its competitors, clients and users due to different factors such as market share, technological development, supply and demand side features and others". CONATEL may also determine whether an operator that has SMP status in one market is leveraging it in a collateral market, when the correlation between two such markets is such that it allows an operator to leverage its significant market power on one side, to create or reinforce its market power on the other.[75] To do this, CONATEL must take into account the definition of relevant geographic and product markets, market shares, interconnection conditions, exclusive rights over infrastructure, the existence of legal, technical or economic entry barriers, and the existence of essential facilities.[76] Currently, Honduras is enforcing retail mobile voice services price regulation and quality of service final regulations.[77]

Mexico: Following an OECD review that led to a constitutional reform in 2013, Mexico passed a new Federal Telecommunications and Broadcasting Law and established a new autonomous regulator, the Federal Institute of Telecommunications (IFT). The IFT is a constitutional entity designed to have broader powers than its predecessor with a new institutional design, incorporating rules on transparency and contact with the regulated industry.[78][79]

The IFT is the convergent authority for both sector-specific and antitrust matters in broadcasting and telecommunications matters, for which it shall exercise the powers set forth in the Mexican Constitution,

70. Ecuador, General Telecommunications Law, art. 33.

71. El Salvador, Decreto No 372, "Reformas a la Ley de Telecomunicaciones", adopted on May 18 2016, https://www.siget.gob.sv/institucion/marco-institucional/informes/normativa/

72. https://www.siget.gob.sv/institucion/marco-institucional/informes/normativa

73. Guatemala, General Telecommunications Law: Decree No. 94-96 of the Congress of the Republic of Guatemala, October 17, 1996.

74. Guatemala, General Telecommunications Law, art. 22.

75. Honduras, General Telecommunications Law, art. 211B

76. Honduras, General Telecommunications Law arts. 211C & 211D.

77. Annex 2 https://www.gsmaintelligence.com/research/?file=b8cd98dab135c05c8443f757d010905c&download

78. Mexico, Political Constitution of the Mexican United States, art. 28.

79. G. Calderón & K. Sanderson, New Competition Law Enforcement in Mexico: Pros, cons and a comparative view from the U.S., 4 ABA Section of Antitrust Law 9 (2013), 9; V. Pavón-Villamayor, Reformando las telecomunicaciones, Forbes Mexico, Apr. 2013; Telecoms in Mexico – Slimming Down, The Economist, Jul. 12 2014.

the Federal Telecommunication and Broadcasting Law[80] and the Federal Competition Law.[81] The Mexican Constitution and the Foreign Investment Law have set forth that direct foreign investment is allowed up to 100% for telecommunications and satellite services, and up to 49% for broadcasting services, subject to a standard of reciprocity.[82]

The IFT has been vested with SMP powers to determine the existence of "preponderant economic agents" in the broadcasting and telecommunications sectors, and to impose the measures deemed necessary to allow competition and free market participation. These include measures relating to service offers, exclusive agreements, asymmetric regulation on tariffs and network infrastructure, unbundling of essential resources and accounting, functional or structural separation of such agents, among others. The IFT can also define as "preponderant economic agents" those that have more than 50% of national market participation, either directly or indirectly, which is measured by the number of users, audience, network traffic or capacity used. The IFT can also declare whether an economic agent has "substantial power" in the telecommunications and broadcasting markets, pursuant to the procedure established in the Federal Competition Law.[83]

Both "preponderant economic agents" and "economic agents with substantial power" are subject to asymmetrical obligations such as, registering unbundled interconnection services, separating accounting and cost-accounting of interconnection services and not to carry out practices that limit efficient use of infrastructure devoted to interconnection. These agents also have asymmetrical obligations regarding information, quality, rates, commercial offers and billing.[84] In February 2018, the IFT approved the unbundling plan for the preponderant economic agent in the telecoms sector, known as the Functional Unbundling Plan, according to which a new company shall exclusively provide wholesale services (see Figure 18).

Mexico is unique both in terms of implementing telecommunications regulatory reform through constitutional reform, but also by including the creation of a wholesale shared network in its constitution.

Nicaragua: Since 1982, the Nicaraguan Telecommunications and Postal Institute (TELCOR) has been in charge of monitoring and enforcing telecommunications-specific regulations. The legislative framework is established in the General Telecommunications and Postal Law of 1995, together with the TELCOR Regulatory Decree. Even though these rules do not grant specific powers to TELCOR to do SMP reviews, they do include the competence to conduct a "permanent analysis of the behaviours and characteristics of the telecommunications market, the degree of competition in all market segments or sub-segments, proposing regulatory actions in those situations that may require so".[85] In addition, the regulator may authorise tariffs, and has introduced regulated tariff caps for mobile voice services.[86]

Panama: The sector-specific regulator, the National Authority of Public Services (ASEP), acts within the framework of the Telecommunications Law of 1996,[87] as modified in 1999, and a series of regulatory decrees and regulations. ASEP is in charge of monitoring, verifying and controlling compliance with telecoms regulations, granting concessions and authorisations, verifying and enforcing quality of service targets, promoting competition in the sector, regulating and supervising the application of general tariffs, applying corrective sanctions when applicable, and intervening to correct market failures or to enforce legal, contractual or regulatory provisions. ASEP also acts as the competition authority for the telecoms market, and as sectorial regulator for other public utilities.

ASEP has the power to declare a market player has a "dominant position", which is the "position enjoyed by a company that has a high share of a particular market or service, which allows it to set or affect the market price for a particular service or services".[88] Particularly, with regard to mobile services, ASEP may declare that a company has a dominant position if it has a market share 15 percentage points higher than that of its closest competitor.[89] Accordingly, ASEP has powers to dictate special regulations to those concessionaries that have a dominant position.[90] Furthermore, ASEP can establish tariffs,

80. Mexico, General Telecommunications and Broadcasting Law, "Ley Federal de Telecomunicaciones y Radiodifusión", LFTR, published in "Diario Oficial de la Federación" on 14 July 2014.

81. Mexico Federal Competition Law, "Ley Federal de Competencia Economica", published in "Diario Oficial de la Federación" on 23 May 2014.

82. John Mayo: "Competition in Telecommunications: Global Lessons for Policy Development in Mexico", at https://cbpp.georgetown.edu/news/mayo-releases-policy-paper-competition-in-telecommunications-global-lessons-for-policy-development-in-mexico/#

83. Mexico, General Telecommunications and Broadcasting Law, arts. 3 and 15.

84. Mexico, General Telecommunications and Broadcasting Law, arts. 3 and 15.

85. Nicaragua, TELCOR Regulatory Decree, art. 40.1.2.

86. Nicaragua, General Telecommunications and Postal Law, "Ley General de Telecomunicaciones y Servicios Postales, n. 200", published in "La Gaceta, Diario Oficial", Number 154 of August 18th, 1995, arts. 78 & 79.

87. Panama, General Telecommunications Law, "Ley No. 31 (De 8 de febrero de 1996) Por la cual se dictan normas para la regulación de las telecomunicaciones en la República Panamá".

88. Panama, Executive Decree 73 of 1997, art. 4.

89. Panama, Res. No. JD- 1334 of 1999.

90. Panama, Executive Decree 73 of 1997, art. 7.

Figure 18: Wholesale Shared Network in Mexico

As a result of the 2013 Mexican Constitutional Reform and the subsequent introduction of a new regulatory framework, the IFT was required to establish a wholesale-only wireless network – a "carrier's carrier" that will sell mobile-network capacity to all comers. This resulted in a major initiative called Red Compartida (Shared Network), announced in 2015, which is a wholesale shared mobile network designed to increase digital inclusion and connect Mexico's rural areas. The company operating the network is not involved in providing retail services, but provides wholesale access to the network to mobile operators, who in turn use the network capacity to provide a consumer mobile product.

The spectrum for the wholesale network (in the 700MHz band) was freed up by the switchover to digital TV completed in 2016. The network is operated through a public-private partnership with a network concession awarded to Altán Redes in 2016. This is the first shared purely wholesale mobile network in the OECD. To implement this project, the Constitutional Decree on the reform of the telecommunications sector set a prohibition on any telecommunications service provider having a significant influence on the wholesale mobile network. The use of a decree (the highest legislative level) implies the highest level of limitations and inflexibility.

Even though this initiative was established to bridge the digital gap between rural and urban areas by connecting 92.2% population, it has many disadvantages from a competition policy perspective. The inclusion of this measure in the Mexican Constitution, together with its weak text, does not help the implementation process, which requires the use of 90MHz of the 700 MHz band by the government. The conditions set forth for the project made it impossible for an existing mobile operator to participate in the bidding process, lacking the necessary competitive neutrality in order to guarantee that the market structure does not harm competition. Moreover, the establishment of a wholesale shared network is incubating market concentration by reserving a specific spectrum band. This lowers the potential for economic efficiencies and generates what in economics is called "dead-weight loss".

Supporters of wholesale shared networks claim these networks can deliver greater coverage than market competition, but these claims often overlook the fact that these networks require significant public subsidies and other forms of support, which are typically not available to competing network operators. A report by the GSMA that looks at the experiences of five countries (including Mexico) found that only one was able to effectively roll out a wholesale shared network. The problems included cost and lack of competition. By contrast, network competition can and does deliver mobile network coverage. In areas where building several networks is uneconomic, there are other approaches, including voluntary network sharing that can facilitate coverage in a particular area. Other alternatives to wholesale shared networks are:

- Cost effective access to low frequency spectrum
- Support for spectrum re-farming
- Support for voluntary infrastructure sharing
- Elimination of sector specific taxation on operators, vendors and consumers
- Non-discriminatory access to public infrastructure
- Support for streamlined planning and administrative processes
- Relaxation of Quality of Service requirements
- Context appropriate competition policy, especially concerning market structure
- Support for multi-sided business models, such as zero rating and sponsored data.[91]

91. GSMA, *Wholesale Open Access Networks* (2017).

if it considers there is a lack of competition, or quality-related regulations, such as the currently enacted regulations on internet minimum speeds.[92]

Paraguay: The entity in charge of supervising the telecommunications industry in Paraguay is the National Telecommunications Commission (CONATEL), applying the General Telecommunications Law of 1995 and its subsequent modifications,[93] with the most recent update in 2014. CONATEL is charged with promoting and monitoring the telecoms sector, approving its technical specifications, managing the radio spectrum, ensuring compliance with telecommunications regulations, proposing, and approving tariff schemes, among other tasks. In August 2018, CONATEL set new mobile termination rates until 2020. These new rates, which are based on a bottom-up long run incremental cost plus model, are significantly lower than their predecessors.[94]

Currently, CONATEL does not engage in SMP reviews, but it has declared that it is legally allowed to do so by the current regulatory framework. The legal basis to do so, according to CONATEL, is the principle of neutrality included in its legislation. This principle states that the concessionaire of a telecommunications service, that supports other services or has a dominant position in a market, is obliged not to use such situations to simultaneously provide other telecommunications services, taking advantage of its position and to the detriment of its competitors, through restrictive practices of free and fair competition, such as limiting access to interconnection or affecting the quality of service.[95]

Moreover, the Regulatory Decree on Competition Matters for CONATEL defines a "dominant position" as that in which:

- a company (or more companies) is(are) the only supplier(s) of a service or
- such company or companies (is) are not exposed to effective competition, or
- such company or companies (is) are horizontally or vertically integrated to such a degree that it affects economic sustainability of a competitor.

The decree also defines "market power" as the capacity of the supplier to influence the level of prices, quantity or quality offered to users, or any other supply conditions in the relevant market, with the objective of raising its income or negatively affecting its competitor's income.[96]

Peru: The Supervisory Agency for Private Investment in Telecommunications (OSIPTEL) is in charge of the oversight and regulation of the telecoms industry. The Telecommunications Supreme Decree, adopted in 1993,[97] serves as the legal framework for these services.

The Peruvian legal framework establishes a methodology for SMP review, which it has named "important telecommunications service providers" review. These providers are those "with the capacity to affect in a relevant way the conditions of participation in the market, from a price and supply point of view, in the relevant market of telecommunications services, as a result of controlling essential facilities or leveraging on its market position". The Directory of OSIPTEL dictated a resolution that includes the framework, methodology and procedures for identifying providers of public telecommunications services as "important providers". Among other things, this Resolution has defined that it will prioritise wholesale markets and markets that have reached a certain level of maturity, in its analysis for determining "important providers". During 2018, after a thorough analysis, Peru decided that there is no "important provider" in the mobile origination market, in mobile wholesale access and call origination markets and in the wholesale mobile market.[98]

Uruguay: Of all countries surveyed in this report, Uruguay is the only one that does not have a comprehensive telecoms-specific regulatory framework in force. Thus, the legal instruments applicable to the sector include:

- The Budget Law, which established the Regulatory Unit of Communications Services (URSEC) as the regulator;

92. Panama, Res. AN No/1370-Telco of 2017.

93. Paraguay, General Telecommunications Law, "Ley no. 642/95 de Telecomunicaciones"

94. Paraguay, CONATEL Directory Res. 1180/2018.

95. This was the answer provided by CONATEL in the framework of a regulatory research performed by REGULATEL in 2015. *See* "Modelos de Regulación en el Sector de las Telecomunicaciones y su Relación con la Aplicación del Derecho de la Competencia en los Paises Miembros De Regulatel", available at http://regulatel.org/w/wp-content/uploads/2018/11/Estudio-comparado-Modelos-de-regulaci%C3%B3n-en-el-sector-de-las-telecomunicaciones-y-su-relaci%C3%B3n-con-la-defensa-de-la-competencia-en-los-pa%C3%ADses-miembros-de-Regulatel-2016..pdf

96. This was the answer provided by CONATEL in the framework of a regulatory research performed by REGULATEL in 2015. See "Modelos de Regulación en el Sector de las Telecomunicaciones y su Relación con la Aplicación del Derecho de la Competencia en los Paises Miembros De Regulatel", available at http://regulatel.org/w/wp-content/uploads/2018/11/Estudio-comparado-Modelos-de-regulaci%C3%B3n-en-el-sector-de-las-telecomunicaciones-y-su-relaci%C3%B3n-con-la-defensa-de-la-competencia-en-los-pa%C3%ADses-miembros-de-Regulatel-2016..pdf

97. Decreto Supremo No. 013-93, Texto Único Ordenado de la Ley de Telecomunicaciones", enacted on April 28 1993.

98. Peru, OSIPTEL Directory Res. 21 of 2018.

- A number of regulatory decrees that set the functions of URSEC;[99]
- Law 17556,[100] that gives URSEC powers to prevent antitrust practices;

The ANTEL Law,[101] created ANTEL, a decentralised public service operator, whose operation was declared as “essential”. Until 2001, ANTEL had regulatory powers, but it is now subject to the monitoring and control of URSEC. Since then, the telecommunications market has been open to competition.[102]

URSEC functions as a decentralised body with technical autonomy within the government Commission for Planning and Budget. URSEC has powers to, among others, define technical regulation, advise the government in communications policy, manage and control spectrum (even though spectrum licenses are granted directly by the government), submit draft terms and conditions for the selection by the government of operators authorised to use radio frequencies.[103] On the other hand, the antitrust legislation in Uruguay attributes to URSEC the power to apply ex post regulation to promote and protect competition. In order to exercise this competence, however, URSEC needs to demand first the non-binding opinion of the competition authority.[104]

Venezuela: The Organic Telecommunications Law, reformed in 2011,[105] was passed in 2000 and granted powers to control and monitor the sector to the National Telecommunications Commission (CONATEL). This Commission had been initially created in 1991, but without a legal persona of its own.[106] CONATEL is now the entity responsible for regulating and licensing the telecoms sector, reporting to the Ministry of Information and Communications.

