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Abuses of Dominance in Developing Countries: A View from the South with an Eye on Telecoms

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Abuses of dominance in developing countries: a view from the south, with an eye on telecoms[1]

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Abstract

Developing countries in the 'south' typically have a greater prevalence of entrenched dominant firms than economies of the large open economies of the north. This is due to various factors including scale and network economies relative to the size of the local markets, compounded by transport and logistics obstacles, the on-going influence of well-connected business groups and families, as well as the legacy of state support. The chapter takes Chile and South Africa as comparative case studies of how competition authorities have faced up to the challenges of assessing and addressing possible abuses of dominance. These countries have broadly similar economies in terms of the level of development, the importance of resource-based industries, and their relative isolation from other industrial countries. They are also similar in their competition institutions, with investigative bodies and independent specialist tribunals. Notwithstanding differences in the legal provisions, each has sought to apply effects-based tests to firm conduct – although with differences that have impacted on the outcomes. The chapter critically reflects on the record, against local expectations and the international debates, and provides concrete examples of the use of completion law in the telecommunication markets.

1. Introduction

We assess the evolution of competition enforcement in abuse of dominance cases in Chile and South Africa, in the broad context of debates about the role of institutions and economic development. Developing countries typically have entrenched interests that have cornered particular markets and the rents that can be earned. This is due to various factors including scale and network economies relative to the size of the local markets, compounded by transport and logistics obstacles, the on-going influence of well-connected business groups and families, as well as the legacy of state support. In both Chile and South Africa there are powerful business groups whose positions can be traced back to advantages gained under previous political regimes which included major state intervention in the economy to favour particular groups.[3]

Enforcement of abuse of dominance provisions of competition law is chiefly about addressing the ways in which dominant firms protect their positions through exclusionary

[1] This chapter draws upon a larger paper by Roberts, Tapia & Ybar (*Journal of Antitrust Enforcement*, forthcoming 2013), where the reader can find more details on some of the ideas expressed here.

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[3] In the Latin American context, the same feature is highlighted in Tapia, J. (2012): 'Increasing Deterrence in Latin American Competition Law Enforcement Regimes', in *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Whish & Townley, eds.), Edward Elgar.

conducts. In other words, it is about ensuring wider access to economic opportunities than if such conduct went unchecked. As such, addressing abuse of dominance under competition law relates to the dynamic and creative role of competitive markets, as part of rules-based frameworks for increased economic participation.[4] Countries, however, differ considerably on the weight to put on the ability of smaller firms and entrants to participate in 'fair' market circumstances.[5]

Competition law has become part of the standard package of reforms recommended by international institutions such as the World Bank.[6] There is a danger, however, that this ignores important realities. First, concentrated interests will defend themselves and undermine institutions which seek to remove their rents.[7] Second, it is not simply a technocratic exercise related to adopting standard legal provisions and establishing institutions, but rather part of choices regarding the values for a market economy, on which there is substantial international divergence. This is most obvious if we consider examples such as South Korea, where the competition regime has been concerned with more 'balanced' or 'shared' growth given the importance of the chaebol conglomerate groupings.[8] The law contains provisions enabling the authority to monitor the chaebols and to tackle 'unreasonable' practices and 'unjustifiable' restrictions on competition.[9] Third, many countries have very successfully developed without competition law (but not without effective rivalry and increased economic participation). For example, Malaysia and Singapore only established competition institutions in the past decade.

We have focused on Chile and South Africa because both countries share similarities in terms of being middle income economies with a strong natural resource base, and being relatively isolated from other industrialised economies. Also, both countries have well established competition institutions. South Africa passed its Competition Act in 1998, coming into effect in 1999.[10] The law created a Competition Commission (CC or the Commission), as the primary investigative body, and the Competition Tribunal (SACT) to adjudicate cases. In

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[4] This is fundamentally different from cartel prohibition, where competitors that should be competing have instead substituted coordination. On the creative role of competitive markets see, for example, Acemoglu, D. and J. Robinson (2012), *Why Nations Fail.* Random House.

[5] See, for example, Budzinksi, O. (2008) 'Monoculture versus diversity in competition economics', *Cambridge Journal of Economics*, 32, 295-324; Fox, E. (2003) 'We protect competition, you protect competitors', *World Competition* 26(2), 149–165.

