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A Short Story of Digital Markets Enforcement in Chile

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Introduction

Latin America as well as Chile, have developed a nascent practice in digital markets in the last years. According to a recent survey, between 2015 and 2023 Latin American competition authorities have led 99 investigations, including enforcement activity (both regarding cartel and unilateral conduct) and advocacy. In the case of Chile, the competition authority (Fiscalía Nacional Económica or FNE) and the competition court (Tribunal de Defensa de la Libre Competencia or TDLC) have decided 7 cases, while 5 investigations are still open by the FNE.

In this regard, Chilean case law has a noteworthy history regarding the enforcement of digital markets and, especially, the reception of foreign experiences to the local reality. In fact, three stages can be observed: a first phase taking place before the surge of the most paradigmatical cases in Europe and the United States; a second stage where the competition authorities contrasted new cases with the local economic reality; and finally, the third and current stage where the FNE has been investigating cases in very similar terms than the analysis performed in foreign jurisdictions.

The first stage: Digital before digital

Although competition laws exist in Chile since 1959, the current system was developed and strengthened between 2003 and 2016, with the creation of the TDLC, the introduction of leniency, the design of a mandatory merger control system and other substantive provisions (such as the imposition of criminal sanctions in *hard-core* cartel cases and interlocking directorates prohibitions).

In this context, both the TDLC and the FNE decided on two digital-related cases. Surprisingly, in times when the discussion of Big Tech's market power and enforcement/regulation proposals did not exist, regarding financial consumers' databases and databases management systems, respectively.

In 2008, in *D&S/Falabella*, the TDLC analysed a merger between two large supermarket chains that were also present in the credit card issuing market. Interestingly, the court held that the joint control of databases regarding patterns of consumption by consumers could constitute "*a significative cost advantage and a privileged aptitude to compete*". These databases could be used by integrated retailers to offer fidelity programs that were not replicable by non-integrated actors,

generating a competitive advantage. Among other reasons, the merger was blocked.

Ten years later, the FNE closed an investigation against Oracle for an abuse of a dominant position in the market of database management systems, following the offering and acceptance of commitments by the company (*Oracle*, 2018). In times when the cloud-based model (offered mainly by Amazon Web Services) was still incipient in Chile, Oracle was considered dominant due to its market share in terms of clients. In this background, the FNE analysed, among other conducts, Oracle's policy of audits, where, in many cases, optional apps were wrongly or automatically pre-installed jointly with the main product. In these cases, Oracle offered commercial solutions that included, for example, the acquisition of cloud products or licenses that were not used by clients, generating user captivity. Among other commitments, Oracle offered the publication of a notice on the downloads webpage that some optional apps could generate additional costs to clients.

A second stage: Incipient markets

Between 2019 and 2022, the FNE dealt with an increasing number of cases in different digital markets, like e-commerce, delivery apps and information-sharing apps, while the TDLC resolved two cases regarding music streaming platforms and ride-hailing apps.

In general, case law during this period held that digital markets were *still incipient, at the early stages of development*. In one case regarding discounts by an e-commerce platform to sellers that used integrated delivery services (*Mercado Libre*, 2020), dominance was excluded because of low online sales levels aggregated and per inhabitant, and the dynamic and rapidly changing motion of market shares. Similar arguments were used to dismiss a complaint against delivery apps for potential self-preferencing in favour of integrated dark stores (*Dark Stores*, 2021).

In two merger cases regarding the acquisition of an important grocery delivery app (*Walmart/Cornershop* in 2019 and *Uber/Cornershop* in 2020), the FNE discarded the presence of anti-competitive risks by claiming, in the abstract, the incipient character of the market in terms of the low levels of online sales as opposed to the total sales produced by supermarkets. Moreover, in the context of COVID-19, the demand shock generated by the crisis was responded to with an acceleration of digital innovation processes that were already being tested by supermarkets. Finally, the FNE held, despite the presence of network effects in these types of markets, the grocery delivery app segment would not be able to generate tipping, given that the bargaining power of traditional supermarkets could counterbalance the potential market power obtained by these platforms.