CONATEL has powers to enforce telecoms regulations, issue a strategy and rules for the development of telecommunications, grant or withdraw telecommunications licenses, approve tariffs, promote competition in the sector, solve operators’ disputes and manage scarce resources, among others.[107] The Law on Social Responsibility on Radio, Television and Digital Media, passed in 2011, also grants CONATEL the power to make decisions on the blocking or deletion of content, and to sanction service providers.[108]

99. Unidad Reguladora de Servicios de Comunicaciones.

100. Ley No. 17556 de 18 de setiembre de 2002.

101. Ley 16.828, de 9 de mayo de 1997.

102. Cullen International, Uruguay country profile.

103. Uruguay, Budget Law and Regulatory Decree 212/2001.

104. Uruguay, Promotion and Defense of the Competition Law, “Ley 18159 de promocio’n y defensa de la competencia.”

105. Venezuela, Consolidated Telecommunications Law, “Ley Orgánica de Telecomunicaciones” published in “Gaceta Oficial” No 39.610 of 7 February 2011.

106. Venezuela, Decree 1.826 of Sep. 5, 1991

107. Venezuela, Consolidated Telecommunications Law.

108. Venezuela, Law on Social Responsibility in Radio, Television and Electronic Media, “Ley de Responsabilidad Social en Radio y Televisión (RESORTE)” enacted on 7 December 2004.

Competition Law

To support change and innovation, regulation should only be used when competition law is not sufficient to deal with the issues identified. As well as establishing a properly functioning competition authority, a country needs to make clear the relative jurisdiction of the competition authority and that the authorities and the regulators should cooperate. Recent legislative reform efforts in Latin America have sought to introduce properly functioning, well-resourced competition authorities, while recognising the important role of cooperation between agencies.

National laws

Competition law generally seeks to prevent anti-competitive agreements and the abuse of a dominant position, while also considering merger control. As an area that requires extra cooperation between the competition authority and the regulator, merger control in the telecommunications sector is dealt with separately below.

No opinion as to the effectiveness or correctness of competition law enforcement

Throughout this booklet, we do not express any views as to whether the example cases considered show a fair or good level of competition law enforcement. The selected cases show how competition law, properly understood and enforced, can be used to deal with issues of alleged anti-competitive agreements and/or abuses of a dominant position, as well as to deal with merger control effectively. This reinforces the contention that the telecommunications sector should be more reliant on competition law, leading to regulatory forbearance.

Argentina: One of the first countries in Latin America to have a competition law framework, Argentina has had anti-monopoly laws since 1923. The first comprehensive antitrust legislation, however, was enacted in 1980. The same legislation also created the first Argentinian antitrust authority, the National Commission for the Defence of Competition (CNDC).

The legal framework was updated in 1999, 2014 and 2018. The 1999 reform called for the creation of a Competition National Tribunal, which was never duly established. At the same time, CNDC was empowered to carry out investigations, but was deprived of all competition decisional powers, which were transferred to the Secretariat of Trade. This Secretariat, a political authority, was vested with all the competences that had been assigned to the Tribunal, which deprived the Commission of the autonomy, independence and resources it needed to perform adequately. In 2014, antitrust legislation was reformed again and all references to the Competition National Tribunal were eliminated altogether; the Secretariat of Trade was officially granted all decision-making power. In the meantime, CNDC only has the power to issue non-binding resolutions, which have to be either approved or dismissed by the Secretariat of Trade.

In 2016, competition was set as a new public policy priority and as the primary way of interaction between companies and consumers. The government decided to strengthen competition law enforcement by restructuring CNDC, which, in 2016, opened a public consultation for the reform of Argentinian competition law. The new Competition Act was approved in 2018. This law changed substantively the competition law and policy framework in Argentina, by including a new merger review system, a leniency programme and, most importantly, creating a new independent and autonomous competition authority (see Figure 19).

The legislative reform has strengthened Argentina's competition authority's autonomy, independence and enforcement power, while also expanding its advocacy competences, to cover all sorts of stakeholders, including the telecoms sector (see Figure 20).

Since Argentina has two different agencies with differentiated powers in telecoms-specific regulation and competition law, it is one of the few countries that has established in its statute that the regulator and the competition agency must maintain interaction and cooperation (see Figure 21).

Figure 19: Competition reform in Argentina: the importance of institutional governance for effective enforcement

A lack of binding powers, together with a shortage of funds and technical staff, decreased the capacity and power of competition enforcement in Argentina, as outlined in the OECD's peer review of Argentina in Competition Law and Policy, in 2006 and 2012.[109] The recent legislative reform aims to reverse this situation. The main amendments introduced by the Competition Act are the following:

- The creation of an independent competition agency, the National Competition Authority (the "ANC"), which will replace the current enforcement authority.
- The increase of antitrust fines and the implementation of new guidelines to calculate them, in order to increase deterrence.[110] The Competition Act also introduces some behavioural sanctions, such as divestures, cease orders, conditions, disqualification to exercise trade activities from one to 10 years, etc.
- The creation of a leniency programme for cartel cases in order to facilitate proper detection, prosecution and sanction of cartels.
- The creation of a specialised Court of Appeals to review decisions of the antitrust authority to deal with competition matters, in order to improve the judicial review of the competition authority decisions.
- The introduction of an *ex ante* notification mechanism for mergers.

The approval of the Competition Act gives the ANC a more complete and effective toolbox to deal with both anti-competitive practices and mergers.

Figure 20: Competition Advocacy in the Telecoms sector

In 2017, the Ministry of Communications sought to intervene on regulation for interconnection and access. The resulting project to develop updated instruments referred to competition law tools and concepts (e.g. essential facilities, market definition and market power). The CNDC intervened through its advocacy department by preparing a document illustrating the relevant competition case-law and the way in which they could have been applied to interconnection and access markets.[111]

Figure 21: Interaction between the telecoms regulator and competition agency in Argentina

Argentina's competition legislation abolishes any competition attribution related to the object and purpose of the Act that was granted to any other agency, other than those mentioned in the Act, including the telecommunications-specific regulator. However, since most merger operations require a license transfer between merging entities, these transactions are subjected to ENACOM's approval. Furthermore, CNDC must ask ENACOM for a non-binding opinion or a report on mergers affecting telecommunications markets. If the regulator does not respond within 15 working days, it means it does not object to the merger.

On the other hand, CNDC can submit ENACOM sector-specific recommendations to promote competition. Also, ENACOM can ask for CNDC intervention when telecommunication providers do not reach an interconnection agreement. CNDC must issue its binding opinion to allow incumbent and mobile operators to provide (non-satellite) broadcasting services.[112]

109. OECD, Argentina: Competition Law and Policy – Peer Review (2006); OECD, Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries (2012).

110. The LDC establishes that fines can be up to 30 per cent of the relevant market turnover, multiplied by the number of years of the practice, which may not exceed 30 per cent of the consolidated national turnover; up to double the illicit gains; or up to 200 million adjustable units (approximately US$150 million).

111. CNDC, Commentaries on the Draft on General Regulation on Interconnection and Access of the ICT Secretariat (2017), available at https://www.argentina.gob.ar/sites/default/files/proyecto_de_reglamento_de_interconexion.pdf

112. Argentina, Telecommunications Law art. 59, Competition Law, art. 27.

Bolivia: As in many countries surveyed in this report, the Bolivian sector-specific regulator is in charge of competition affairs in the telecoms market, even though there is a competition agency in charge of applying competition law in all non-utilities sectors.[113]

The Regulation and Fiscalisation Authority for Telecommunications and Transport (ATT), the sectorial regulator, is part of a national system of regulatory authorities, which is in charge of promoting competition and efficiency in telecommunications markets,[114] and is also vested with powers to set specific obligations to promote competition.[115] However, in competition matters, ATT does not apply general competition law, but, instead, it implements a specific set of provisions of competition law included in the telecommunications regulatory framework.[116] Therefore, Bolivia's regulatory and institutional landscape, even though there is an existing competition authority and competition legislation in force, resembles that of Guatemala, which is the only country surveyed in this report that has no competition authority or general competition legislation in force.

This means that Bolivia has no general competition merger review system applicable to the telecoms sector. However, regulation in force forbids economic transactions that limit, restrict, suppress or distort competition or that seek to control or hold exclusivity of the provision of telecommunication services.[117]

Brazil: The Administrative Council for Economic Defence (CADE) is the decision-making authority and enforcer of the Brazilian Competition Act. CADE was created in 1962 as an agency of the Ministry of Justice.

In May 2012, with the entry into force of a new Competition Law,[118] the institutional structure and competition policy underwent significant changes. CADE became an agency comprised of two main bodies: the General Superintendence (GS) and an Administrative Tribunal. The GS became responsible for the investigations and for the summary mergers, while the Tribunal rules on ordinary mergers and issues the decisions on anti-competitive conducts. Under the new legislation, CADE became responsible for instructing the administrative processes to investigate 'infractions to the economic order', as well as merger assessments.

In the new system, the GS is responsible for investigations of anti-competitive agreements, abuses of dominance and merger control. The reform also established a Department of Economic Studies tasked with providing internal economic analyses and impact assessments. Moreover, the new

Figure 22: Interaction between CADE and Anatel

Brazilian competition law is fully applicable to the telecoms sector. Both CADE and Anatel have powers to analyze matters related to the telecommunications sector.

For takeovers with transfer of control evolving one or more telecommunications company, Anatel performs a sector-specific analysis based on the assumption that the measure is not harmful to competition in the market and does not place under risk the performance of the contracts based on the sectors regulation. Anatel is competent for approving such takeover operation. It is also competent for imposing remedies on issues such as coverage, wholesale network access, maintenance of the services, market portfolios, licenses and spectrum control.

On the other hand, CADE does an economic analysis, based on competition law, in the context of anticompetitive conducts inquiries, possible market losses, concentrations or merger assessments. As most competition authorities, CADE may approve – with or without remedies - or reject each transaction submitted. Accordingly, Anatel must provide all assistance and collaboration requested by CADE. As a general principle, competition law is applicable to the telecoms sector as long as it does not contradict the General Telecommunications Law. In this regard, Brazil is one of the many countries in the region that established a statutory system of competences for each entity.

It is also important to highlight Brazil's fight against corruption in recent years, which is also linked to antitrust enforcement. The Clean Company Act of 2013[119] was influenced by competition rules. Such rules regarded in particular leniency procedures. Several public bodies, including CADE, have on the other hand collaborated to raise awareness about different aspects of compliance, in particular about bid rigging, and to exchange information and best practices.

113. *See generally* Bolivia, Laws No. 2427, 2495 and 3076.
114. Bolivia, Supreme Decree 71 of 2009, art. 17
115. Bolivia, Supreme Decree 1391 of 2012, art. 172.
116. Bolivia, Supreme Decree 1391 of 2012, Chapter III on "Corrective Actions and Anti-Competitive Practices".
117. Bolivia, Supreme Decree 164 of 211, art. 61.
118. Brazil, Law 12,529/2011.
119. Brazil, Law 12,846/2013

law raised the minimum fines for anticompetitive conduct and reinforced CADE's ability to impose 'appropriate and proportionate' remedies.

This new law and the restructuring of the competition authorities notably improved the flow in the proceedings and the decision-making process. In the period from when the law entered into force and June 2018, it had completed 20 regulations about the definition of economic groups for turnover calculations, definition of associative agreements and CADE's internal rules, among others. This is reflected in the improved interaction between the telecoms regulator and the competition agency (see Figure 22).

Probably because of a stronger competition system, together with an enhanced view on digital policy

Figure 23: CADE applies economic analysis to digital policy in a zero-rating inquiry

In September 2017 CADE closed a preliminary inquiry into the legitimacy of zero-rating plans offered by the four largest mobile network operators in the country, which exempted traffic generated by Facebook, Twitter and/or WhatsApp from the data cap included in the end-user's subscription.[120]

Background

The complaint had been filed by the National Prosecutor Office in 2016, claiming that mobile network operators:

- Offered plans that illegally discriminate against applications outside the scope of zero-rating agreements, harming consumers on the basis of the Competition Law
- Infringed network neutrality provisions included in the Internet Law
- Made offers that inhibited innovation, creating an artificial barrier to entry in the mobile applications market, contrary to the Competition Law

Analysis

CADE closed the preliminary inquiry on the basis of five parameters, based on the economic analysis of the provisions from the Competition and Internet Laws analysed. It found that:

- Operators did not block or throttle traffic of any mobile application;
- Operators did not have shares of application providers involved in the zero-rating agreements, nor vice-versa (meaning there was no vertical integration);
- The zero-rating agreements do not establish exclusivity clauses or payment between operators and application providers;
- The mobile applications under these zero-rating agreements were already popular before operators launched their plans;
- The zero-rating agreements allowed end users to access more applications – in addition to the ones offered under the zero-rated plans - potentially fostering competition in the mobile applications market.

CADE also added that, even though it was Anatel's primary responsibility to enforce the Internet Law, zero-rating offers were not contrary to net neutrality or the Internet Law because they do not prioritise traffic or specific applications. CADE also underlined that sponsored data services are similar to other services funded by third parties that are regarded as legitimate, such as toll-free calls, free-to-air broadcasting channels funded by advertising and pay-TV also funded by advertising or user's subscription fees.

Anatel's opinion

Anatel submitted an opinion, supporting these zero-rated offers because they:

- Increased the usage of applications in general, contributing to higher mobile broadband penetration and adding value to mobile networks
- Reduced the marginal and average cost to access mobile networks and applications
- Allowed for coordination between mobile operators and application providers

120. Brazil, CADE SEI/CADE - 0380317 - Technical note, available at https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yOTVltdzdZLqhkfLgLcg20sp2COFkT0u4F6kpO2C8HmeI4kRnRnEVbwvcVZhl5-Ryodazm-kfXdvuF-MMocM8XW

matters through the enactment of the Internet Law, CADE and Anatel are now in a better position to apply economic analysis to competition policy in the digital ecosystem. Figure 23 gives an example of this.

CADE and Anatel also cooperate in the analysis and clearance of mergers in the telecommunications sector. Merger operations are, in fact, first analysed by CADE from a competition protection point of view and then by Anatel, which focuses more on the effects that the transaction might have on the structural functioning of the market(s) and of the provision of the relevant telecommunications' services.

Chile: Since 2003, two separate institutions have been charged with enforcing competition laws in Chile: the Competition Court (TDLC) and the National Economic Prosecutor (FNE), an administrative agency that investigates antitrust violations and enforces the acts passed by the TDLC and the Courts of Justice.