[6] See World Bank/OECD (1999) *A Framework for the Design and Implementation of Competition Law and Policy.* Washington: World Bank.

[7] See Mateus, A. (2010) 'Competition and Development: Towards an Institutional Foundation for Competition Enforcement', *World Competition*, 33(2), 275-300; North, DC, JJ Wallis, B Weingast (2009) *Violence and Social Orders*. Cambridge: CUP.

[8] Korea Fair Trade Commission (KFTC) (2011) *Annual Report 2011 Special Edition 30 Years of KFTC, Looking Back, Moving Forwards*. KFTC, Seoul. While South Africa appears to adopt a similar approach of linking competition standards to economic development, if one looks at the objectives of the Act, this is not reflected in the specific provisions.

[9] Fox, E. (2003) 'We protect competition, you protect competitors', *World Competition* 26(2), 149–165. Hur, J.S. (2004) 'The evolution of competition policy and its impact on economic development in Korea' in P Brusick, AM Alvarez, L Cernat & P Holmes (Eds) *Competition, competitiveness and development: Lessons from developing countries*, Geneva: United Nations Conference on Trade and Development.

[10] Currently, Act 89 of 1998, as amended. The previous competition law was the 'Maintenance and Promotion of Competition' Act 96 of 1979, which subject the assessment against a broad 'public interest' standard.

2003, Chile introduced major reforms to the Competition Act, creating a tribunal to decide cases, the *Tribunal de Defensa de la Libre Competencia* (TDLC), while maintaining separated powers for the investigative body, the *Fiscalía Nacional Económica* (FNE).[11]

As we show in part 2, despite their similar, well-established institutional structures, there have been important differences in terms of quantitative results. During the period covered by our review (2003-August 2012), the Chilean TDLC has ruled on much more cases than its South African peer. Certainly, this fact is not necessarily a source of concern in itself. As the old saying goes, the glass is half empty or half full depending on the standpoint of the beholder. However, the contrast invites enquiry as to the way two comparable developing countries are dealing with exclusionary conduct. In part 3 we argue that the difference can be explained mainly by resorting to two factors: on the one hand, the dissimilar structure of the legal provisions; on the other, the application of the law made by the specialised bodies, which translates into legal tests to analyse abuses of dominance cases. After explaining our claim, in part 4 we exemplify it using the case of telecoms – one of the sectors where positions have been traditionally protected through exclusionary conducts. We finish by providing some concluding remarks in part 5.

2. Similar institutions, dissimilar outcomes

2.1. Institutions

As indicated, both Chile and South Africa have separate investigative bodies (the FNE and the CC, respectively) and independent specialist tribunals (the TDLC and the SACT, respectively). The tribunals in each country work are collegial bodies of expert members, lawyers and economists. By comparison, the investigative authorities are headed by one individual, the National Economic Prosecutor in Chile and the Commissioner in South Africa. The Prosecutor may only be removed by cause and subject to a prior motion at the Supreme Court. Similarly, the Commissioner may only be removed due to serious misconduct, permanent incapacity or for engaging in activity that may undermine the integrity of the CC.

Both the Commission and the FNE investigate and prosecute, with cases initiated either by a third party complaint or on the part of the authority itself. Both authorities have also adopted prioritisation strategies. Investigations into possible abuse of dominance either result in an administrative decision closing the investigation or a referral to the Tribunal for adjudication in essentially adversarial proceedings. In Chile, regarding abuses, antitrust private litigation has generally been a bit more active than public litigation, although the FNE is involved in most of the main cases.

[11] The current Competition Act is Law Decree No 211/1973. It has been amended on several occasions, the main reforms introduced in 2003 and 2009. The first competition law was enacted in 1959 (Law No. 13.305), after an American mission recommended its introduction as part of a number of macroeconomic reforms. The FNE was established in a reform in 1963. Notwithstanding this long tradition, a modern competition regime was only established with the reforms introduced during the past decade.

