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I. INTRODUCTION

A breath of fresh air is coming to Latin America competition law and policy. Compliance seems to have started booming—at last! In 2015 alone there have been at least three international conferences, held in different countries, with long sections dedicated to the subject. There is also an international academia ("SCCE") providing courses once a year in an important Latin American city (Sao Paulo, Brazil). These are the most recent steps in the path of increasing knowledge and importance of compliance and ethics programs in the field. Authorities, academics, practitioners, and firms—of any size—now talk about antitrust compliance. Only five years or so ago, this would have been something unexpected.

Most importantly, the talk has turned into action. At governmental level, several agencies are adopting real methods of recognizing compliance. Some of them have issued—or are about to launch—guidelines on the topic. For instance, the Chilean competition agency ("FNE") issued a document entitled *Competition Compliance Programs: Complying with Competition Law* (hereinafter, "the FNE Guidelines"), which definitive version was launched on June 11, 2012. Likewise, the Colombian authority ("SEC") is undertaking interesting projects in the area, with the aim of issuing an official document. In other countries, guidelines used in other areas may have a significant impact on competition. This is the case of the Brazilian Decree No. 8,420/2015, issued within the framework of the Clean Company Act, which aims at implementing effective anticorruption compliance programs.

These guidelines represent a landmark step for competition regimes, because of their double value as policy declarations (setting out the approach the agency will adopt regarding compliance programs) as well as guidance for business conduct.

All of this is welcome news. So far, besides big multinational firms, compliance programs have remained a novelty among Latin American business communities and public servants. However—as I argue here—they are utterly needed.

As Section II shows, Latin American markets are highly prone to cartels. Several reasons may explain the phenomenon. There is a mixture of cultural, historical, and institutional factors supporting this assertion. The answer to this reality, as Section III exposes, has been to deal with collusive behavior using an *ex post* approach—what in the regulatory literature is called "dissuasion." Under this, prosecution, detection, and deterrence are explicitly favored.

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However, dissuasion is not without its shortcomings. As Section IV argues, such an approach has proved insufficient to tackle anticompetitive conduct; arguably because it does not completely match the very same features that explain misbehavior in first place. An *ex ante* approach, based mainly on compliance and ethics programs, should at least serve as a necessary complement.

There is a need for placing more emphasis on the compliance and ethics field. However, the success of such an enterprise depends on a profound understanding of the true nature of compliance. Do we really know what we talk about when we talk about compliance? That is the question advanced in Section V.

II. LATAM COUNTRIES ARE PRONE TO CARTELS

Generalizations apart, one could state (with a great level of confidence) that most Latin American markets are, *prima facie*, highly prone to cartelization. This claim is based on a number of distinctive social, historical, political, and economic characteristics most Latin American countries share.

At least three features stand out:

1. Despite important progress, social inequity still haunts. This evil, which is even more pervasive in non-industrialized economies, provides a welcome environment for the next two features.
2. The degree of concentration in most industries remains high. Oligopolies are (or have been until fairly recently) largely dominant in many markets; these as a result of a long tradition of state-controlled economies combined with social conflicts and resentments and/or various concerns about "too much competition" (!).
3. There are powerful interests with strong political power. It is extremely difficult to go against these ruling elites. While in some sectors the threat of entry may come from imports (especially in countries with more open economies), such a menace is fairly limited in both tradable and non-tradable sectors. Particularly in the latter, there is no credible threat of entry whatsoever, since financing is usually not readily available for new entrepreneurs outside these concentrated groups.

The aforementioned characteristics are entrenched in the general Latin American economic structure. Most countries are of medium- or small-size. Considering gross domestic product ("GDP"), only two of them—Brazil and Mexico—are among the top 20 of the world's largest economies. Furthermore, no Latin American country ranks in the upper-third part of the world ranking in terms of GDP *per capita*; and most of them are still considered to be "middle-income" in terms of gross national income ("GNI") *per capita* at purchasing power parity ("PPP"). Despite some notable exceptions, for the most part Latin American countries have a shameful place in the bottom half of most cross-country indicators.