As well as seeing cases in connection with anti-competitive practices and merger notifications, the TDLC proposes the modification or abolition of legislation that create competition problems and issues binding "general instructions" to industries. The TDLC can only act at the request of the FNE or individuals and its final acts can be challenged before the Supreme Court of Justice.[121]

The FNE, headed by the National Economic Prosecutor, acts as a prosecutor, tasked with the defence and promotion of free competition in all sectors of the economy. It is an independent, decentralised body, with its own legal entity and budget under the watch of the Ministry of Economy. It has extensive powers to investigate anti-competitive behaviour and merger notifications to file complaints before the TLDC when there is a reason to believe that the competition rules have been breached. The FNE is also tasked with advocacy powers, to spread the benefits of competition, with the objective of creating a "culture of competition". The FNE also authorises mergers. If these involve the transfer of telecommunications licenses or authorisations, it requires the intervention of Subtel as well.[122]

The general Competition Law Decree was enacted in 1973, with major modifications in 2003 and 2016. The latest reform included substantial changes, such as the obligation to notify mergers (subject to a cumulative transaction and turnover threshold), the introduction of criminal sanctions and a *per se* illegality rule for hard-core cartels, the incorporation of a new system for the assessment of horizontal mergers and an increase in fines against anti-competitive conduct (including a flexible cap depending on revenues or economic benefit obtained from the infringement). The same legislative reform introduced private competition enforcement (subject to TDLC decision allowing follow-up damages actions). After the 2016 reform, the FNE saw an increase in staff and has since published guidelines on, among others, leniency, competition and thresholds. In practice, competition enforcement in Chile has recently focused mostly on collusion and coordinated conduct.[123]

Figure 24: Sector-specific entities acting as competition agencies in Chile

Subtel acts as technical advisor to TDLC and/or FNE in competition matters that affect telecommunications. When TDLC considers that a given telecoms market is not competitive and that tariffs in that market should be regulated, the Ministry for Transport and Telecommunications (MTT) and the Ministry of Economy must jointly issue a tariff decree setting maximum tariffs and based on an 'efficient operator' standard for services offered by dominant providers.

In some instances, the MTT 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).[124]

The FNE and the TLDC can propose the modification or abolition of legislation that creates competition problems and can issue binding "general instructions" for industries.[125] An example of this is the proposed enactment of obligations on service and handset bundles, resulting from an FNE investigation that recommended the separation of mobile services and handsets in bundled offers and, transparency obligations to ensure that users are duly informed about bundled and unbundled offers of mobile services and handsets.[126]

121. Chile, Law 19911 of 2003.

122. Chile, Law Decree 211 of 1973, Title III.

123. https://one.oecd.org/document/DAF/COMP/AR(2016)26/en/pdf

124. Chile, General Telecommunications Law, art. 36.

125. Chile, Law Decree 211 of 1973, art. 39.

126. Subtel, *Gobierno exigirá transparentar cobros de servicios de telecomunicaciones,* 27 December 2016 in https://www.subtel.gob.cl/gobierno-exigira-transparentar-cobros-de-servicios-de-telecomunicaciones/

Colombia: The first elements of competition law in Colombia appeared in 1959. However, they were not effectively implemented until 1991, when the new Constitution recognised free competition as a collective right, paving the way for the adoption in 1992 of Decree 2153, which introduced a list of anticompetitive conduct and behaviours, which is still valid and implemented today. This reform also included new legislation that created sectorial commissions with general competition powers, together with a Superintendence of Public Services. The result was a decentralised model for protecting and promoting competition in which various economic authorities applied sanctions for restrictive practices and controlled mergers and acquisitions, with overlapping powers and competences.[127]

It became apparent that this model resulted in administrative inefficiency and confusion regarding the scope of action of each authority and legal unpredictability without a unified body of competition law. Further reforms removed the authority for enforcing competition law from the various sector agencies and consolidated it in the Superintendence of Commerce (SIC), expanding the range of parties subject to competition law. This competition law, amongst others, established the SIC as the unique competition authority, included a leniency programme as one of the tools at its disposal, made some procedural adjustments and, brought a substantive increase of the applicable fines. However, the 1959 and 1992 laws are still in force and contain provisions related to the prohibition of restrictive agreements and abuse of dominance. This scheme was reviewed by the OECD in its Competition Policy review in 2016,[128] positively influencing Colombia's accession to this organisation.

Now, the Superintendent, within the SIC, has decision-making powers, whereas the Deputy Superintendent conducts investigations. As a result, the Superintendent may impose fines or order the cessation or modification of a conduct. SIC is therefore in charge of approving or dismissing mergers, monitoring potential anti-competitive practices, imposing conditions and penalties, conducting investigations and issuing preliminary injunction orders.[129]

Costa Rica: In Costa Rica, the first competition law was adopted in 1994. It was directed at the promotion of competition and free market participation. However, the General Telecommunications Law states that the operation of networks and telecommunications services in the country will be subject to a sectorial competition regime ruled by that law, and that overall general competition law is auxiliary.[130] Nonetheless, in general terms, the regulations governing competition in the telecoms sector are very similar to those included in the general Competition Law.

The Costa Rican Competition Law also created the competition authority (COPROCOM) to oversee its enforcement. However, as with most of the countries in this survey, SUTEL has exclusive jurisdiction to apply competition law and merger control in the telecommunications market. Still, SUTEL must request the non-binding opinion of COPROCOM in competition matters. If it decides differently from COPROCOM's opinion, SUTEL is required to offer detailed reasoning as to why, as well as to obtain a qualified majority within SUTEL's Directorate.[131]

In 2015, the OECD carried out an analysis of Costa Rica's Competition Law, as well as the implementation of the law by COPROCOM and the sectorial competition authorities. This analysis found that, overall, Costa Rica has a well-established competition law system in the telecoms sector, but suggested that COPROCOM, rather than SUTEL, should be vested with competition powers within the sector, to strengthen competition policy decisions.[132]

Dominican Republic: In 2008, the Dominican Republic approved its General Competition Law and created the National Commission for Competition Defence (ProCompetencia), which is entitled to "promote and ensure the existence of effective competition and increase the economic efficiency of the products and service markets".[133] This law provides that its guidelines will supplement those applicable by sectorial regulations comprising special rules on competition, which therefore includes sector-specific regulations. However, these measures did not come into force until 2017, upon the appointment of ProCompetencia's first executive director. Until then, INDOTEL applied a specific regulation on competition matters for the telecoms sector, approved by its Board.[134]

Since 1998, the Dominican General Telecommunications law has included its own provisions that entitle INDOTEL to intervene *ex-post* in the event of practices that may restrict or hamper competition in the telecommunications market. Also, INDOTEL's Board may "issue

127. https://one.oecd.org/document/DAF/COMP/AR(2016)26/en/pdf
128. https://one.oecd.org/document/DAF/COMP/AR(2016)26/en/pdf
129. https://www.oecd.org/daf/competition/CostaRica-PeerReview2014en.pdf
130. Costa Rica, Competition Law, art. 52.
131. Costa Rica, Competition Law, art. 52.
132. https://www.oecd.org/daf/competition/CostaRica-PeerReview2014en.pdf
133. Dominican Republic, General Competition Law, art. 1.
134. INDOTEL, Resolución No. 022-05.

regulations of general application and rules of specific application, within competition rulings". However, the General Competition Law states that INDOTEL must request ProCompetencia's non-binding opinion on competition-related actions. Conversely, if ProCompetencia receives a complaint or is asked to intervene in telecommunications matters, it must refer the issue to INDOTEL.[135]

Figure 25: The competition authority advocates for regulatory simplification in the telecoms sector in the Dominican Republic

In July 2018, ProCompetencia issued a non-binding report advising against the approval of a bill regulating "telephone services", which included both fixed and mobile voice and data services. The competition authority understood that most of the provisions included in this bill were already regulated under INDOTEL's Regulation on the Rights and Obligations of Users, which had been approved after several public consultations and with the input of different stakeholders. Thus, similar to the case of Colombia's regulatory simplification process, the competition authority highlighted the importance of avoiding regulatory duplication that would lead to an increase in transaction costs and imperil proper competitiveness and investment in connectivity.[136]

Ecuador: Following on from the Andean Community's decisions 608 and 616, which had imposed the adoption of an interim national competition law, Ecuador's Competition Law was approved in 2011. Before that, in 2009, the Presidential Decree 1614 created an interim competition authority, the Ministry of Industry and Productivity, which introduced some competition enforcement procedures.

Once enacted, the General Competition Law created an independent competition authority, the Superintendence for Market Power Control (SPCM). The General Competition Law gave SPCM broad and incisive investigating and sanctioning powers. SPCM is charged with assessing dominance in each specific market and with analysing mergers and acquisitions. There are no provisions that refer to the interaction between SPCM and ARCOTEL, in charge of sectorial regulation.[137]

El Salvador: The Salvadoran General Competition Law came into full force in 2006, creating the Superintendence of Competition (SC). The SC forms part of the National Consumer Protection System, which includes many other institutions whose competences are related to consumer protection. This legislation concentrates competition law enforcement's competence on SC, eliminating all rules empowering sectorial regulators to enforce competition rules in their sectors. This also applies, of course, to the telecoms regulator.[138]

The General Competition Law assigns the SC's Board of Directors advocacy powers, by granting it the competence to issue non-binding opinions on relevant laws and regulations that could affect and ultimately restrict competition. The SC can also inform sectorial regulators of sector regulation that is likely to negatively affect competition in the markets.[139]

The SC is the only authority entitled to authorise economic mergers. Regarding spectrum's secondary market, if SIGET deems it necessary, it will ask the SC's opinion in order to establish if certain spectrum transfer might be seen as a concentration/merger.[140] This opinion is binding, once it has been asked by SIGET. Also, SIGET may ask for the SC's opinion to determine if certain individuals should participate in a spectrum auction. If the SC does not respond, the answer will be understood to be favorable.[141]

Guatemala: Guatemala is one of the few countries surveyed in this report that has not yet approved a General Competition Law (see Figure 26). However, there are some competition-related provisions dispersed in other sets of rules that regulate antitrust practices.

First, the Constitution of Guatemala establishes a general prohibition on monopolies and state privileges. It empowers the state to limit companies that may absorb production in one or more industrial, commercial or agricultural activities, to the detriment of national economy.[142]

135. Cullen International, *Dominican Republic*

136. ProCompetencia, Observaciones al Anteproyecto de Ley que dispone la Regulación a Servicios Telefónicos, 24 July 2018 http://procompetencia.gob.do/Docs/Abogac%C3%ADa/Opinion%20no%20vinculante%20Proyecto%20Ley%20Telecom.pdf?platform=hootsuite

137. *See generally* Ecuador, General Competition Law.

138. El Salvador, General Competition Law, art. 13.

139. El Salvador, General Competition Law, art. 14.

140. El Salvador, Telecommunications Law, art. 9-A.

141. El Salvador, Telecommunications Law, art. 15-A.

142. Guatemala, National Political Constitution, Art. 130.

Secondly, the Commerce Code also has a general provision that prohibits monopolies by imposing the obligation on all companies to supply to anyone who requests them their products or services, observing equal treatment among the various consumer categories.[143]

Thirdly, the Criminal Code regulates monopolistic behaviour, i.e. practices that, for illicit purposes, are to the detriment of the national economy, absorbing the production exclusively of one or more industrial branches, or of the same commercial activity or related to the agricultural industry.[144] The legislation also specifies the acts that are considered monopolistic, while other specific, very concise, provisions regulate matters related to free competition in the telecoms sector, which are all enforced by SIT, the sector-specific regulator.

Figure 26: Guatemala and the making of a General Competition Law

In May 2010, Guatemala adopted a commitment, as part of a Central American Association Agreement with the European Union, to adopt antitrust legislation by the end of November 2016. However, it was not until 2012 that discussions regarding the nature of this act begun, and as of 2019, Guatemala is still in the process of approving its first Competition Law.

In May 2016, a General Competition Law draft Bill (Bill No. 5074) was submitted to Congress for approval. The bill contains (amongst others) rules on: (i) competition advocacy; (ii) the Superintendence of Competition (competition authority); (iii) the administrative procedure; (iv) infringements, sanctions, measures and prescriptions. This Bill includes a provision that states that the Guatemalan General Competition Law will apply to all acts originated outside the territory of Guatemala that have effects in the territory of Guatemala.

The Superintendence of Competition would be an autonomous state entity that will oversee the defence and promotion of free competition, and the prevention, investigation and sanctioning of anticompetitive practices.[145]

The case of Guatemala shows the importance of having general competition laws in force for economic development. The main objective behind the enactment of such a bill is that Guatemala can have a level playing field to establish equal conditions for economic agents that wish to offer their products or services in the market, in turn driving more competition among those agents. This results in better products or services being offered, better quality and prices, and more predictability for economic agents.

Honduras: While the process to create a law-based competition policy began in the mid-1990s, the decisive input arrived in 2002, thanks to the obligations arising from the signing of a free trade agreement with the United States. In 2006, Honduras approved a General Competition Law, which was subsequently revised in 2015, with only minor changes related to the calculation and definition of fines. The antitrust authority in charge of applying and enforcing the General Competition Law is the Commission for the Defence and Promotion of Competition (CDPC).

The Honduras Competition Law also explicitly gives the CDPC wide powers to issue opinions or recommendations on draft laws, regulations, decrees, executive agreements, resolutions and international treaties. As an example, it made wide-ranging recommendations on the draft telecommunications law.[146] On the other hand, the Honduras General Telecommunications Law prohibits practices that limit competition in the telecommunications sector, making specific reference to anticompetitive agreements and abuses of dominant position.[147]

Mexico: The Mexican competition law regime has undergone several reforms in recent decades, changing every four to five years between 2006 and 2016. The system changed dramatically in 2013 with the reform of the Mexican Constitution, which included specific commitments regarding competition enforcement. The reform aimed to "lead Mexico to its full potential" by introducing more efficient regulation and enforcement systems. Reducing the inefficiencies in the telecoms sector, in particular, was one of the priorities.[148] In addition to the institutional changes, as a result of the Constitutional Reform,

143. Guatemala, National Commerce Code, Arts. 361-362.

144. Guatemala, Criminal Code, Title X.

145. Guatemala, General Competition Law draft Bill –Bill No. 5074

146. https://repositorio.cepal.org/bitstream/handle/11362/40014/4/S1700446_es.pdf P. 22

147. Honduras, General Telecommunications Law, art. 38.

148. On 10 June 2013, the decree to reform the Mexican Constitution, mainly in telecommunications and broadcasting matters, was enacted by President Enrique Peña Nieto. The Reform recognised as human rights the access to: (i) information and communications technology, and (ii) broadcasting and telecommunications services, including broadband and the Internet. Following the Reform, the Federal Telecommunications and Broadcasting Law was published on 14 July and entered into effect on 13 August 2014.

Figure 27: Sectorial assessment by the competition authority in Honduras

In December 2018, the CDPC presented its assessment of the telecommunications market in Honduras.[149] The report points out the need to update and simplify the regulatory framework. A recommendation to simplify the proceedings to grant authorisations and licenses seems like a positive step towards properly incentivising investments and competitiveness in connectivity.

However, the report recommends the creation of a wholesale shared network, similar to the *Red Compartida* case in Mexico. Figure 18 explains the competition challenges and disadvantages that these solutions pose, and alternatives to such initiatives.

Also, the CDPC makes an assessment of the results of the merger between Claro and Digicel in 2011. It highlights several consumer welfare improvements since the approval of the merger, such as:

- An increase in the frequency of low-price offers of pre-paid services
- A decrease of 16% in final prices paid by users
- Increased efficiencies in terms of quality, coverage and client services
- Most of Digicel users, which operated a 2G network, were able to access 3G mobile services at ease and low cost
- Increased efficiencies in the integration of Americal Movil and Digicel's networks as a result of better economies of scale and due to providing services to a larger client base at lower operational costs
- Increased levels of investment in infrastructure, which resulted in improved infrastructure topology

Even though the CDPC report acknowledges these improvements, it expresses some concerns by equating competition intensity with the amount of market players. However, a report by the GSMA found the merger reduced the gap between the top two players: Claro's market share increased from approximately 20% to 40%, bringing it much closer to market leader Tigo. A lower number of competitors can result in higher competition intensity as operators compete to gain clients on the basis of quality, thus explaining all the improvements in prices, efficiencies, coverage and quality acknowledged by the CDPC. High and stable market shares can indicate competitive efforts rather than a lack of competition.[150] As telecoms services require heavy investment, a high number of operators can undermine an operator's ability to invest.