While the TDLC may impose fines and/or behavioural or structural remedies, several sections of the abuse of dominance provisions in South Africa do not have penalties for a first offence. A penalty may be imposed for a first contravention of provisions dealing with separately specified conduct (other than price discrimination) and not generally defined exclusionary abuse. The penalties are determined by the Tribunal depending on a range of criteria, including the nature, duration and extent of the conduct and are capped at a maximum of 10% of one year's turnover. The SACT can make a range of orders including requiring a firm to supply goods or services and ordering divestiture if there is no other adequate remedy. It can also order remedies of a structural or behavioural nature although these would also be fought over in an intensely adversarial process in hearings.

The TDLC in terms of powers and in practice has more latitude to address the causes of the conduct. Orders can amend or eliminate anticompetitive acts, contracts, agreements, schemes or arrangements in violation of the Act.[12] The TDLC can also order divestiture or dissolution of partnerships, corporations or business companies whose existence rests on anticompetitive arrangements. Administrative fines may be imposed upon the infringing legal entity and on its directors and managers and persons who participated in the infringement. According to the Act, the amount depends on the financial benefit received from the infringement, the severity of the breach and the offenders' recidivism. The maximum fine is 30.000 'annual tax units' (approximately US$30 million) for cartel offenses and 20.000 annual tax units (approximately US$19.75 million) for other infringements.[13] The Act also gives the TDLC the faculty to propose Executive amendments to the legislation.[14]

2.2. The outcomes: dissimilar enforcement record

Unlike the similarity in institutions, the enforcement record in both Chile and South Africa is quantitatively different. Whilst the Chilean TDLC had ruled on 57 cases since 2003 up to August 2012, from 1999 to August 2012 the South African CT made a determination on just 11 abuse of dominance cases. Altogether, 19 cases have been referred to the SACT, with 3 having been settled after referral, and 5 not yet decided.

Since 2004, the FNE has investigated an average of 45 cases per year, being approximately 15 initiated *ex officio* and 30 by 'denounces of particulars' (i.e., private complaints). The South African Commission receives a very large number of complaints in the order of 100 to 200 per year, which it is obliged to investigate. However, very few raise substantive

[12] For example, mandatory requests to modify internal procedures were made to private dominant firms in *GTD/EFE* (76/2008) and *Atrex/SCL* (75/2008).

[13] Tax units are a special monetary measure of value used by the legislation to keep the value of sanctions, exemptions, tax purposes and others, in line with inflation.

[14] Chilean Competition Act, article 18.3. The TDLC has used this faculty in several cases. For example, in both *Transbank* (29/2005) and *CCS I* (56/2007), the Chilean TDLC recommended the sectoral regulator (in both cases the financial authority) to apply the corresponding norms and regulations (!). Likewise, in *Lan Airlines* (55/2007), the TDLC proposed 'the regulatory changes that were necessary and suitable to favour competition' to be introduced by the customs agency; instructed the FNE 'to keep watch the functioning of the airfreight transport market and the custom warehousing market'; and ordered the dominant firm 'to restructure its tariffs for airfreight transport' (it also imposed several other regulatory measures to the dominant firm).

competition issues that mean the investigation is pursued beyond a screening process. The Commission has pursued around 20 in-depth investigations each year.

The TDLC identifies two categories: abuse of dominance cases and cases involving the 'imposition of artificial barriers to entry'. However, a great majority of the latter are, in effect, also about abuse of dominance, so they can be considered as single category for statistical purposes. During the period January 2004 – December 2012, the TDLC reviewed 59 cases regarding abuse of dominance. The FNE has referred 21 of these cases, compared with 32 cases between private parties with no direct intervention from the FNE.[15] Of the 59 cases, the TDLC has sanctioned and fined in 19.[16] Nine of those regarded exploitation practices mostly towards consumers, but in some cases also towards suppliers – the latter, for infractions to requirements established previously, during the former system of 'Antitrust Commissions' (the TDLC predecessors). The other 10 sanctions regarded exclusionary practices by economic agents. There is one sanction for predation, two for exclusivity clauses (one of which includes sanction for rebates) one for tying, two for refusal to deal (in one of those cases, margin squeeze was also sanctioned) and, finally, another four for conducts that raised artificial barriers to entry but do not fall under any 'clear-cut' category.