Later on, in the context of two joint ventures regarding maritime and automotive information-sharing apps (*GSBN* in 2020 and *Catena X* in 2022), the FNE considered that the incipient character of the market implied that the other actors in the market, different to the parent companies considered, could enter the market or provide the same services.

In parallel, the TDLC analysed a request for the termination of behavioural remedies imposed against local radio stations after a merger (*Grupo Latino*, 2021). Questioning the FNE's reiterated argument on incipiency, the court held that music streaming platforms would have enough presence to exercise competitive pressure on radio stations, at least on the advertising side of the market for younger generations. Hence, both platforms and radio stations should be considered part

of the same relevant market. Finally, in an unfair competition case brought by taxi drivers against Uber and other ride-hailing apps (*Uber*, 2021), the TDLC held that public policy issues generated by disruptive innovations should be addressed by both legislation and sectoral regulation.

As seen at this stage, new digital cases were confronted with the local economic reality by Chilean competition authorities. Practically in all the cases analysed by the FNE, the markets were characterized as incipient, without the constatation of dominance or competitive risks. In this context, it was not surprising that the analysis of new conducts and theories of harm (such as self-preferencing) were not addressed or, if analysed, no evidence of effects was found thereof. Finally, the FNE acknowledged that the state of the market at that time could be subject to changes, depending precisely on the evolution of the competitive conditions in the digital arena.

A third stage: Think Bigger

According to public information, the FNE is currently investigating four digital-related cases and a market inquiry: i) a complaint against delivery apps Glovo and Delivery Hero for an allegedly geographic market-sharing agreement (*Glovo/Delivery Hero*, 2019); ii) an *ex-officio* investigation against delivery apps for vertical restraints, such as exclusivity agreements with restaurants and most-favoured nation clauses (*Delivery Apps*, 2021); iii) an investigation against Meta and WhatsApp's agreement for degrading their privacy policies (*Facebook*, 2021); iv) a complaint against Apple and Google for an abuse of a dominant position in their respective app stores, due to the use of the in-app purchase system (*App Stores*, 2022); and v) the launch of a market inquiry on hotel accommodation, especially on the advertising and online travel agencies segments (*Hotels*, 2023). Preliminary, there would be evidence of algorithmic price recommendations by agencies imposed on hotels via the use of most-favoured-nation clauses. In parallel, the FNE has systematized its previous experience on digital mergers in the new 2022 Horizontal Merger Guidelines.

These new cases have a peculiar characteristic: the investigations follow the path of similar cases around the globe. For example, the *Glovo/Delivery Hero* conduct was first addressed by the Egyptian Competition Authority in 2019. *Facebook* is reminiscent of the German 2017 Facebook and 2023 Google cases on the excessive collection of users' data on their respective platforms. At the same time, *App Stores* continues the long list of lawsuits and case law, both in Europe and in the US, regarding the rules imposed by the administrators of the dominant app stores in their respective operative systems. Finally, the hotel accommodation market inquiry addresses the European cases against Booking and several market studies and regulations.

Although the content and scope of the investigation are confidential, it is expected that the FNE makes a statement, following previous case law in the preceding stage, of the current state of these markets (especially those of social networks and app stores) to note those areas where there might be a greater level of development. At the same time, new theories of harm, like data-related exploitative effects (previously used in *Uber/Cornershop*) should be probably analysed in depth. Lastly, this analysis should lead to another discussion that recently has already been presented in some local conferences and columns: the need for a special digital markets regulation, in similar terms to the Digital Markets Act or Section19a GWB (an opinion in favour of regulation can be found here and a contrary view here). However, this debate has not been addressed formally by Chilean competition authorities.

Conclusions

In sum, the history of digital enforcement in Chile has been developed in parallel with the growth of local digital markets. At first, in an early stage with pseudo forms of digital markets (financial consumers' databases and database management systems), the competition authorities made their first statements on the matter. Next, while the enforcement around the globe was strong, the FNE transferred the discussion to the local reality showing that they did not display dominance or anti-competitive risks because of the incipiency of the markets.

Nowadays, the competition authority is investigating bigger cases, hand in hand with foreign competition authorities, where it is expected that critical aspects of previous case law should be enhanced: the current state of markets, the reception of new theories of harm and, more critically, the need for a special digital markets regulation.

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