In addition, support for competition as a "value" is weak, particularly among many governments and business or political leaders. Despite the fact that most countries (excepting Guatemala) have competition statutes in place, support for competition policy depends largely on the political background of the ruling coalition. Argentina and Bolivia are two well-known examples of this. To a lesser extent, Ecuador has also suffered this misfortune.

The notable exception is a group of countries where competition policy has become an important part of the rules of the game. Brazil, Mexico, Chile, Colombia, and Peru are taking the lead. Even in these jurisdictions, however, for large parts of the ruling elites competition is not seen as the best path to enhance productivity and achieve prosperity and economic progress. Conversely, ideology and historical anti-market traditions still play a role, making industrial policy and control over the wider economy still a favorite approach among several governments or businessmen. Furthermore, to many people, competition only applies to "big firms."

Overall, the real influence of competition in Latin America remains at least dubious; and at most completely ineffective. Along with the other features, this provides a fertile soil for cartels.

III. THE TRADITIONAL APPROACH AGAINST CARTELS AND ITS SHORTCOMINGS

Within this context (and despite the weak support), most Latin American jurisdictions have developed institutions to protect and promote competition. Institutional designs vary as much as their degrees of "success." However, they all share a common approach to the field—an approach the regulatory literature identifies as "dissuasion." This means, in a nutshell, that the emphasis is put on protection (*ex post*) rather than on promotion (*ex ante*).

Dissuasion implies that detection and prosecution of collusive behavior are the keys to protecting competition, and therefore they are of increasing importance in most jurisdictions. Alongside this approach, different ideas on how to deter misbehavior have also flourished. Accordingly, competition policy aims either to increase the rate of detection or the magnitude of the sanction, following the generally accepted approach known as "optimal deterrence."

This means that the theory and practice of competition enforcement in Latin America normally cover two main aspects. On one hand, it encourages the provision of more resources to agencies. On the other, it promotes a general expansion of the range and level of competition law sanctions—foremost, an increase in the level of fines and the introduction of criminal convictions (incarceration).

However, dissuasion has many shortcomings. And contrary to the common perception, for the most part these shortcomings may not be related to a lack of financial resources. Certainly, this is a genuine concern in most regional jurisdictions, for budgetary resources allow agencies to tackle only a few infringements. Nonetheless, problems seem to be more linked to other factors, particularly the local environment and the types of error agencies are more willing to accept.

Some of the shortcomings are related to the specific local environment. First, due to the highly legalistic culture prevailing in Latin America, the dissuasion model places a disproportionate weight on dealing with anticompetitive conduct through legislative improvements. Since improvement of sanctions and the provision of resources are substantial reforms, they normally need (some level of) changes to statutes. This, however, may take more time than expected. If any statutory reform is already difficult to undertake in civil law regimes, the burden is heightened by the lack of awareness of competition concerns among congressmen and the public. In such a situation, simple policy measures (such as boosting compliance, as I

argue later) could be even more effective than substantive reforms, but they tend to be left behind due to cultural reasons.

Second, given that dissuasion is based on tough sanctions, there is a real danger that high(er) penalties are used with unfettered discretion by competition agencies, some of them being prone to capture. In fact, in some countries (such as Argentina and Colombia) the very institutional design of the agency somewhat enhances the interference of non-technical actors.

Also, actors may not readily respond to the proposed changes as expected. For instance, it is unlikely that criminal sanctions have a high impact in a context where civil law judges, with a lack of a sound knowledge of competition law, are not willing to convict for what they deem to be "mere" economic infringements, in that these would be morally less blameworthy. (Indeed, there is also the most basic problem of judges who do not understand complex economic law.) This was actually the case in Chile, where incarceration was repealed due to its practical ineffectiveness in 2004, although its re-introduction is now being discussed.

The third shortcoming of dissuasion related to the local environment is that human capital remains generally under-developed in Latin America. There is still an educational gap for agency officials, lawyers, economists, and competition scholars alike, because neither industrial organization nor competition law is widely taught in universities. The effects of this lack of human resources are potentially serious for welfare and the agencies' long-term policies. First, there is the risk of erroneous decisions, for the application of competition law requires complex analysis of market conditions and their effects on welfare. Second, decisions are linked to reputational considerations for the agency. Bad decisions may lead to a poor reputation, which is particularly harmful for competition regimes where political support for agencies is already weak. Finally, enforcement is likely to be limited because of the lack of readily available means to both identify offending practices and deal with complex matters.