In South Africa nineteen abuse cases in total were referred to the Tribunal from September 1999 to December 2012, an average of 1.5 per year. The great majority were referred by the Commission. A further two cases that were not referred were subject to settlements, making 21 cases in total. The SACT made a determination on eleven while five cases were the subject of settlements with the Commission (three after referral), one of which the SACT did not confirm. The remaining five cases referred were at various stages in the process of hearing as of 31 August 2012.

The South African cases have involved price discrimination, excessive pricing, and exclusionary arrangements including vertical arrangements, and loyalty rebates. There have been no decided cases of predation, or tying and bundling.[17] Of the eleven cases the SACT has decided, it has found that abuse occurred in seven (on the part of *Patensie*, *South African Airways* (twice), *Sasol*, *Mittal Steel SA*, *Senwes* and *Telkom*). However, in two of these the finding was overturned or set aside by higher courts (*Sasol* and *Mittal Steel SA*) and *Telkom* is still under appeal. In addition, three of the settlements (*GlaxoSmithKline & Boehringer Ingelheim*, *Sasol Nitro* and *Foskor*) involved substantive undertakings. On this basis, taking the findings and the substantive settlements, abuse of dominance was proscribed in eight cases.

[15] See FNE: http://www.fne.gob.cl/defensa-de-la-libre-competencia/actuaciones-ante-tribunales/. Note that there are cases initiated under the previous regime and ended in the TDLC. They were not 'referred' to the tribunal, so we have not considered them. This explains the difference in numbers.

[16] Note, the finding may only have been on one aspect of the case referred. It is also somewhat difficult to classify all of the cases given the nature of the Chilean legislation.

[17] We exclude applications for interim relief. This provision allows for a complainant to approach the Tribunal for an interim order, similar to an urgent interdict, for example, while the Commission may still be investigating. In practice there have been very few and almost none have been successful.

3. Why do similar structures lead to dissimilar quantitative results?

At a first glance, 57 cases against 11 seems a huge difference and certainly raises the question as to what lies behind this outcome.

One reason that may explain the dissimilarity in the quantitative results is procedural. The tribunals in each country have latitude to determine how to hear cases. But the SACT has stayed more aloof from the process, with the scope of the hearing tending to be fought over through applications from both sides and with extensive discovery. In the South African regime, the various steps involved from referral to hearing and the scope for legal challenges have all meant that two to three years have typically elapsed from referral to ruling in the major enforcement cases, with appeals following. By contrast, in Chile (where there is no discovery process) the TDLC may call a settlement conference after notifying the complaint and receiving the responses by the parties involved. If such call is considered unnecessary or the parties do not reach an agreement, the TDLC sets out the so-called *auto de prueba* (i.e., the resolution of proof), which identifies what it believes is the scope of the case and the relevant facts. This also guides the hearing of factual witnesses and expert witnesses, normally local economic experts. While it may be (and has been) challenged on this resolution, it makes the hearing of the case proceed more quickly than in South Africa.

We do not further explore this kind of procedural differences – which may well be simply due to the civil law and common law nature of the Chilean and South African legal traditions, respectively. Nor do we assess their implications. Instead, we are more concerned about substantive differences. As we argue in this section, the main reason underpinning the striking difference in the number of cases is related to two factors: on the one hand, the different nature of the legal provisions; on the other, the different applications of the law made by the specialised bodies, which translates into dissimilar legal tests to analyse abuses of dominance cases – particularly those referred to as exclusionary practices.

3.1. Different nature of the law

The Chilean and South African Competition Acts both have broad objectives, although stated with different 'legal styles' in the respective provisions. Thus, article 1 of the Chile Act gives the purpose as follows:

> *The purpose of the present law is to advocate and defend free competition in the markets. Affronts to free competition in economic activities will be corrected, prohibited or repressed in the manner and with the sanctions provided in this law.*

This is supplemented in article 2 by the mandate to competition authorities to 'to enforce the present law to safeguard free competition in the markets'.

The South African Competition Act sets out the objectives in (section 2):

> *The purpose of this Act is to promote and maintain competition in the Republic in order-*
>
> *(a) to promote the efficiency, adaptability and development of the economy;*
>
> *(b) to provide consumers with competitive prices and product choices;*

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Both regimes emphasise economic efficiency in their decisions, notwithstanding the wider objectives given in the respective Acts. In South Africa, the emphasis reflects the specific provisions of the Act which identify understanding the effects of conduct on competition. In Chile, 'freedom to compete' has been considered more important than efficiency in the past, which to an extent reflects the wording of the law. However, it is now more accepted that competition is about promoting economic efficiency and this has been reflected in the great majority of the recent decisions.