A more in-depth analysis on these proceedings is included in the section on Mergers in this report.

the Mexican government introduced a new Federal Law of Economic Competition in May 2014.

While the reforms maintained the Federal Commission of Economic Competition (COFECE), it gave the IFT, the new telecoms regulator, full and exclusive powers to apply the new Economic Competition Law to the telecoms and broadcasting sectors, including mergers. As a result of the reform, within the IFT, an Economic Competition Unit was created, which is charged with overseeing antitrust investigations. The objective is to allow for better cooperation, information sharing and to exploit synergies between the sectorial regulators and the competition authorities within the IFT.[151]

Still, IFT and COFECE need to continue to work in close coordination. Both have to enforce the competition regulatory framework, and the coherence with which they do so may directly influence litigation brought before the tribunals or the possibility of economic agents seeking to arbitrage certain regulatory undertakings between COFECE and IFT.[152] Competition legislation also establishes some information sharing mechanisms and joint collaboration in the drafting of guidelines.[153]

Nicaragua: The structure and content of the Nicaragua Competition Law is similar to most of those surveyed in this report. It bans anticompetitive practices,

149. https://www.cdpc.hn/sites/default/files/Privado/estudios_mercado/Estudio%20Sectorial%20de%20Telecomunicaciones%20en%20Honduras%20%28Telefon%C3%ADa%20M%C3%B3vil%2C%20Fija%20e%20Internet%29.pdf

150. GSMA, Assessing the impact of market structure on innovation and quality: Driving mobile broadband in Central America (2018).

151. V. Pavón-Villamayor, *supra* note 65; J. Delgado & E. V. Mariscal, *supra* note 44, p. 152.

152. *See* W. E. Kovacic & D. A. Hyman, *Divide or Conquer?, supra* note 43. p. 13

153. Mexico, Federal Economic Competition Law, art. 5, 60, 168.

establishes a regime for controlling mergers and acquisitions and bans unfair competition between economic agents.[154] The Law created ProCompetencia, which officially started work in 2009, and empowered it to look into anticompetitive practices and mergers, carry out *ex ante* assessments for some mergers, take on important tasks of competition advocacy and deal with complaints of unfair competition.

The general competition law grants sector-specific regulators, including TELCOR, the telecoms regulator, the power to investigate competition law infringements. However, ProCompetencia must be notified of such matters so it can issue a non-binding resolution with its opinion. TELCOR must consider ProCompetencia's opinion and, it needs to argue its case should it decide to issue a resolution in a different direction.[155]

Panama: Although there is a general competition law authority in Panama, ASEP, the telecoms regulator, has exclusive powers to apply competition law in this sector. However, ASEP has to collaborate with the Authority for Consumer Protection and Defence of the Competition (ACODECO) to consistently apply competition law, and it may ask it to issue guidelines and definitions regarding competition.[156]

With respect to mergers, Panama has recently eliminated the restriction on mobile concessionaries merging with or acquiring another mobile concessionaire. To do so, concession holders need to get ASEP's prior authorisation, whereas ACODECO may verify the transaction (*ex officio* or at the request of a third party) and whether it will restrict or not competition. ACODECO may approve such mergers subject to conditional remedies.[157] However, as explained below in the "Mergers" section, in the context of mobile concessionaries' mergers, ASEP has established the principle of "equitable distribution in the assignment of scarce resources", such as spectrum. Under such concept, ASEP, as the regulatory and supervisory agency for telecommunications services in Panama, has to ensure that existing and current mobile concessionaires, after the economic concentration transaction, have the same amount of spectrum for the provision of such services. Thus, our salient mobile operator must return spectrum to the sector-specific regulator, which must manage it accordingly.[158]

Peru: Peru adopted competition law in 1991, mainly focusing on preventing anti-competitive agreements and tackling abuses of dominant positions. However, Peruvian Competition Law did not preview a merger control mechanism and included specific exemptions for otherwise anti-competitive agreements.[159] Thus, Peru is the only country among those surveyed in this report that has no merger review system in force. On the contrary, telecoms concessionaires are only obliged to notify the Ministry of Transport and Communications of any change of ownership of 10% or more within 30 days from the date in which the operation comes into effect.[160]

In the telecommunications sector, the application of the relevant competition laws is the responsibility of the sectorial regulator OSIPTEL (the Supervisory Agency for Private Investment in Telecommunications). A collegiate body created *ad hoc* within OSIPTEL takes decisions on competition matters in the telecoms sector. Once an administrative decision is reached, the collegiate body is disbanded. An administrative dispute resolution tribunal, also established within OSIPTEL, and whose members are appointed by the Transport and Communications Ministry, issues appeal decisions.[161]

Uruguay: The Commission for the Promotion and Defence of Competition is the general antitrust agency, but URSEC has been vested with powers to apply competition law in the telecoms sector exclusively, which includes merger review. However, in performing its competition law duties, URSEC must request the non-binding opinion of the general competition authority.[162] Acting as a competition authority in the telecoms sector, URSEC must promote competition, foster economic efficiency, investigate forbidden practices that restrict competition and impose fines in the event of abusive practices.[163] In September 2019, the Uruguayan Congress passed a bill that introduces modifications to the merger control regime and the "*metodología de análisis para los llamados cárteles de núcleo duro*".[164]

Venezuela: The first General Competition Law in Venezuela was enacted in 1992. This law instituted the Superintendence for the Promotion and Protection of Free Competition (Procompetencia) as the competition authority. Procompetencia is a functionally independent body accountable to the Ministry for Trade and Production. Although formally independent,

154. Nicaragua, Law on the Promotion of Competition, art. 15.

155. Nicaragua, Law on the Promotion of Competition, art. 15.

156. Panama, Executive Decree No. 73 of 1997.

157. Panama, General Telecommunications Law, Bill 479, 2017.

158. Panama, Regulation AN No. 13200-Telco

159. Peru, Competition Law, Legislative Decree 1034.

160. Peru, General Telecommunications Law, art. 51.

161. Peru, Competition Law, Legislative Decree 1034, art. 17; General Regulation of OSIPTEL, Law 27332, art. 45.

162. Article 17 of the Uruguayan Competition Law states that in all sectors subject to the "oversight or supervision of specialized regulatory bodies, (...) the protection and promotion of competition is the responsibility of those bodies".

163. Uruguay, Law 17296 of 2001, arts. 157 and 158.

164. Uruguay, Law of 2007, as amended in 11 September 2019.

Procompetencia does not have financial autonomy and gives technical assistance to the Ministry to develop relevant competition policies. Procompetencia is also in charge of *ex ante* merger review.

More recently, in 2014, a new General Competition Law was approved, even though some provisions of the 1999 legislation are still in force. This newly-enacted legislation ties the application of competition law to several social and political objectives,[165] while excluding public or mixed strategic companies and national state-owned companies providing public services from the application of competition law.[166]

Enforcement of the new Venezuelan Competition Law must coexist with the enforcement of the Organic Law of Fair Prices (OLFP),[167] which is the principal legal framework to regulate and control the economy in Venezuela. The administrative entity responsible for enforcing the OLFP is the National Superintendence for the Defence of Socioeconomic Rights (SUNDDE). The main provision in the OLFP imposes that the maximum profit margin of each member of the commercialisation chain cannot exceed 30%.[168] In light of the above, economic agents are focused on complying with the OLFP and SUNDDE regulations.

165. Venezuela, General Competition Law, art. 1.

166. Venezuela, General Competition Law, art. 3.

167. Venezuela, Organic Law of Fair Prices, Published in “Gaceta Oficial Extraordinaria No 6342 of November 22, 2017”.

168. Venezuela, Organic Law of Fair Prices, art. 31.

Coordination and Cooperation among the Region's Authorities

Introduction

There are different trans-national organisations in Latin America that deal with communications and digital affairs with different degrees of influence within the region, generally with the objective of finding a common regional strategy to foster high-quality connectivity and digital services. Broadly speaking, initiatives are in place within each organisation that should lead to better regional coordination of regulatory regimes, as consensus builds towards harmonisation and greater regional coordination of cross-border affairs. Nonetheless, the overlapping nature of these organisations has hampered progress towards a more effective and integrated regional digital economy.

All the surveyed countries are involved in some form of international cooperation agreements or organisations (see Figures 28 and 29). These vary in scope, ranging from the elimination of trade and non-trade barriers to the free movement of people and capital. These agreements also vary in their geographical reach, while some intend to include all Latin American countries, other have a sub-regional scope. As a result of these varying factors, these agreements and organisations vary in the level of integration, participation and implementation,

Figure 28: Membership of regional organisations in Latin America

Country	MERCOSUR	CAN	PA	REGULATEL	CITEL	ECLAC	COMTELCA	SELA	LACF	COMPAL
Argentina	•			•	•	•		•	•	•
Bolivia	In process of accession	•		•	•	•		•		
Brazil	•			•	•	•		•	•	•
Chile	•		•	•	•	•		•	•	•
Colombia		•	•	•	•	•		•	•	•
Costa Rica				•	•		•		•	•
Ecuador		•		•	•	•		•		•
El Salvador				•	•	•	•	•	•	•
Guatemala				•	•	•	•	•		•
Honduras				•	•	•	•	•	•	•
Mexico			•	•	•	•	•	•	•	•
Nicaragua				•	•	•	•	•		•
Panama				•	•	•	•	•	•	•
Paraguay	•			•	•	•		•		•
Peru		•	•	•	•	•		•	•	•
Uruguay	•			•	•	•		•		•
Venezuela	•[169]			•	•[170]	•				

169. Venezuela is currently suspended from MERCOSUR for indefinite time, since August 2017.

170. In 2017, Venezuela announced that it planned to leave the Organization of American States - CITEL - but this is a process that would formally take two years. In the meantime, it does not plan to participate in that forum.

meaning some are focused on fewer and more achievable cooperation objectives that others.[171]

Because of the overlapping nature of these agreements and organisations, together with the non-binding nature of most of the resolutions and instruments they issue, there is no comprehensive set of trans-national rules aiming at establishing policies and protecting competition in the digital sector.

In terms of competition provisions for cross-border cooperation, several overlapping regional trade agreements (RTAs) play a key role. The most important are: the Andean Community of Nations (CAN) and the Common Southern Market (MERCOSUR). The latter includes some competition provisions, but does not create a supranational authority that can deal with competition matters at the regional level. In addition, implementation of the competition provision of the RTAs has not been infrequent, which is partly explained by the fact that RTAs with competition-related provisions are a relatively new phenomenon.

Intergovernmental organisations

Inter-American Telecommunications Commission (CITEL): Within the Organization of American States (OAS), based in Washington D.C., CITEL's mission is to "facilitate and promote the integral and sustainable development of interoperable, innovative and reliable telecommunications/ICTs in the Americas, under the principles of universality, equity and affordability".[173] The OAS is the most comprehensive regional organisation in the Americas in terms of member states: as of October 2018, the OAS brings together all 35 independent states in the region. CITEL is mostly used as a regional forum to provide inputs to global organisations, mainly the International Telecommunications Union (ITU).

Figure 29: membership of regional organisations in Latin America collaborating on competition matters

Country	MERCOSUR	CAN	SELA	LACF	COMPAL
Argentina	•		•	•	•
Bolivia	In process of accession	•	•		•
Brazil	•		•	•	•
Chile	•		•	•	•
Colombia		•	•	•	•
Costa Rica				•	•
Ecuador		•	•		•
El Salvador			•	•	•
Guatemala			•		•
Honduras			•	•	•
Mexico			•	•	•
Nicaragua			•		•
Panama			•	•	•
Paraguay	•		•		•
Peru		•	•	•	•
Uruguay	•		•		•
Venezuela	•[172]		•		

171. For detailed information on regional digital strategies on integration and cooperation in Latin America, see generally: Cullen International, Building a Digital Single Market Strategy in Latin America (Ed. CAF Latin American Development Bank), 2016; Cullen International, Regional and Sub-Regional Approaches to the Digital Economy: Lessons from Asia Pacific and Latin America (Ed. CAF Latin American Development Bank), 2018.

172. Venezuela is currently suspended from MERCOSUR for indefinite time, since August 2017.

173. CITEL, Strategic Plan 2018-2022 CITEL/RES. 79 (VII-18)1.

For 2018-2022, CITEL has set three strategic missions: promoting digital inclusion, developing a telecommunications/ICT context that is harmonised and interoperable and improving the financial and institutional sustainability of CITEL and regional participation.[174]

Andean Nations Community (CAN): CAN is notable in that it has binding sector-specific regulations in force and a permanent community tribunal, the Andean Community Justice Tribunal, to solve community disputes and enforce its regulations (see Figure 30).

CAN members are **Colombia, Bolivia, Ecuador** and **Peru**. In 1991, CAN created the **Andean Committee of Telecommunication Authorities** (CAATEL), constituted of representatives of sectorial regulators of the member states. In 1999, CAATEL adopted the 'Community Decision 462'[175] with the aim of progressively liberalising telecommunications markets, and stimulating investment by eliminating restrictions and harmonising regulations. CAN has also established common rules on consumer protection[176] and device theft.[177] Moreover, CAN has created a community regulatory framework for the commercial use of satellite resources and an Andean satellite communications system.[178]

CAN has announced it will update the telecommunications community regulations, while it is also working on a proposal to eliminate or reduce roaming costs in the community.[179] In August 2018, CAATEL published its Working Plan for 2018-2019, together with a series of actions to promote further integration and development of telecommunications at the Andean level, with a special focus on bridging the digital divide, spectrum harmonisation towards 5G and disaster response.[180]

CAN and Competition Law

CAN is a notable exception to the lack of cross-border implementation of competition law. The Cartagena Agreement, the basis for CAN, contains a mandate to adopt the rules needed to protect competition in the territory of the member states.[181] After this, Decision 285 of 1991 introduced the first regional legislation aimed at establishing a competition law and policy system largely based on the European Union model.[182]

Since 2005, CAN's "Community Decision 608" contains a comprehensive set of rules aimed at protecting and promoting effective competition in CAN member states, making markets more efficient and providing consumer welfare. The Decision defines forms of anticompetitive conduct and equips the General Secretariat with tools and enforcement powers to conduct competition related investigations and if necessary impose sanctions for violations.[183] This Decision reformed the previous supranational competition system, allowing the General Secretariat to initiate its own investigations and impose fines and/or interim measures. It has also been granted the competence to request the cooperation of National Competition Authorities. Furthermore, Decision 608 created an advisory committee (the Andean Committee for the Protection of Competition) composed of members of the national authorities (this is quite similar to what happens in the EU context).

Moreover, national competition authorities, consumer organisations, legal entities and individuals were given the right to file complaints. This competition system was also meant to complement national laws that were still lacking a comprehensive competition regime by allowing national competition authorities to apply regional competition rules to cases that affect regional trade. Thus, Member States, such as Bolivia, which do not have their own competition laws can apply CAN rules to cases of anticompetitive conduct in their own jurisdictions as the default rules.

Common Southern Market (MERCOSUR): The largest trading bloc in South America, Mercosur is comprised of Brazil, Argentina, Paraguay, Uruguay and Venezuela. Bolivia is in the process of joining as a full member, while Chile, Peru, Colombia and Ecuador are associate members.