Besides these shortcomings, too much emphasis on dissuasion is linked to the type of errors agencies are willing to tolerate. Errors can never be avoided. The problem arises because, notwithstanding how much fines are increased in the statutes, the fear of over-enforcement (Type I errors) or under-enforcement (Type II errors) may lead competition authorities to avoid setting the level of fines too high. The reason is that if the level of a sanction is calculated incorrectly, it may deter activity that does not result in any social cost.

Moreover, Latin American agencies seem more tolerant to errors of the second type. This is wrong. The reality is that, with regard to cartels, the risk of Type I errors is (very) low: If rival firms agree to fix prices, reduce quantities, or allocate territories, the existence of pro-competitive reasons to justify such conduct is highly unlikely. Conversely, the risk of incurring Type II errors is significant: If the cartel is successful, the damage to competition is certain to be severe. Therefore, agencies should not be afraid to lead a policy of cartel prosecution that is carefully biased, to some extent, towards Type I errors.

There may be two (alternative) reasons for the bias toward Type II errors. The first is prioritization. It is commonly argued that, considering the lack of resources and experience, agencies should be selective and focus their efforts on fewer cases with high social impact in order to achieve credibility in the community. However, while this is sensible in some cases, prioritization should not imply a sort of "selection" of collusion cases. Despite the fact that

enforcement policies are usually focused more on some sectors than others (meaning that there is no uniformity across cartels in terms of the likelihood of being detected), the truth is that all collusive agreements should be equally enforced. There is a need to send a strong signal that all cartels, regardless of their size or the motives of their members, produce great social harm and hence must always be sanctioned.

The second reason for there being more tolerance with Type II errors is (again) under-developed human resources. Inexperienced or untrained officials might erroneously judge the particular circumstances of firms—such as their size, lack of knowledge of the infraction, or unintentional behavior. In fact, this produces a "vicious cycle" where the lack of detection translates into limited opportunities for "learning by doing."

IV. THE FAILURE OF DISSUASION AND THE NEED FOR COMPLIANCE & ETHICS

The almost exclusive emphasis on the dissuasive strategy may explain why Latin American competition regimes have not reflected great success. Despite most countries having now enacted competition statutes, enforcement remains limited. On the one hand, prosecution has been far from vigorous. Priorities seem not always to be driven by the aim of tackling anticompetitive conduct where they are rooted, but simply to get rewards for catching "big fishes." Moreover, even though agencies have applied structural and behavioral remedies, historically fines have been rare and low. On the other hand, probability of detection is low, impacting negatively on deterrence. Many markets that could—and should—be competitive receive limited attention from competition officials due to lack of resources or misguided prioritization.

Overall, none of the tools of a traditional approach have proven especially useful. Still today, in many countries, collusion cases represent a meager percentage of the total number of cases of anticompetitive conduct. Standard tools based upon dissuasion—mainly, higher penalties, incarceration, and providing more resources for the agencies—have to a large extent failed.

This is not an argument to totally deny the crucial importance of increasing detection, prosecution, and deterrence. The question is how to improve the regimes in a context in which the institutional setting does not provide the most ideal scenario for the development of competition policy. The failure of dissuasion is a forceful reason to look for a more suitable and balanced approach—an approach where compliance and dissuasion are placed at least on equal levels of importance.

But my argument goes even beyond. Indeed, where reforms to increase enforcement and deterrence are deemed necessary, they should carefully consider institutional endowments and behavioral characteristics. It is my contention that Latin American competition regimes would gain a lot by taking compliance programs more seriously and recruiting the private sector to the fight against cartels. I think there are compelling reasons for paying more attention to compliance programs, even over fundamental reforms to the statutes. It is time to make a profound paradigm-shift.