However, when the objectives are translated into provisions proscribing anti-competitive conduct, important differences arise. On the one hand, the Chilean legislation is enabling and general. Article 3 contains the substantive provisions relating to anti-competitive conduct including abuse of dominance.

Any person that enters into or executes, individually or collectively, any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effects, will be sanctioned with the measures mentioned in article 26 of the present law, notwithstanding preventive, corrective or prohibitive measures that may be applied to said actions, acts or conventions in each case.

The following will be considered as, among others, actions, acts or conventions that impede, restrict or hinder competition or which set out to produce said effects:

a) Express or tacit agreements among competitors, or concerted practices between them, that confer them market power and consist of fixing sale or purchase prices or other marketing conditions, limit production, allow them to assign market zones or quotas, exclude competitors or affect the result of bidding processes.

b) The abusive exploitation on the part of an economic agent, or a group thereof, of a dominant position in the market, fixing sale or purchase prices, imposing on a sale of another product, assigning market zones or quotas or imposing other similar abuses.

c) Predatory practices, or unfair competition, carried out with the purpose of reaching, maintaining or increasing a dominant position.

On the other hand, the South African Act deals with abuses of a dominant position in section 8, under separate sub-sections, and with prohibited price discrimination by a dominant firm in section 9. Under section 8(a) it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers, with such a price defined under the Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such

value (Section 1.(1) (ix) Definitions and interpretation). Economic value is not defined in the Act.

Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act.[18] Section 8(b) prohibits a dominant firm from denying access to an essential facility. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms, with no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market. Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, as follows:

> *(i) requiring or inducing a supplier or customer to not deal with a competitor;*
>
> *(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
>
> *(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;*
>
> *(iv) selling goods or services below their marginal or average variable cost; or*
>
> *(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.*

This section also provides that the firm concerned (the respondent) 'can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act' which means that, assuming the respondent can put up some arguments for pro-competitive gains, the anti-competitive effect must be evaluated by the Commission or private complainant and found to be of significance.

3.2. Different emphasis on the competition test

Although no single test is suitable for every type of case, some common foundations can be sketched after a review of the cases in each country. In both of them, the employment of an effects-based approach, coupled with the particular institutional regime, means that the standards and their pace and areas of progress depend largely on the cases brought by parties and agencies as the regime matures.

The higher number of cases in Chile reflects an ability to arrive at more speedy decisions. One explanation for the relative speed is that most cases can be characterised as 'easy', in the sense that a large proportion involved firms that were overwhelmingly dominant, had relatively clear effects, and the dominant firms alleged weak – if any – efficiency

[18] Price discrimination by a dominant firm, with the effect of substantially preventing or lessening competition, is prohibited under section 9, and has no penalty for first offence. A finding depends on the pricing being for equivalent transactions of products of like grade and quality. The dominant firm may establish that the differences are justified on various grounds, including reasonable allowances for cost differences and meeting competition.

justifications.[19] These features, plus the flexibility embedded in the Chilean legal provision, has allowed the TDLC to deal with the cases using a sort of 'shortcut' where there is (super)dominance[20] and the conduct, on the face of it, *evidently* harms competition.[21] Arguably, this is no more than an application of the 'no economic sense' test – although the TLDC has never explicitly embraced such test.[22] Implicitly then, though never stated, the reasoning of the TDLC is directed to avoid 'unreasonable restrictions to competition', which involves sanctioning the conducts that distort competition by limiting rivals' production without creating a sufficient improvement in performance to fully offset the distorting effect.[23] In economic terms, this equals the use of the 'no economic sense test', had its application been possible in the cases.