Mercosur was created in 1991 to establish a "southern-cone" trading bloc, with different stages of integration, starting with the free circulation of goods, services and capital, followed by the elimination of trade tariffs, and moving forward with the establishment of a common commercial strategy, the coordination of macroeconomic policies and the harmonisation

174. CITEL, Strategic Plan 2018-2022 CITEL/RES. 79 (VII-18)1.

175. Community of Andean Nations, Decision 462, available at http://www.comunidadandina.org/StaticFiles/DocOf/DEC462.pdf

176. Community of Andean Nations, Decision 638, available at http://www.comunidadandina.org/StaticFiles/DocOf/DEC638.pdf

177. Community of Andean Nations, Decision 786, available at http://www.comunidadandina.org/StaticFiles/DocOf/DEC786.pdf

178. For more information, visit http://www.comunidadandina.org/Seccion.aspx?id=315&tipo=TE&title=telecomunicaciones

179. For more information, visit http://www.comunidadandina.org/Seccion.aspx?id=315&tipo=TE&title=telecomunicaciones

180. Community of Andean Nations, "Comité Andino de Autoridades de Telecomunicaciones impulsará reducción de brecha digital en países de la CAN", available at http://www.comunidadandina.org/Prensa.aspx?id=7987&title=comite-andino-de-autoridades-de-telecomunicaciones-impulsara-reduccion-de-brecha-digital-en-paises-de-la-can&accion=detalle&cat=AF&idfoto=0

181. Andean Community Cartagena Agreement, art. 93.

182. CAN, Community Decision 608.

183. CAN, Community Decision 285.

184. Mercosur, 1991 Asuncion Treaty on the Establishment of Mercosur.

of legislation in different areas.[184] However, as of now, Mercosur serves as a trading bloc with an intermediate-to-low degree of commercial integration.

While the Common Market Counsel (CMC) is the political lead of Mercosur (and is comprised of its foreign affairs and finance ministries), the Common Market Group (GMC) is charged with applying and enforcing Mercosur rules. These are the main Mercosur organs with the power to issue binding decisions. The GMC is organised in Sub-Working Groups (SGTs), each of them corresponding to a sector included in Mercosur's founding treaty. The SGT 1, founded in 1995, deals with Communications issues.

Figure 30: Judicial interpretation of community regulation in CAN: COMCEL v. ETB

The Andean Community of Nations' (CAN) Justice Tribunal is the competent entity in charge of interpreting and applying community regulations. When it comes to Latin America, this is the only supranational entity that has adjudicated a decision in a particular case regarding the interpretation of community telecommunications regulations. In this case, the tribunal interpreted community rules at the request of a Colombian arbitral tribunal, in the framework of an interconnection dispute between two Colombian telecommunication operators.

Legislative Framework

- CAN Decision 642 on "Rules that regulate the process of integration and liberalisation of the commerce of telecommunications services in the Andean Community"
- CAN Resolution 432 on "Rules on telecommunications interconnection"

Background

- COMCEL and ETB signed a contract on the interconnection of ETB's long distance public commuting network with COMCEL's mobile telephony network. The agreement included a clause stating that ETB had to pay COMCEL for access charges on international long distance traffic.
- While CRC, Colombia's regulator had issued resolutions regarding interconnection charges, ETB and COMCEL did not agree on the applicable charges to this agreement.
- As a result, in 2015, the dispute was brought before an arbitral tribunal.
- The arbitral tribunal requested the Andean Community Justice Tribunal's interpretation of community regulations regarding:
    1. The reach of the competence and jurisdiction the telecoms regulator has to solve disputes between telecom operators on competition and interconnection matters.
    2. Whether the decision issued by the telecoms regulator in these disputes has the same legal effects of a jurisdictional sentence.
    3. Whether it is up to each member State of CAN to decide the extension and reach of the competence and jurisdiction of the telecoms regulator to decide on interconnection and competition disputes, taking into consideration the CAN decision is silent on the matter

Analysis

The Andean Community Justice Tribunal decided that:

- CAN regulations prevail over national legislation. National interconnection regulations can complement Andean regulations in those matters in which Andean regulation is silent, but they must always do so on the basis of CAN's telecommunications regulation principles.
- Telecoms regulators have exclusive jurisdiction to adjudicate in interconnection controversies regarding the execution of the interconnection agreement when there is no direct agreement on the dispute.
- Community regulation states that parties in interconnection contracts can agree on different dispute settlement mechanisms in regards to previous contract stages. Thus, it is up to the national regulator to decide whether the dispute arising in each particular case refers to a stage prior or after the execution of the agreement.
- It is up to each national legislative framework to decide whether a regulator's decision has the same legal effects of a jurisdictional sentence, and its reach and extension.

SGT 1 is organised into commissions, one of which pursues the objective of moving towards a common telecommunications market in the Americas' southern cone. This commission passes recommendations, which are then approved by the plenary of the GMC through a resolution. It is up to each member state to adopt these resolutions within their internal legislative framework. So far, GMC has issued resolutions with regards to guidelines related to frequency coordination, roaming and emergency services.[185] In April 2018, the GMC approved the creation of a Digital Agenda Working Group, together with its Action Plan, that includes priorities on user protection and the development on initiatives to deploy infrastructure and harmonise regulation.

Mercosur also announced the elimination of roaming charges for communications within their State members, in its Presidential Summit that took place in July 2019. However that will require the approval of the legislative branch in each of the member States, as well as the establishment of technical commissions that can tackle the issues of double taxation as well as technical matters.[186] However, both in the case of CAN and Mercosur, these should be considered as interventions on market dynamics, which do not present a clear market failure but, on the contrary, are showing signs of decreasing roaming prices via self-regulatory frameworks and commercial agreements.

Mercosur and Competition Law

Due to internal political divisions, MERCOSUR has made little progress on harmonising competition policy, which is still largely set at a national level. The 1996 'Fortaleza Protocol,[187] which has not been ratified by all members, sets out that MERCOSUR members are obliged to adopt national competition laws and create national competition authorities. If a competition matter has cross-border effects within MERCOSUR, member states are obliged to refer the matter to MERCOSUR bodies. Decisions by MERCOSUR must be implemented by national authorities. However, these measures have never really been implemented because of the difficulties of creating a full cross-border competition regime and authority in the absence of truly cross-border entities.

However, the need for some form of cooperation and coordination between the member states remains. In 2010, the CCM adopted the "Agreement for the Defence of Competition of MERCOSUR" (the Agreement) and repealed the Fortaleza Protocol. The Agreement is aimed at creating a network of cooperation between agencies, especially with regard to practices with cross-border effects. In this context, the national competition authorities retain full, exclusive competence on all restrictive practices that take place in the national territory or that produce their effects therein.[188]

REGULATEL: Regulatel is an association that convenes 23 telecommunications regulators, of which 20 are from Latin America and the Caribbean, and the remaining three are from Europe (Portugal, Spain and Italy).

Regulatel acts as a platform for dialogue and exchange between regulators to look for possible ways of harmonising regulation and public policies in the region, and also to identify regional interests prior to international forums. Its agreements are not binding and its activities consist mainly of research, organised through thematic working groups. During 2016, Regulatel published research regarding competition in the telecommunications market, which is quoted throughout this report, mainly based on information provided by each regulator.[189]

The Pacific Alliance (PA): Officially established on April 2011, the PA regional integration initiative comprises Chile, Colombia, Mexico and Peru. The PA has mandates to improve the free movement of goods, services, resources and people, as well as promoting the competitiveness of its members, and becoming a platform of political articulation, economic and commercial integration and projection to the world.[190] In 2016, the PA established a Digital Agenda Sub Group and in 2017 a regional Digital Agenda and roadmap were created. In 2018, a Digital Agenda Public-Private Subgroup was created within the framework of the Pacific Alliance.[191] This group has the potential to create comprehensive, harmonised and enforceable rules that would lead to converging regulation within its member states.

Other relevant organisations - Regulation

Other relevant organisations working on digital regulation matters are the **United Nations**

185. Mercosur, 1991 Asuncion Treaty on the Establishment of Mercosur.

186. For more information on the elimination of roaming in Mercosur countries, see https://www.enacom.gob.ar/institucional/primera-reunion-para-eliminar-el-roaming-en-el-mercosur_n2128

187. Protocol of Fortaleza for the defence of Competition in Mercosur, signed in Fortaleza Brazil, on 17 December 1996 and approved by decision No 18/96 of Mercosur's Common Market Council.

188. With the exception of Venezuela whose competition law (Ley para Promover y Proteger el Ejercicio de la Libre Competencia") only applies the principle of territoriality.

189. For more information on REGULATEL, see www.regulatel.org

190. For more information on the Pacific Alliance, see www.alianzapacifico.net

191. See Pacific Alliance, Hoja de Ruta del Subgrupo de Agenda Digital, 2018.

Economic Commission for Latin America and the Caribbean (ECLAC) and the **Central American Telecommunications Commission** (**COMTELCA)**. As of now, neither of these bodies has an established body of work oriented towards economic regulations in the digital ecosystem, though there are some efforts that may move in that direction.

ECLAC is a regional United Nations commission based in Santiago, Chile, with 45 member states and 13 associate states. ECLAC is focused on economic development, public policy and social issues, rather than regulatory matters. It also works in research and delivering training on these matters, with the aim of building capacities in the region. Since 2005, ECLAC has been working as a platform to set a digital agenda for the region, to accelerate the development of the digital ecosystem, boost electronic commerce, improve access to information and protect the privacy of users. To do so, it has created eLAC, which works as a mechanism to gather public and private entities, to set a digital agenda and activities with long-term vision, on the basis of the United Nations Sustainable Development Goals. In 2018, the Cartagena Declaration was signed, including eLAC's digital agenda for 2020.[192]

COMTELCA is a specialised technical commission within the Central American Integration System (SICA) that works on coordinating, supporting and harmonising the development of telecommunications in Central America. Its members are: Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, and Dominican Republic. COMTELCA is led by a Directive Board, in which telecommunications regulators participate to set COMTELCA's decisions and policies, issuing resolutions. Five thematic committees support the board and the work of each of these is coordinated by the Executive Secretariat. In the past two years, COMTELCA has been very active in building regional capacities, with a particular emphasis in spectrum harmonisation, as well as in finding common ground before global organisations, such as the ITU.

The Organization for Economic Cooperation and Development (OECD) has also been very influential in the region, pushing for regulatory reforms both in member countries as well as in countries seeking for accession. The most notable examples are Mexico – whose 2012/3 telecoms and constitutional reforms were the result of OECD recommendations[193] - and Colombia, the OECD's newest member,[194] which have been mentioned throughout this report. Membership requests from Argentina, Brazil and Peru are under consideration by the OECD Council.[195]

Other relevant organisations – Competition law

There are a number of other organisations promoting collaboration in both regulatory and competition matters.

The Competition Program for Latin America (COMPAL) is a United Nations Conference on Trade and Development (UNCTAD) programme that provides capacity building and institutional strengthening on competition and consumer affairs matters to 17 beneficiary countries in Latin America. The State Secretariat for Economic Affairs of Switzerland (SECO) has provided funding since 2004. Begun in 2003, this programme has expanded in phases, now being in its third phase, running from 2015 to 2018. The ultimate goal of COMPAL is to increase its members' competitiveness and increase consumer trust in both national and regional markets.[196] Within the framework of COMPAL, in 2010, the Permanent Secretariat of the Economic System of Latin America and the Caribbean (SELA) and the United Nations Conference jointly formed the UNCTAD Working Group on Trade and Competition in Latin America. The Group meets annually to promote cooperation, consultation and joint work in trade and competition matters in Latin America and the Caribbean.[197]

Most Latin American countries also take part in completion and regulation-related initiatives at OECD level. Apart from Competition Commission meetings, this includes the Latin American Competition Forum (LACF), which is run jointly by the OECD and the Inter-American Development Bank (IDB). LACF was created to foster effective competition law and policy in Latin America and the Caribbean, committing the two organisations to promote dialogue, building

192. For more information on ECLAC, eLAC 2020 and its agenda, see https://conferenciaelac.cepal.org/6/es

193. In 2012, the OECD published its 2012 Review of Telecommunication Policy and Regulation in Mexico report, which included 31 recommendations. In its 2017 Telecommunication and Broadcasting Review of Mexico, the OECD assessed that Mexico had complied with 28 out of the 31 recommendations.

194. In 2014, the OECD Review of Telecommunication Policy and Regulation in Colombia presented a series of recommendations for the sector, the most notable one being that Colombia should establish a convergent regulator. In June 2018, Colombia joined the OECD as its 37th member. In December 2018, the OECD presented its commentaries to the ICT Modernization Draft Bill, which acknowledged the Bill as a positive proposal, aligned with OECD recommendations, but highlighting some points – particularly in regards to institutional design - as needing further modifications.

195. As of April 2019, these membership request have not made any references to possible sector-specific reports or recommendations.

196. For more information, see www.compalunctad.org

197. VII Annual Meeting of the Working Group on Trade and Competition of Latin America and the Caribbean (WGTC) Report, 12 and 13 October 2017, SP/VIIRAGTCCALC/IF N° 1-17.

consensus and networking among policymakers and enforcers. As in telecoms-specific regulation, the OECD has been a driver of reform in the region, particularly in Colombia and Costa Rica, and to a lesser extent, in Chile, Peru and Argentina.[198]

Most countries in the region also participate in the International Competition Network (ICN), which is a global network that provides competition authorities with a specialised, yet informal, venue for maintaining regular contacts and addressing practical competition concerns. This network serves as a platform for its members to work in project-oriented and results-based working groups. While the ICN does not exercise any rule-making functions, where it reaches consensus, it may publish documents on recommendations or "best practices" guidelines, which have served for national authorities to implement reforms in their countries. With the exceptions of Guatemala, Bolivia and Venezuela, the competition authorities in the countries' surveyed for this report are parties to ICN.[199]

198. See, among others, OECD, Competition Law and Policy in Latin America peer reviews of ARGENTINA, BRAZIL, CHILE, MEXICO AND PERU (2007); OECD, Colombia: Assessment Of Competition Law and Policy (2014); OECD, Competition Law and Policy in Costa Rica 2014 Peer Review; OECD, Competition Law and Policy in Chile 2015 Peer Review.

199. For more information, see www.internationalcompetitionnetwork.org

Cooperation Frameworks and Agreements

Introduction

Cooperation is important:

- Between agencies at the **national level** (i.e., between the national competition authority and the regulator)
- Between agencies at the **international level** (i.e., between cross-border groupings of regulators and competition authorities, and between the groups that, in each intergovernmental organisation, deal with regulation and competition law);
- Between regulators at the **international level**
- Between competition authorities at the **international level**

Cooperation between agencies at the national level

When there are two different agencies, there is a need for cooperation in each country between **the telecommunications regulator and the competition authority**. As seen in Figure 31, a different model involves setting up one agency with powers to enforce both competition law and regulation. While none of the countries surveyed in this report have adopted the "integrated model" shown in Figure 31, in **Mexico**, **Panama**, **Peru**, **Uruguay**, **Costa Rica** and **Nicaragua** the regulator has powers to apply both sector-specific regulation and competition law with exclusivity in the sector, despite the existence of a competition authority.

Two agencies - Three models in competition policy

Three possible models can be adopted when there are two agencies with competition policy enforcement powers, depending on whether the regulator has the power to apply competition law to the sector that it regulates. These are shown in Figure 31.