One of these reasons is the changing reality of regulatory authorities around the world. They are increasingly fostering compliance programs and taking them into account in their

regular activities. Canada has just updated the guidelines on the topic. Compliance programs are now considered in decisions in the United States, such as in the *Optronics* and Apple eBooks cases. And even the U.S. Department of Justice's Antitrust Division ("DOJ") seems to be looking at compliance programs more favorably (one cannot stop thinking of the words of Winston Churchill, who famously said that "You can always count on Americans to do the right thing—after they've tried everything else"). These and other important developments in major jurisdictions are sure to influence local developments.

V. WHAT WE TALK ABOUT WHEN WE TALK ABOUT COMPLIANCE (AND THE WAY AHEAD)

So, what is the best way to go forward, beyond merely talking about the subject? The main risk that Latin American companies and authorities face when trying to implement compliance is to understand the real meaning of the term. Given the highly legalistic culture and adversarial procedures that tend to dominate in the antitrust field, I think compliance seriously risks being understood as no more than paper and preaching. And even if there is some paper in place, these are normally mere generalizations of compliance with the law.

Furthermore, there are three pervasive beliefs that should be overcome. First, compliance programs are not a "sanction." Given the cultural features described above, it is hardly surprising that this is dominant thinking in many circles. Second, compliance programs are not only for multinationals and other big firms (i.e., they are not necessarily expensive). Finally, programs are not a "thing for lawyers."

This is far from what real compliance is. As other authors have stated (see the other articles in this CPI special issue), compliance programs consist of management committing to doing the right thing, and taking steps to make this happen. This means compliance is essentially related to business management. Programs are—above all—internal efforts of firms to foster an internal compliance and ethics culture, from top to bottom.

Having said that, governments have also an important—crucial—role to play. They should boost the creation of corporate compliance programs with their own actions. Particularly, I envision three main steps that governments in general, and competition agencies in particular, could take to change the current state of the art:

The first one is no different to the current approach: be tougher on cartel enforcement. Notwithstanding the shortcomings of dissuasion, it remains true that strong enforcement is one key to success.

Second, agencies should set clear guidelines on the topic. One example is the aforementioned FNE Guidelines. This is a state-of-the-art document that has been built to mirror the best comparative practices in the field—it even recognizes the possibility to use screens internally to detect cartels. Among its other sections, the FNE Guidelines define (i) compliance programs, (ii) their essential requirements and elements, and (iii) the benefits of having such programs (including reducing fines requested to the Chilean Competition Tribunal, "TDLC").

The FNE Guidelines set four essential requirements that are well-known features in the field:

1. commitment to comply,
2. risk assessment (classifying the risks according to their importance and reassessing them from time to time),
3. implementation of internal structures and procedures (including incentives and communication channels) in accordance with competition law, and
4. (last but not least) continuous involvement of the economic agent's managers and/or directors in the program.

Overall, a program must be created in response to the specific needs and characteristics of each business (including its size) and be based on its situation within the market. Using this base, the program must "meet the requirements of seriousness and comprehensiveness." Hopefully, other countries will follow (and improve on) the FNE Guidelines example soon.

Finally, agencies should be clear that they seriously consider compliance programs when dealing with businesses. This general statement should be backed by practical actions. In particular, one of the main challenges ahead will be to prove the applicability of any written statement in practice. For instance, in recent cases the Chilean TDLC has started imposing compliance programs on firms in its judgments (*Ginecologos*, 2015) and has explicitly endorsed the FNE Guidelines. The TDLC has also analyzed whether a compliance program adopted by a firm can be considered to be complete and serious enough to decrease a potential fine (*CCT II*, 2010). The FNE has performed similar tasks in recent settlements. Recognition of the programs is vital.

Another way for agencies to show commitment is to hire a specialist on compliance—someone trained in the field and with cutting-edge knowledge, who can help and guide companies in their private compliance efforts. To my knowledge, no Latin American agency has such a person within their staff.

These are only a handful of examples that can show governmental commitment with compliance. Surely, there are many more. The challenge is to demonstrate that any advance in the area means a true belief in that "doing things right" and attacking anticompetitive conducts at their roots, is at least as critical as—if not more than—prosecuting and punishing wrongdoers. Unlike dissuasion, compliance allows the public and private sector to walk hand-in-hand in the fight against anticompetitive behavior. Let's give this approach a warm welcome.