The sort of 'shortcut' used by the TDLC has important consequences. The positive view is that the case law has established some (rough) 'path of legality' to be followed by firms. The flip side of the coin is that Chilean authorities have not clarified important aspects of the notion of abuse and the substance of anti-competitive effects, including in-depth enquiry into different measures of costs, the role of presumptions or whether there should be a *de minimis* rule. Nor has the TDLC has clarified the type of error it seeks to avoid. At the same time, the lack of comprehensive economic analysis may be providing perverse incentives to private parties to bring a larger-than-expected number of cases before the TDLC, because low economic standards make room for gaming the system in order to hurt competitors.[24]

By contrast, in the South Africa system the meaning of each of the separate, detailed provisions has provided fertile ground for differing legal interpretation. This has also meant very long timetables from referral to hearings, decisions and then possible appeals. While the SACT has sought to incorporate consideration of super-dominance' as a consideration in weighing up evidence of a firm's conduct, this was explicitly rejected by the Competition Appeal Court as having no basis in the Act.[25] As in Chile, the South African abuse cases almost all relate to firms that can be characterised as super-dominant, with market shares of

[19] For example, in a sanction for predatory pricing, the defendant did not argue against the accusation of selling below avoidable costs, facilitating the process (*Loncomilla*, 28/2005). Also, in a tying case, there was no need for testing because the second product was implicitly negatively priced; this due to the price of the bundle being lower than the value of the binding product (*Voissnet*, 97/2010).

[20] We use the term only with an explanatory meaning. We do not imply that the European "superdominance" doctrine and the "special duties" it imposes, which some authors have derived from the case law (especially *Tetra Pak II* [1996] and *Compagnie Maritime Belge* [2000]), has been adopted in Chile. In fact, when the TDLC has mentioned the superdominance (e.g., in *Sanitarias*, 2009 or *CCS II*, 124/2012), it has done it in a rather confused and undefined way.

[21] For instance, in *CCS II* (124/2012) the TDLC indicated that 'it does not observe that there are *obvious* economic incentives' to exclude and that 'it is not possible to identify a clear and evident economic incentive for the [alleged] exclusion', there being alternative, factual explanations more 'reasonable' (paras. 35 and 38) (emphasis added).

[22] In *Transbank* (29/2005), for instance, the TDLC found 'no economic justification' for the conduct of the dominant firm and supported its conclusion on sound economic analysis. In that case, the TDLC analysed the credit cards market as a two-sided market. While considering the characteristics of such markets it noted that 'what it is charged to each category of users do not necessarily attends to a logic based on direct costs of providing the good or service' (para. 14).

[23] See Posner (2008), where he indicates that when conventional legal materials enable judges to ascertain the true facts of a case and apply clear pre-existing legal rules to them, they do so straightforwardly.

[24] As seen above (section 3.1), most abuse of dominance cases are brought by private parties, not the FNE.

[25] *Harmony Gold v Mittal Steel South Africa*, Case No: 70/CAC/Apr07.

80% of more. However, the specific nature of the legal provisions has meant that the SACT has had to consider effects in some depth – and has found these to be weak in cases such as *JTI-BATSA*, even with shares around 90% and conduct evidently seeking to undermine the much smaller rivals with little if any efficiency justification.[26]

The SACT in *SAA* established that the anti-competitive effect can be shown either through evidence of direct harm to consumer welfare and/or that the conduct forecloses a substantial part of the market to a rival. The substantial foreclosure test has subsequently been used by the SACT in most of its decisions, while it has also in practice considered evidence as to how the dominant firm's conduct has affected the performance of rivals. In the latter the SACT has been willing to place considerable weight on credible factual witness testimony, which has withstood the intense cross-examination that characterises hearings, and which is consistent with the data.

4. Addressing abuse of dominance and opening up access to markets: the case-study of Telecoms

How do two systems with different laws and legal tests – but similar institutions - actually address abuses of dominance cases? In this section, we answer this question by focusing on the telecommunications sector. This is mainly due to two reasons. The first one is that, as in many other developing economies, traditionally that sector has been characterized by entrenched dominant firms that wish to maintain the privileges associated with their former status as monopolies. We briefly sketched the market structure and development in section 4.1. The second reason is the importance of the cases in both Chile and South Africa. Quantitatively, in Chile, telecommunication cases are the largest, representing approximately 16% of the total number of adversarial cases filed before the TDLC. In South Africa, the two telecommunications cases referred by the Competition Commission are very significant given the small number of cases in total. The first case was ruled on by the Tribunal in August 2012.[27] The second is still to be heard having been referred in late 2009. More importantly, though, is the qualitative aspect – explained in section 4.2. Incumbents have engaged in different types of conducts, which have evolved as time passes to seek to combat the growing threat of rivals. As we show, competition law has a crucial role to play in addressing such conducts and opining up access to markets.