In the first model, adopted by Argentina, Brazil, Colombia, Venezuela, El Salvador and the Dominican Republic, the regulator does not have competition law powers: Competition law is applied by the competition authority in all sectors of the economy. At first sight, this model suffers from the disadvantage that the competition authority will not have the same in-depth knowledge as the sectorial regulator. This disadvantage can be overcome by close cooperation between the agencies: when the sector under investigation by the competition authority is the specific sector regulated by an independent regulator, the competition authority needs to take into account the views of the regulator. The advantage of this model is that, when the agencies cooperate properly, competition law is applied equally to all sectors of the economy and the competition authority acquires the necessary expertise. By contrast, an intense focus on subjecting the telecoms sector to enhanced scrutiny, to the exclusion of other sectors of the economy, may lead to foregoing the above mentioned benefits that competition policy enforcement can have for the economy as a whole.

The second model is an intermediate model. The regulator can apply competition law to the sector, but the competition authority retains the powers to apply the rules to the sector also. This is known as the "concurrency model", adopted in **Chile**, **Ecuador**, **Paraguay** and **Honduras**. This model has a theoretical appeal: the regulator can act under competition law, but if it does not, then the competition authority retains the powers to do so. In practice, in the countries that have adopted the concurrency model, the competition authority rarely interferes with the powers of the sectorial regulator. There is evidence that, given the choice, a regulator with competition law powers does not use them often, preferring the tried and tested regulatory route. There is also the risk that the regulator and the competition authority would reach different views about the same behaviour, perhaps allowing it in the wider economy and restraining it in the telecom sector. And finally, there is still a need for a MoU or other means to agree between the agencies which have jurisdiction in different kinds of cases. For example, the agencies would need to decide who would investigate a complaint that a telecom operator has entered into an anticompetitive agreement with a company not subject to the jurisdiction of the regulator.

The third model entails the **exclusive application by the regulator of competition policy (law and regulation) in the sector.** The reason to adopt this model is that the telecom sector is complex. The regulator has a head start over a competition authority when it comes to understanding market dynamics. This model has been adopted in many of the surveyed countries: **Mexico**, **Panama**, **Peru**, **Uruguay**, **Costa Rica**, and **Nicaragua.** The main advantage of this institutional design is that it offers

Figure 31: models in competition policy

	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 to telcos competition law	**One agency:** Only the regulator, only regulation	**One agency:** The Integrated Model
EXAMPLES	• Argentina • Brazil • Colombia • Venezuela • El Salvador • Dominican Republic	• Chile[200] • Ecuador • Paraguay • Honduras	• Mexico • Panama • Peru • Uruguay • Costa Rica • Nicaragua	• Guatemala[201] • Bolivia[202]	• N/A
POSITIVES	Ensures that competition law is applied equally to all sectors of the economy	Ensures that competition law should be applied with sector knowledge, but competition authority retains ability to consider issues too	Ensures that competition law is applied with sector knowledge. No safeguard of 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 applies regulatory categories when applying competition law	Only Telcos are subject to scrutiny, which doesn't account for the convergence in the digital economy and can result in a non-level playing field	If the agency is not properly resourced, risk of backlogs. Need for coordination across the different parts of the agency.

Source: GSMA

regulatory consistency, while avoiding overlapping.[203] Also, the regulator has a deep knowledge and understanding of the telecoms sector, which can be technical and complex.[204] At the same time, the telecoms regulator may lack the specialised staff and knowledge needed to investigate cartels and abuses of dominance.[205] Moreover, coordination between the sector-specific regulator and the competition authorities remain necessary. Both have to enforce competition law, and the coherence with which they do so may directly influence the amount of future litigation brought before the tribunals.[206] Thus, information sharing mechanisms and joint collaboration in the elaboration of guidelines may still prove useful. Such is the case of merger control in Mexico, in which in some limited cases, authorisation from the competition authority is still needed,[207] as explained in further detail in Figure 32.

200. Even though primary jurisdiction on competition matters lies with 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)

201. 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.

202. 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.

203. OECD, DSTI/ICPP/TISP(99)15/FINAL, *supra* note 59, p. 22

204. V. Pavón-Villamayor, supra note 146; J. Delgado & E. V. Mariscal, supra note 124, p. 152.

205. ICN Report, p. 86; OECD, DAFFE/CLP(99)8, p. 33-4.

206. See W. E. Kovacic & D. A. Hyman, Divide or Conquer?, *supra* note 19. p. 13

207. *See* Mexico, *Acuerdo mediante el cual el pleno del Instituto Federal de Telecomunicaciones expide la Guía para el Control de Concentraciones en los Sectores de Telecomunicaciones y Radiodifusión*, available at http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/pift280617368canexo.pdf

Figure 32: The constitutional reform in Mexico and the internal governance of IFT

In 2013, the Mexican Constitution was reformed. As part of the constitutional reform in telecommunications matters, a new Federal Telecommunications and Broadcasting Law was passed and came into force in August 2014. The reform created a new autonomous regulator, the Federal Institute of Telecommunications (IFT). The IFT is a constitutional entity with broader powers than its predecessor, including exclusive competence on economic competition matters, and a new institutional design, incorporating rules on transparency and contact with the regulated industry.

Mexico also has a new authority with jurisdiction on matters of economic competition regulation, the Federal Economic Competition Commission (COFECE). However, since all competition powers were granted to IFT with exclusivity,[208] not just those relating to the imposition of regulation, COFECE has no power in the telecommunications and broadcasting sectors.

The main driver for the constitutional amendment that granted competition powers to the telecommunications regulator was to improve the coordination that had been lacking between the former competition authority and telecommunications regulator, as well as the latter's weak performance.[209] Also, some of the changes introduced by the constitutional amendment and the legislative reform follow OECD recommendations. One of them was that the IFT had to be able to act independently to give certainty to the market and produce effects that benefit consumers.[210]

Some salient issues of this reform and IFT's internal governance are:

Independence and accountability: Both the Telecommunications Law and the IFT's statute have established a number of provisions seeking to ensure transparency and independency of the IFT. This shows that the creation of an agency with broad competences does not have to necessarily result in the return of powers to the executive branch, which generally lacks the technical knowledge and political autonomy to decide in these matters.

Separation of decision-making processes from investigative work: IFT has an Economic Competition Unit (UCE) that is in charge of competition advocacy while collaborating with other units, but at the same time functions as an independent division itself within IFT.[211] This is one of the "check-and-balances" mechanisms within IFT, which is a direct consequence of the constitutional requirement of the separation of investigative work from the decision-making process.[212]

Policy coherence and synergy challenges: the IFT has a very broad mandate, as reflected in its work plan for 2019-2023 [213] which encompasses freedom of speech, universal access, free markets access, eliminations of restrictions for innovation and competition, regulating the use of spectrum and networks for telecommunications and broadcasting services and the protection of the rights of users and audiences. It will be a challenge to manage and prioritise such a diverse mandate.

Emerging markets should consider their options carefully when reconsidering their existing frameworks: policymakers need to be really clear that the chosen model is the best route for their country and about the interplay between agencies.

Cases of Cooperation Frameworks between NRAs and NCAs

Whatever the model chosen, close cooperation between the regulator and the (separate) competition authority is crucial to ensure that the competition authority has access to relevant sector-specific information and can apply the competition rules consistently. This issue is recognised in Latin America. In some countries, there is a statutory system for determination of the jurisdiction between the regulator and the competition authority:

- In **Panama**, the telecoms regulator ASEP applies competition law with exclusive powers in the sector. However, it may ask the general competition authority to issue guidelines and definitions regarding competition issues. Although

208. Mexico, Political Constitution of the Mexican United States, art. 28.

209. G. Calderón & K. Sanderson, New Competition Law Enforcement in Mexico: Pros, cons and a comparative view from the U.S., 4 ABA Section of Antitrust Law 9 (2013), 9; V. Pavón-Villamayor, Reformando las telecomunicaciones, Forbes Mexico, Apr. 2013; Telecoms in Mexico – Slimming Down, The Economist, Jul. 12 2014;

210. *See generally* OECD, Review of Telecommunication Policy and Regulation in Mexico (2012), p. 120-8.

211. Mexico, Federal Telecommunications and Broadcasting Law, art. 75.

212. Mexico, Political Consitution of the Mexican United States, art. 28; Mexico, Federal Telecommunications and Broadcasting Law, art. 75.

213. Mexico, *Visión regulatoria de las telecomunicaciones y la radiodifusión*, 2019-2023, by the IFT.

mergers must only be approved by ASEP, the merging companies may voluntarily notify the competition authority and request its approval. If it does not expressly oppose, the transaction is considered to be approved. However, when an economic concentration has not been submitted for prior verification, the authority may start an investigation within three years after execution.[214]

- In **Argentina**, the competition authority and the regulator have separate powers. However, the competition authority can submit sector-specific recommendations to promote competition. It must also ask the regulator for a non-binding opinion or a report on mergers affecting telecommunications markets. If the regulator does not respond or expresses its disapproval, it means they will not issue an opinion opposing the merger. The regulator can also ask for the competition authority's intervention when telecommunication providers do not reach an interconnection agreement. The competition authority must give its binding opinion to allow incumbent and mobile operators to provide non-satellite broadcasting services.[215]

- In **Chile**, Subtel acts as a technical advisor to the TDLC and/or the FNE in competition matters that may affect the telecoms sector. The General Telecommunications Law also establishes that when the competition authority considers that a given telecoms market is not competitive and that tariffs in that market should be regulated, the Ministry of Transport and Telecommunications and the Ministry of Economy must jointly issue a tariff decree setting maximum tariffs and associated formulas. In some instances, the Ministry of Transport and Telecommunications is entitled to directly control and supervise anticompetitive conducts ex post when the General Telecommunications Law or any other telecoms-specific regulation expressly forbids such conduct.[216]

- In **Colombia**, the competition authority must notify the sector-specific regulator of investigations in the telecoms sector. The regulator can issue a non-binding opinion. The competition authority must provide specific reasoning should it choose to depart from the regulator's opinion.[217]

- In **Costa Rica**, the regulator has exclusive powers to apply competition law and merger control in the telecommunications sector. However, the regulator must request the non-binding opinion of the competition authority on competition law and merger reviews.[218]

- In the **Dominican Republic**, the telecoms regulator and the competition authority have separate powers. However, the sector-specific regulator can ask the competition authority to issue an opinion by sending a request to the board via its executive director. The competition authority must give its public non-binding opinion. Also, if the competition authority receives a complaint or is asked to intervene in cases that fall within the competence of the regulator, it must redirect the complaint to the sector-specific agency.[219]

- In **Ecuador**, legislation establishes a generic mutual duty to share information between the sector-specific regulators, including ARCOTEL, and the competition authority. The regulator is also obliged to inform the competition authority of any abuse of market power that may take place in the telecommunications market, so that it can investigate and intervene accordingly.[220]

Even when there is a statutory recognition that issues may arise, the rules may not be mandatory. In all cases where there are no rules, or the rules are not very specific or not mandatory, the agencies themselves should consider entering into informal MoUs (see Figure 33) to specify in advance how each agency will deal with the issues in cases of overlap.

Merger control in the mobile sector

Nowhere is the need for coordination greater than **in merger control cases in the mobile sector**. Cooperation between the competition authority and the regulator should lead to a decision that would take into account all aspects of a proposed merger capable of impacting the market. The risk otherwise is that the competition authority and the regulator/government conduct parallel investigations, leading to the possibility of divergent decisions, the involvement of the courts and suboptimal results.

214. Panama, General Competition Law.
215. Argentina, General Telecommunications Law and General Competition Law.
216. Chile, General Telecommunications Law.
217. Colombia, General Telecommunications Law.
218. Costa Rica, General Telecommunications Law.
219. *See above*, footnote 65.
220. Ecuador, Regulation and Market Power Control Law.

Figure 33: The signature of MoUs between competition agencies and telecom regulators in Latin America

There are many countries in the region, such as Costa Rica, Colombia, El Salvador, Honduras and Venezuela, in which the telecoms regulator and the competition agency have signed an MoU or coordination agreement, or are in the process of doing so.

Generally speaking, these agreements have the objective of strengthening collaboration and cooperation between both agencies, setting common methodologies for market assessments or economic analysis, coordinating actions to promote competition in the telecoms sector, etc. Some of the tools commonly used are the establishment of joint steering committees, technical capacity building activities, protocols for information sharing or issuing of guidelines, jurisdictional assignments, among others.[221]

In Latin America, some countries have adopted a system that imposes extra scrutiny on the telecommunications sector, as compared to other sectors of the economy, leading to concerns about an uneven playing field in the digital economy. For example:

- **Argentina**'s former competition law provided for an *ex post* merger review regime, which has shifted towards an *ex ante* methodology with the country's new Competition Law, which will enter into force one year after the new competition authority has been established. As in the case of Panama below, the former regime operating on a post-closing basis faced the challenge of "unscrambling the eggs" in relation to problematic transactions, and device remedies to restore the competitive conditions in the affected markets.

  Until the new competition authority is established, the Competition Bill foresees a transition period until the pre-merger control regime is implemented, providing for a reasonable amount of time to streamline processes and make all necessary adjustments for the smooth transition to the new *ex ante* regime. Once the pre-merger control regime is adopted, the merging parties will be prohibited from implementing (or taking any actions in furtherance of implementing) the transaction until the Argentinian competition authority issues its clearance. The most salient features of the new merger review regime are: i) the increase in the notification thresholds, so that mandatory notification is required only in connections with those transactions which are worth being reviewed in Argentina and could potentially have an effect on competition in its territory; ii) a reduction in the review period for reportable transactions, whose timeframe is now set slightly above 8 months, subject to important caveats, since the competition authority may suspend this timeframe by requesting additional information.[222]

- A sectorial approach applies in **Panama**. Until 2018, mobile network operator mergers were prohibited. This was reversed to incentivise mobile sector investment and infrastructure upgrades, in order to bring better services to users (see Figure 36).

  Network operators may transfer their concessions to other legal entities that meet the required conditions, subject to the regulator's approval.[223] Notifying mergers is voluntary.[224] This means that there are no penalties for non-notification, but that the relevant authority can investigate mergers within three years after its execution, which may result in the competition authority challenging the transaction in the courts. The risk of having to "undo" a merger following an investigation (unscrambling the eggs) is often sufficient to make notification the preferred option when the parties to a merger consider that there may be issues. The adoption of a voluntary system of merger control can be efficient, allowing the competition authority to prioritise the investigation of mergers that may lead to a substantive lessening of competition. The vast majority of mergers in the economy do not give rise to competition concerns, but under a system of mandatory merger control all mergers that meet the requirements would need to be investigated.

- **Bolivia** has no competition law-specific merger control provisions. The only regulatory guideline issued on the matter is included in the section regarding anticompetitive practices in the General Telecommunications Law. This section

221. For more information, see in general the agreements uploaded in each of the agencies' websites. Also, see REGULATEL ESTUDIO COMPARADO.

222. Argentina, Competition Law.

223. Panama, Executive Decree Nº 73 of 1997.

224. Panama, General Competition Law and its regulatory decree.

prohibits mergers between operators and suppliers that are aimed at limiting, restricting, suppressing or distorting competition or that seek to control or have exclusivity in the provision of telecommunication and information technologies. This lack of further precisions and clarity in the merger review regime means that the sector lacks predictability and certainty.[225]

- In **Peru,** until May 2019, only a sectorial approach applied: the authorisations granted by the regulator were deemed to be non-transferable without the authorisation of the Ministry of Transport and Communications. Only in some cases, the Ministry took into account competition considerations to authorise or reject such transactions. Apart from that, there was no competition law requirement with regard to merger review. However, this has been reverted recently in a bill passed by the Congress of Peru, to which OSIPTEL had expressed its support.[226] With this new bill, set to enter into force one year after its approval, the competition authority will evaluate *ex ante* all mergers with effects in Peruvian territory, subject to specific thresholds. This new bill establishes that the sector-specific regulator must present a non-binding report on the structure and competition intensity of the market under analysis.[227]

- In **Argentina**, **Brazil** and **Chile,** the authorisation for merger operations is granted by competition authorities. Such authorisations are awarded on the basis of a process in which, the regulator must issue a non-binding opinion or recommendation. In each of these countries, statutes establish the proceedings for cooperation.

- In **Venezuela**, **Colombia**, **Paraguay**, **Ecuador** and **El Salvador**, the competition authority issues its authorisation to mergers without requiring the intervention of sector-specific regulators.

- 10 out of the 18 surveyed countries establish a fast track for merger review, excepting them of the need to get authorisation from the competition authority.[228] These countries establish parameters based on revenue, market shares, gross annual turnover or ownership of an essential facility.

- The **Dominican Republic** and **Uruguay** require authorisation from the sector-specific regulator to approve a merger, without establishing in any statute the intervention of any other authority.

Figure 36: Competency conflicts and "double window" concerns in merger review in Mexico

In December 2016, AT&T filed before both COFECE - the antitrust agency - and IFT - the telecoms regulator - a notification concerning the acquisition of Time Warner.

This transaction, at the aggregated level, involved mainly telecommunications and broadcasting operations, as well as other related markets that do not belong to either sector, such as merchandise commercialisation and content distribution through non-digital formats.

The IFT presented an opinion before COFECE, claiming full competence to deal with the matter. Even though it explicitly recognised that not all markets involved in the merger belonged to the telecoms or broadcasting sectors, it noted that the major part of the parties' turnover did. The IFT also argued that the splitting of the facts to be assessed – separating the cause - generated a "double window" in addressing the transaction analysis. In its reply to IFT, COFECE claimed its jurisdictional powers to assess the merger in those aspects and markets that did not belong to the telecoms and broadcasting sectors.

This resulted in a competence conflict between the two authorities, which, pursuant to the telecommunications and broadcasting legislation, was sent for the consideration of a special tribunal. This court decided that the case had to be assessed by both the IFT and COFECE. This was been the choice originally made by the notifying parties.

In its subsequent reviews, the OECD was very critical of this decision. It stressed the fact that the purpose of the institutional reform of 2013 in the telecoms sector, which led to the creation of the IFT, was to eliminate the "double window" proceedings. This has led, according to OECD, to less efficiency in using administrative resources, higher transaction costs and more time to make decisions. Also, the decision did not consider the implications of convergence between voice, video and data. Such considerations, according to the OECD, should lead to the IFT keeping and increasing its mandate to deal with these competition cases.[229]

225. Bolivia, General Telecommunications Law.

226. https://elcomercio.pe/economia/peru/deberia-existir-control-previo-fusiones-adquisiciones-noticia-505616

227. http://www2.congreso.gob.pe/Sicr/Prensa/heraldo.nsf/CNtitulares2/1a0c40e018c31919052583d000717aba/?OpenDocument

228. In some of these, if there is an authorization, concession or license transfer, there is still need to receive authorization from the regulator.

229. OECD Telecommunication and Broadcasting Review of Mexico 2017, pages 212-213

Recommendations for merger review in the digital ecosystem

In most of the surveyed countries, the merger control regime governing the telecom sector raises issues about whether the playing field is level and how the rules could be applied in a non-discriminatory way. The jurisdiction of the regulator and of the competition authority, however, seems to be relatively clear in most countries.

Recommendations in cases of horizontal mergers

The GSMA has conducted recent studies on the effects of market structure on quality of service and innovation in Austria[230] and Central America (see Figure 35).[231] Both reports came to the conclusion that market consolidation intensified competition in quality-related aspects and that reducing the number of market players can deliver more widely available

Figure 35: Comparing merger review in Honduras and El Salvador

In a recent report, the GSMA studied the effects of market structure on innovation and quality of services in Central America.[232] This report analysed two mergers in the region and focused on how, among other competition policy mechanisms, merger review can be an important tool to improve the competitive capabilities of operators, achieving greater competitive intensity.

In **El Salvador**, in 2012, the competition authority did not authorise the acquisition of Digicel by Claro for the second time. The market had four operators with a market share above 2.5%. The proposed merger would have combined the second player and the fourth player. The resulting operator would have increased its market share from 30% to 45% (similar to the case of Honduras where the new operator had 40%), about 5 points above the share of the leading operator of the Salvadoran market Tigo.[233]

In **Honduras**, in 2011, the competition authority approved the merger between Claro and Digicel. This merger combined the second and third operators in a market of four players. After the merger, Claro went from having approximately 20% of the market to a share of 40%. Claro remained the second largest player behind Tigo. However, since the merger, Claro has increased its market share - reducing the distance between the first two players.[234]

There are two relevant merger review considerations that stand out in these two cases, and the different approaches taken by each competition authority:

Use of concentration indexes and the understanding of competition intensity:

In **El Salvador**, the competition authority only calculated the evolution of the HHI index over the number of users, concluding that the transaction may harm competition, taking into account thresholds usually applied in the United States and Spain. In this case, competition intensity was based only on the parameters of the number of market players and the evolution of market shares.

Instead, in **Honduras**, the competition authority not only calculated the HHI, but also the DI (Dominance Index), both based on network operators' income and market share. Based on HHI, the competition authority came to the conclusion that the merger could harm competition. However, the agency found that the concentration led to a reduction of the DI, both based on market share and income, and that as such, there was a low probability of negatively affecting competition. The decrease in the DI reflected the fact that the merging operators were of relatively small size, in comparison to the market leader. The decrease in the DI reflected the relative size of the merging companies as well as market structure. In this case, competition intensity was based on the potential all players would have, after the merger, to compete on quality to gain clients.

Consideration of dynamic efficiencies

In **Honduras**, the competition authority acknowledged that the merger might affect the competitive dynamics of the market, considering its impact on unilateral effects, coordinated effects and entry barriers. However, the Commission authorised the merger based on costs savings and dynamic efficiencies that would allow network operators to increase their investments and improve coverage. In its decision, the Commission placed special emphasis on the use of spectrum, in a context of increasing demand for capacity and the limited availability of this resource. In this sense, the Commission explicitly argued that the merger could contribute to a spectrum allocation that optimises the capacity of networks. These points were not considered in the merger in El Salvador.

230. GSMA, Assessing the impact of mobile consolidation on innovation and quality: An evaluation of the Hutchison/Orange merger in Austria (2017).

231. GSMA, Assessing the impact of market structure on innovation and quality: Driving mobile broadband in Central America (2018).

232. GSMA, Assessing the impact of market structure on innovation and quality: Driving mobile broadband in Central America (2018), Section 4.1.

233. El Salvador, Resolution No. SC-009-S/C/R-2011 of the Competition Superintendence.

234. Honduras, Resolution No. 19-CDPC-2011-AÑO-VI of the Commission for the Defence and Promotion of Competition.

and faster 4G services. Both studies also showed how a **horizontal merger** between two operators allowed them to perform better than other operators with similar market positions did. Even though these two studies reflect the specific situations in Austria and Central America respectively, these findings highlight how merger reviews may positively affect consumer welfare in the digital ecosystem. In particular, the latter study recommends that merger reviews should:[235]

- **Define relevant markets with a forward-looking approach considering competitive pressures in the digital ecosystem**, this includes taking due consideration of the substitution roles of so-called over-the-top players (OTTs) on both the supply and the demand side.

- **Avoid using biased indicators of market power and competition**, such as assuming that a lower number of operators results in a loss of competitive intensity, that stable market shares indicate lack of competition or that concentration indexes, such as the HHI, can capture the potential of merged operators to become more competitive. Unlike the HHI, some other indexes, i.e. the Dominance Index (DI), measure the relative size of concentrated firms and the particular market structure. The DI does not increase when relatively small firms are concentrated (it can actually decrease), but it does increase in cases of concentrations of relatively large firms.

- **Assess entry barriers, taking into account the innovation inherent in the ecosystem**, including the possibilities of disruptive innovation, different forms of rivalry and growth expectations.

- **Analyse efficiencies in light of empirical evidence**, such as the evolution of population coverage, trends for upload and download speeds, etc.

The recent legislative modification regarding merger review in Panama represents a move in the right direction (as explained in Figure 36).

Recommendations in cases of vertical mergers

The considerations explained above are also applicable for vertical integrations and mergers, which include agreements between or the acquisition of companies operating in different parts of the value chain i.e. merger between connectivity providers and content producers.

Here are some further considerations on the matter:

- **The only limitation on entry into neighbouring markets should be technology and not prescriptive regulation.** The convergence of products and services in the digital ecosystem allows players to offer more than one service using the same technology. Thus, the larger the amount of services

Figure 36: Merger review in Panama

Panama had established de facto direct regulatory barriers to mergers between mobile operators. Until 2018, the General Telecommunications Law distinguished between Type A (mobile telephony) and Type B (fixed telephony and others) licences, establishing a limit on the number of Type A licences. In addition, the concession contracts stated that Type A operators cannot merge. In April 2018, the Congress of Panama approved a law authorising economic mergers between two mobile telecommunications concessionaires. This reform acknowledged the need for new investment in infrastructure and that a structure that allows four-to-three consolidation can enable economies of scale and strengthen incentives and capacity to invest.[236]

However, when regulating this bill, ASEP established the principle of "equitable distribution in the assignment of scarce resources", such as spectrum. Under such concept, ASEP has the duty to ensure that existing mobile concessionaires, after the merger takes place, have the same amount of spectrum for the provision of mobile services. Thus, the merging or salient mobile operator must return spectrum to the sector-specific regulator, which must manage it accordingly.[237]

In this context, it is worth noting that this regulation imperils legal certainty of Panama's telecom sector when it comes to future investments. The obligation to cede back the use of a resource, which had been duly assigned and whose concession rights had been duly paid, attempts against the possibility of mobile operators to make the necessary investments that can boost connectivity in this country.

235. GSMA, Assessing the impact of market structure on innovation and quality: Driving mobile broadband in Central America (2018), Section 4.1.
236. Panama, General Telecommunications Law, Bill 479, 2018.
237. Panama, Regulation AN No. 13200-Telco

provided, the better the offer and alternatives for consumers and, therefore, the greater competition in the provision of digital services. This is positive in terms of content diversity, quality and price, limiting regulation to instances of market failure, where the current restrictions on packaging services should be maintained or appropriately implemented.

- **Dynamic efficiencies lead to cost reductions, which will benefit users, taking into account that a vertical integration will replace a market transaction performed by users, therefore reducing transaction costs.** This is because the more efficient the use of networks, the lower the unit cost and the more intensive the capital use. This leads to a direct increase in network productivity.

- **Vertical merger reviews must adapt relevant market definition to the digital era and, therefore, should take into account dynamic efficiencies.** This is similar to the points described above with regard to horizontal mergers. There is a presumption over the pro-competitive effects of vertical mergers, and thus, in any event, the analysis must be led on a case-by-case basis**.** Competition assessments should focus on the possibility of the vertically integrated company to foreclose one market.

As in horizontal mergers, by looking into new combinations of company assets, regulators should not only look at encouraging innovation, but also at improving finances and business sustainability. Since 2010, vertical mergers have increased considerably in Latin America in the wider digital ecosystem, as in the rest of the world. The rationale behind this trend is that vertically integrated firms are better placed to harness the financial resources network operators need to expand their infrastructure and roll-out world-leading 5G systems. Most network operators have gone into debt to build the networks that content providers have used to expand their own revenues. Thus, regulators need to acknowledge that vertical mergers are a sign of structural changes that defy traditional industry silos and layers.

At the international level — cooperation between agencies

If coordination between the agencies tasked with the application of the competition rules and those tasked with application of sectorial regulation is desirable at the national level, this should also be desirable at the cross-border level, within the various regional organisations that have a remit covering the digital ecosystem. However, these organisations often tend to operate in silos, and even though there are some groups and forums focused on competition policy matters in the digital economy, they do not convene competition authorities and telecom regulators. Thus, the silos approach extends to the way in which competition law and regulatory efforts are viewed even within the same regional organisations. Indeed, cooperation is easier among regulators that meet at a cross-border level, and among competition authorities organised in cross-border groups.

In addition to the regional organisations described earlier in the section, several of the countries included in this survey have signed international cooperation agreements or Memorandums of Understanding, establishing guidelines for collaboration in ICT regulatory matters, which include working groups, capacity-building activities, and cooperation in the framework of market assessments, among others.[238] In particular, Argentina and Chile[239] and Peru and Chile[240] have announced agreements to end roaming between their countries.

Cooperation among competition authorities at the international level

Cooperation among competition authorities is growing. For example, the Argentinean competition authority, CNDC, has signed formal cooperation agreements with the Peruvian and Brazilian competition authorities. These agreements allow for increased engagement between the two countries on matters of anti-competitive conduct, international cartel investigations and price supervision, subject to confidentiality and privacy restrictions under the laws of each of country.[241] The Chilean antitrust prosecutor, FNE, has signed several agreements with other regional competition authorities, such as those from Colombia, Peru, Brazil, Costa Rica, Ecuador and El Salvador.[242] The Brazilian competition agency has also signed a cooperation agreement with its Ecuadorian counterpart.[243]

COMPAL and the **LACGF**, although lacking policy "teeth", have also worked steadily to boost international cooperation between competition authorities.

238. These include the MoUs between the regulators of Argentina and Mexico, Argentina and Peru, Mexico and Peru, Venezuela and Ecuador, Colombia and Honduras, among others.

239. Peru, "Osiptel suscribirá convenio con Subtel para eliminación de roaming internacional", available at https://www.osiptel.gob.pe/repositorioaps/data/1/1/1/not/osiptel-suscribira-convenio-subtel-roaming/files/np-convenio-osiptel-subtel.pdf

240. Argentina, "En el 2019 Argentina y Chile eliminaran el roaming internacional", available at https://www.enacom.gob.ar/institucional/en-el-2019-argentina-y-chile-eliminaran-el-roaming_n1890

241. Argentina, "CNDC: Contribuciones Internacionales", available at https://www.argentina.gob.ar/defensadelacompetencia/contribucionesinternacionales

242. Chile, "FNE: Acuerdos de Cooperación", available at http://www.fne.gob.cl/internacional/acuerdos-de-cooperacion

243. Brazil, "CADE: Cade assina memorando de entendimento com órgão antitruste do Equador", available at http://www.cade.gov.br/noticias/cade-assina-memorando-de-entendimento-com-orgao-antitruste-do-equador

Spectrum policy and competition in Latin America

Spectrum is at the core of mobile services. As wireless services cannot be provided without spectrum, public policy must incentivise efficient, optimal and sustainable use of this resource. This is even more important given the increasing demand for data-intensive services, the expansion of the Internet of Things and the digitisation of health, education and transportation, among other services. Policymakers should aim for a timely and appropriate assignment of sufficient spectrum for mobile services in large blocks, to achieve greater efficiency, and diversified frequency holdings that maximise network capacity in different topographical and demographic contexts.

Thus, there is a direct relationship between spectrum assignment and competition policy. Spectrum assignments determine market structures in the mobile sector and are, therefore, one of the main determinants of competition policy. For example, merger review of transactions involving mobile network operators, often affects the pre-existing allocation of spectrum, as does the assignment of spectrum to new entrants. Spectrum pricing is also intertwined with competition policy, as high spectrum fees can undermine competition if network investment is stifled and price competition is discouraged.