4.1. Telecommunications in South Africa and Chile (in a nutshell)

In South Africa the state-owned utility, Telkom, was partially privatized in 1996, and subject to regulation. Telkom was granted an exclusivity period over public switched telecommunications services (PSTS) until 2002, based on the perceived need for it to invest

[26] In *Sasol-Nationwide Poles* the CAC over-turned the SACT's findings, although it was evident smaller firms were undermined and there was quite obvious dominance.

[27] Case 11/CR/Feb04. The original complaint was filed with the Commission by 21 complainants including the South African VANS Association (SAVA). The Commission referred the case in February 2004 and the Tribunal issued its reasons and decision on 7 August 2012.

in upgraded facilities coupled with obligations it was given to roll-out fixed lines to historically under-serviced areas.[28] This was in line with the government's approach to seek 'strategic equity partners' for state-owned enterprises being privatized that were perceived needed an injection of expertise and technology in order to respond to the rigours of competition. A consortium formed of Southern Bell Corporation of the USA and Telekom Malaysia bought the 30% strategic equity stake in Telkom and were granted management control and incentives.

The transition, however, went on much longer than planned. The *de jure* monopoly in PSTS extended as a *de facto* monopoly until 2005 due to delays in licensing a second national operator (SNO) which only happened in November 2005. Along with the privatization in 1996 had been the implementation of price cap regulation on fixed line services. It was assumed that regulation was not required in value added services as these were opened up to competition right away.

In Chile, the process of privatization, deregulation and vertical disintegration of telecoms firms was part of a wider process of economic liberalization initiated in 1974. It was a major reversal of policies the country had previously followed, characterized by increase participation of the State in the economy. The telecommunication sector was not the exception. By the late 1970s, the industry was dominated by two firms: CTC, which provided basic, fix telephone service throughout most part of the country, and ENTEL, the single provider of long-distance services. The State was also the owner of two regional local telephone firms and the firm that provided telegraph services.

The process of liberalization can be sketched in three phases. The first phase (1977-1985) involved the establishment and implementation of formal foundations. Thus, in 1982 a new Act was passed (Law 18.168), and the two regional companies were sold to a local telegraph operator – currently the second largest provider of telecommunication services in the country. The second phase (1985-1988) involved the privatization of the two largest monopolies. Since 1985 the State would gradually reduce its participation in the companies until, in December 1990, it held less than 0.1%. The third phase (1989-present) involves the repositioning of the privatized companies into new areas of business, including –recently– a massive development of mobile telephony and the advances towards convergence.

Nowadays, Chile's telecom sector is one of the most developed and dynamic in Latin America, with a state-of-the-art infrastructure and regulatory system. There are no restrictions on foreign investment and the government proactively promotes competition. As will be shown, a great part of this outcome is due to the leading part played by competition authorities and the role of 'can opener' of markets they have given to antitrust.

[28] See Makhaya, G. and S. Roberts (2003) 'Telecommunications in developing countries: reflections from the South African experience', *Telecommunications Policy*, 27 (1-2), 41-59.

4.2. Case analysis

4.2.1. South Africa

The South African cases illustrate the mistake in equating liberalisation with effective competition. In this context, they also point to the challenges in the competition regime meeting the expectations of it. The incumbent's conduct well illustrates the strategies that a firm in such a position is likely to follow at different market levels.