Therefore, at the institutional level, cooperation between competition agencies and telecom regulators is crucial, since these decisions should be backed by technical expertise and proper market analysis, to ensure that the marketplace achieves a satisfactory assignment of spectrum between existing mobile operators. Here are some examples of interrelation between spectrum policy and antitrust or sector-specific regulation that are key to achieve this objective:

- **Spectrum assignment and merger control.** Spectrum holdings are a key determinant of operators' efficiency. When spectrum is fragmented and assigned in small amounts, operators have less capacity and coverage for the same investment in infrastructure. As operators provide services in different geographical and demographic contexts, a combination of low and high frequency bands is required to maximise network coverage and capacity. In this context, mergers could offer a solution for those operators that need to consolidate their spectrum portfolio.

  However, it can be difficult for mobile operators to merge, as the relevant law and the jurisdiction of different authorities are often unclear: merger control is an area where regulators and governments want to retain control over spectrum allocation. In this context, the Salvadorian and Honduran merger cases described in Figure 35 illustrate the importance of case-by-case assessments in the assignment of spectrum, giving adequate consideration to the growing demand of broadband capacity and the scarcity of spectrum as a resource.

- **Competition policy and spectrum caps.** Fragmentation and assigning small amounts of spectrum can lead to inefficiency and stifled network investment. Thus, establishing absolute spectrum caps can reduce the quality of current and new services (see Figure 37 for an example of this dynamic), as well as the efficient use of economies of scope and scale in device making.

244. For a summary of the judicial proceedings see SUBTEL, "SUBTEL destaca fallo de la corte suprema por espectro de 700 MHz y reitera el llamado al uso eficiente de este bien nacional de uso público", available at https://www.subtel.gob.cl/subtel-destaca-fallo-de-la-corte-suprema-por-espectro-de-700-mhz-y-reitera-el-llamado-al-uso-eficiente-de-este-bien-nacional-de-uso-publico/

245. See SUBTEL, "SUBTEL ingresa consulta del Plan Nacional de Espectro al TDLC", available at https://www.subtel.gob.cl/subtel-ingresa-consulta-del-plan-nacional-de-espectro-al-tdlc/

246. See Jentel.MX "Chile: Se acabó el plazo para Claro y Movistar: Subtel da siete días para definir devolución de espectro", available at https://www.jentel.mx/2019/10/25/chile-se-acabo-el-plazo-para-claro-y-movistar-subtel-da-siete-dias-para-definir-devolucion-de-espectro/

Figure 37: The risks of establishing low caps and defragmenting spectrum assignment in Chile

During 2013, the three incumbent mobile operators were assigned spectrum bands in the 700 MHz frequency by the telecoms regulator, Subtel. The authorities dealing with competition matters, the competition tribunal, TLDC, and the competition prosecutor, FNE, approved the conditions of these assignments.

Despite this, a Chilean NGO presented judicial claims against the mobile operators, claiming that they had engaged in anticompetitive conduct by being assigned blocks of spectrum in the 700 MHz band. The basis for such claim was the alleged existence of a 60 MHz cap for spectrum holdings that had been allegedly established by the country's Supreme Court in previous decisions in 2009 and 2011.

After several instances, in June 2018 the Supreme Court resolved this matter in favour of the existence of such absolute cap for spectrum holdings, ignoring the decision previously made by the competition tribunal, disregarding the 60 MHz limit. The Supreme Court also pointed out that it was up to the telecoms regulator, with the approval of the competent competition authorities, to establish a new spectrum cap, if any.[244]

In October 2018, the Chilean regulator proposed new spectrum caps for approval by the competition tribunal, which are not intended to be of immediate effect but, instead, to be "gradually enforced".[245] This was complemented by a new proposal submitted to TLDC for its approval, published in March 2019, to establish dynamic spectrum caps (disregarding the 60 MHz absolute limit favoured by the Supreme Court in its decision). This report proposed a maximum cap of 32% of spectrum within each band as a short-term objective. The initiative takes into consideration that Subtel will assign 20 MHz of spectrum on the 700 MHz band, together with an undetermined amount of spectrum in higher bands, considering that operators require enough flexibility to acquire even more spectrum for 5G. In July 2019, the telecoms regulator presented a timeline for operators to return the disputed bands of spectrum, and in August 2019, the TLDC unveiled a report that had been requested to Subtel on how operators plan to comply with its decision. The report indicates three alternative routes to do so. In October 2019, it was decided that mobile operators had a two-year period to return the disputed spectrum and requested operators to inform by the end of that month on the route they would apply and the band to do so.[246]

The Supreme Court ignored the fact that, based on Chilean legislation, the effects of its own decisions are only applicable to the parties of a particular dispute. Furthermore, this sentence disregarded the fact that technology requirements clearly differ from those of 10 years before, when few people had smartphones and there was no ecosystem of converged apps and services. On the contrary, if the 60 MHz cap had continued into this decade, Chile would not enjoy the quality and range of services it now has. And the growth of demand for data-intensive mobile services, with the spread of the Internet of Things and digitisation of industrial processes, will require mobile operators to combine low, medium and high spectrum bands and make necessary investments in 5G infrastructure.

Furthermore, the Supreme court's ruling was almost immediately followed by a decision by Subtel to freeze spectrum assignments in the 3.5 GHz band, a decision that was subsequently challenged by some of the operators in Chile. In this context, Chile needs to explore options to remedy the situation, which will probably lead to the establishment of new dynamic spectrum caps. However, it should explore different alternatives and avoid further legal action, uncertainty and institutional wrangling if it aims to secure the investment needed to move towards 5G.

The institutional, judicial and legal complexity of the matter makes it very difficult for the agencies to remedy the situation without risking future legal uncertainty in the country, even more than in the current situation. Even though the return of spectrum has been stalled, the decision is still detrimental for users. This decision, in fact, divests important resources to mitigate the mentioned impact and endangers the future of mobile investment in Chile required for the expansion of 4G and the rollout of 5G services, in which Chile was expected to lead the region.[247]

As digital technologies move to the core of health services, education, transportation, urban planning and other sectors, there is increasing demand for mobile services. For example, the January 2019 Ericsson Mobility Report predicts that the data traffic per active smartphone in Latin America will grow from 3.4 GB on average for 2018, to 18 GB on average on 2024, while mobile subscriptions are expected to surpass 740 million in the region.[248]

In December 2019, TDLC approved Subtel's proposal to establish dynamic spectrum caps for four of the five grouping of bands that exist - low, medium-low, medium and high - leaving the medium-high frequencies without limits. TLDC's resolution also notes that the adjustment to the proposed limits should be gradual. Overall, this should be positive as it implies that in future spectrum assignments, there will not be an obligation to review or validate the limits each time a new band is in competition. This in turn will provide more certainty, legally and economically, to encourage future investments in the sector.[249]

247. See DICTUC, "Análisis Técnico-Económico de Escenarios de Ejecución del Fallo de la Corte Suprema de Chile sobre Espectro Radioeléctrico", available at https://www.dictuc.cl/comunicados/comunicado-dictuc-analisis-tecnico-economico-de-escenarios-de-ejecucion-del-fallo-de-la-corte-suprema-de-chile-sobre-espectro-radioelectrico/

248. Ericsson Mobility Report, Special 2019 World Economic Forum Edition, available at https://www.ericsson.com/assets/local/mobility-report/documents/2019/ericsson-mobility-report-world-economic-forum.pdf

249. See La Tercera, "TDLC define límites de espectro y abre espacio para un cuarto operador móvil", available at https://www.latercera.com/pulso/noticia/tdlc-define-limites-espectro-abre-espacio-cuarto-operador-movil-2/928234/

Alternatives to the setting of absolute spectrum caps are the establishment of caps per groups of bands, either at each auction or permanently like in Brazil (see Figure 38), Peru, Chile and Colombia. Given that participating in spectrum auctions is very costly, establishing absolute spectrum caps increases the risk that spectrum auctions end up declared as vacant. Meanwhile, the spectrum that is not allocated, and therefore is not exploited, represents a "deadweight loss" in economic terms.

- **High spectrum prices and inappropriate award rules that constitute a barrier to entry.** High annual fees distort the market by discouraging interest in licences and reducing incentives to invest and making price competition more risky. Inappropriate award rules, including short licence terms, lack of transparency in awards and award formats that do not allow for price discovery, act as a disincentive to the efficient use of spectrum. The result can be an artificial scarcity of spectrum and vacant assignments. With appropriate spectrum pricing and rules, together with an understanding of the competition implications of the assignment, auctions can deliver an efficient market-based pricing of a scarce resource, meet public finance goals and, most importantly, deliver output efficiency. [250]

Furthermore, a GSMA report concluded that, in developing countries, spectrum prices were, on average, almost three times more expensive than in developed countries in relation to expected revenues. In these countries, high spectrums costs slowed down the rollout of both 3G and 4G networks and drove long-term reductions in overall network quality. Even more so, in those countries with the highest spectrum prices, the average mobile operator's 4G network would cover 7.5% more of the population if they had acquired spectrum at the median spectrum price.[251]

- **Unequal treatment of operators in the allocation or renewal of spectrum restricts competition**. It is important that in the processes of license renewal, as well as in the competitive processes of new spectrum assignments, operators and participants receive non-discriminatory treatment. Spectrum valuation methodologies for renewal or for the establishment of reference or reserve prices must be transparent and non-discriminatory when it comes to the same frequency bands or similar bands. An inadequate price increase reduces the competitive capacity of operators and discourages the balanced allocation of resources for the deployment and expansion of networks. As a result, there may be a loss of efficiency and a reduction of competition that will produce a negative impact on the welfare of consumers.

Figure 38: Spectrum caps in Brazil

Anatel, Brazil's telecommunications regulator, first established an absolute cap of 80 MHz for the 800, 900, 1800, 1900 and 2100 MHz bands, later adding caps for specific bands on the basis that they were important to promote competition in the mobile market.

In November 2018, Anatel removed all previous existing spectrum caps, adopting different caps for bands up to 1 GHz and from 1 GHz to 3 GHz:

For holdings up to 1 GHz (204 MHz allocated in the 450, 700, 850 and 900 MHz bands), the cap is now 35%, which can be increased up to 40% if approved by an Anatel decision.

For holdings from 1 GHz to 3 GHz (575 MHz allocated in the 1800, 2100, 2300 and 2500 MHz bands), the cap is now of 30%, which can be increased up to 40% if approved by an Anatel decision.

In January 2018, Anatel has also established that it may approve transactions, such as mergers between operators, that would lead to the acquisition of spectrum which would result in the acquirer exceeding these caps, as long as they do not exceed a 40% absolute cap.[252] This seems like a positive first step towards a more efficient use of spectrum, particularly since Anatel announced in January 2019 its intention to make more spectrum available for mobile services.[253] However, these moves may be undermined by a subsequent decision in 2018, in which Anatel ruled that only operators that did not acquire 700 MHz spectrum in 2014 could participate in a further 700 MHz auction. While Anatel has announced that it will auction licenses for 5G spectrum in 2020, this decision may generate artificial scarcity in spectrum, thus restricting the amount of players able to bid.[254]

250. For more on these cases, see GSMA, "Effective Spectrum Pricing in Latin America: Policies to Support Better Quality and More Affordable Mobile Services" (2018).

251. GSMA, "The impact of spectrum prices on consumers" (2019).

252. Cullen International, Brazil: Increase of Mobile Spectrum Caps, 26 January 2018.

253. Cullen International, Brazil: More Spectrum for Mobile Services, 25 January 2019.

254. Anatel, Resolucion 703 of 2018.

- **If a country is considering the introduction of a new entrant, it should do so only after a proper market assessment to determine whether the market structure needs to change in such a fundamental way, as with reserving spectrum for new entrants or for vertical industries.** Failure to conduct a proper market investigation when reserving spectrum for new entrants may result in overcrowded mobile markets. Studies by the GSMA show that new entrant operators in different markets between 2010 and 2015 faced many difficulties from the beginning, often being unable to meet their scheduled release dates and/or their connectivity objectives.[255] Even after beginning operations in markets where there were three incumbent operators, new entrants did not manage to establish and increase their market share of connections above 10% more than six years after the launch of their operations. This has resulted, in many cases, in entrant operators ultimately merging with other operators or giving up their networks.

Additionally, public consultations in different jurisdictions across the region, such as **Colombia**, **Argentina** and **Chile**,[256] have considered the issue of spectrum that is set-aside nationally for vertical industries. In particular, in pioneer 5G bands such as 3.5 GHz, this poses a severe threat to the wider success of 5G. Set-asides can limit the assignment of sufficiently large contiguous blocks. This, in turn, prevents them from delivering the fastest 5G services by fragmenting the foundation on which those services will be built. More widely, set-asides for restricted use cases can lead to inefficient spectrum usage. Spectrum assigned outside a conventional market-based national award procedure open to all players, risks being underused. The global footprint of 5G services and applications needs a specific harmonised standard based on IMT technologies and deployed in licensed IMT frequency bands.[257]

Figure 39: High spectrum prices and inappropriate award rules in Latin America

Unfortunately, Latin America has several examples of spectrum policies that have led to inefficient results, regarding annual fees and inappropriate award rules. Here are some examples:

High annual fees

- In **Mexico**, it is up to the Ministry of Finance to set annual fees. Thus, the regulator has little flexibility to set the reserve price, which has led to vacant spectrum tenders in the past. In fact, annual fees represent up to 80% of the total annual price paid by operators for spectrum.
- In **Ecuador**, the annual fee is directly linked to the number of base-stations and the amount of assigned spectrum. This can discourage investment and promote spectrum hoarding.

Inappropriate award rules

- In **Brazil**, rural coverage obligations on the 2.6 GHz band were too onerous for operators. This made it necessary to modify the conditions in the 700 MHz assignment, but not without heavy transactions and administrative costs.
- In **Paraguay**, licenses are usually assigned for only five years. The lack of guarantees on the renewal of such licenses is a significant risk, since such a short period of time cannot grant sufficient returns over such a large investment. Although operators have adequate expectations that licenses will be renewed, the obligations connected to such renewals present an element of risk.[258]

Figure 40: The inefficiency resulting from reserving spectrum for new entrants in Chile and Peru

In Chile, the AWS award during 2009 is a clear example of the inefficiency resulting from reserving spectrum for new entrants. In this award, a rigid 60 MHz spectrum cap was established, which led to the entry of two new operators and the exclusion of incumbent operators, restricting their access to new spectrum. The launch of new services by entrant operators was delayed for more than two years, and it is unclear whether the granted spectrum was used in the most efficient way. Eventually, one of the entrant operators reconverted its operation into a virtual mobile operator, leading to vacant spectrum and a debate on the necessity to establish secondary spectrum markets as a mechanism to reassign spectrum.

A similar scenario played out in Peru, where the new entrant received spectrum in the 900 MHz and 1.9 GHz bands, requiring more than two years to launch its commercial services at a low cost.

255. For more on these cases, see GSMA Intelligence "Spectrum for new entrants, lessons learned" (2015).

256. See for example Diario Financiero, "Lucas Gallitto: 'vemos potencialmente riesgoso separar el espectro para verticales para industrias o privados", available at https://www.df.cl/noticias/internacional/economia/lucas-gallitto-vemos-potencialmente-riesgoso-separar-el-espectro-para/2019-05-31/195424.html

257. To see more information on GSMA's position on this matter, see "Spectrum for Vertical Industries: GSMA Europe Policy Position Paper" (2019).

258. For more on these cases, see GSMA, "Effective Spectrum Pricing in Latin America: Policies to Support Better Quality and More Affordable Mobile Services" (2018).

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