The first case referred against Telkom in February 2004 related to Telkom's conduct in providing access to its fixed line network to providers of Value Added Network Services (VANS) that competed with Telkom's own offerings in this area. Given the structure of the South African Act, the Commission referred a case against Telkom of refusing access to an essential facility, excessive pricing of the facility, inducing customers not to deal with its competitors and prohibited price discrimination. The Tribunal found that the conduct constituted a prohibited practice in refusing access to an essential facility and inducing customers not to deal with a competitor (under section 8(b) and 8(d)(i)).[29]

Telkom's defence rested on the argument that certain VANS, and virtual private networks (VPNs) in particular, overlapped with its exclusivity in PSTS, despite findings by the regulator to the contrary. Telkom placed a series of restrictions on independent VANS providers ostensibly to ensure they were not encroaching on its domain, including insisting that VANS providers could not sub-let or cede control over the facilities obtained from Telom and that the lines be in the names of the ultimate user. Telkom then approached the end users to warn them that Telkom would freeze services to the VANS provider if they believed the boundary into PSTS had been crossed. The Tribunal decision emphasises that Telkom recognised the importance of potential switching by large end-customers served by VANS to the SNO when it was expected to enter in 2002. The Telkom 'war strategy' drawn up in 1998 aimed to 'own the customer'.[30] Under the South Africa Act effects do not have to be proven for refusing access to an essential facility, just that it is economically feasible to provide the access, however, effects are relevant for the conduct of inducing a customer not to deal with a competitor. The Tribunal imposed a penalty of R449 million (approximately US$69 million).

The second case brought by the Commission against Telkom in October 2009 relates to complaints regarding Telkom conduct from 2005 to 2007 involving its pricing of leased lines to internet service providers (ISPs).[31] The Commission alleged excessive pricing in high bandwidth national and international leased lines, and a margin squeeze when taking into account Telkom's downstream pricing of its internet and network services, having the effect of substantially excluding other first tier ISPs. As of the end of 2012 the case had not been heard.

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[29] Competition Tribunal decision, *CC v Telkom SA Ltd*, case no 11/CR/Feb04, 7 August 2012. Telkom is appealing the decision.

[30] *CC v Telkom SA Ltd*, case no 11/CR/Feb04, paras 67-71.

[31] See Founding Affidavit (non-confidential version) of Avishkar Kalicharan, Competition Commission v Telkom SA Ltd.

4.2.2. Chile

The ambiguities of the Act allowed the maintenance of monopolies for a long time after privatization. The importance of competition law on dismantling their privileges cannot be put sideways. Both the TDLC and its predecessor, the Antitrust Commission (*Comisión Resolutiva*), have issued critical judgments –on each of the segments of the market– that have increased participation, restricted the monopoly and given shape to the market by way of complementing the legal framework. At the same time, the work of the authorities has allowed to keep an old regulatory framework, directed mainly to regulate independent services, to keep up to date with technological change and converge.

Regarding the long-distance market, in 1993 the Antitrust Commission finally authorized the participation of local telephone companies in the long distance market (Resolution 306/1989). The discussion had started when a number of companies applied for licenses to operate in such market. After the vertical integration issue was cleared, the law was modified in 1994 to introduce competition through the 'multi-carrier' system, which had the effect of putting an end to Entel's long-distance monopoly. Following the ruling of the Commission, the law also restricted the participation of local telephone companies in the long distance market and subject access charges to the local network to regulation. By 1998, long-distance tariffs had been cut by two-thirds and long-distance traffic had nearly trebled.

In fixed-line telephony, several important cases referred to the regulated tariffs of the incumbents (mainly CTC). Although Chilean telecommunication law generally provides for a free market, rates may be regulated for those services the Antitrust Commission (currently the TDLC) considers to be provided under inadequate conditions of competition. Price regulation was confirmed in numerous occasions (Rulings 393/1993, 515/1998, 611/2001, 686/2003), to finally be liberalized by the TDLC in 2009 (Report N°2/2009). In each of these cases the Competition Authorities reviewed market conditions in detail and adopted important measures to improve competition.

In the Chilean case Voissnet (Sentence 45/2006), the TDLC partially accepted the actions presented by the FNE and Voissnet S.A. against CTC (as mentioned, the dominant firm in the market for telephone services), for preventing the use of its broadband capacity by IP telephone operators with the objective of restricting the entry of Voissnet and of other potential competitors into the market. The lawsuit was dismissed in all other charges. CTC had to pay a fine of around US$1.4 million. The TDLC additionally ordered CTC to abstain from restricting or making more difficult the use of its broadband capacity for providing IP telephony services in the future.[32]

Recently, in *on-net/off-net tarrifs* (General Instruction N°2/2012), the TDLC initiated, *ex-officio*[33], proceedings to review the risk to competition derived from the difference in tariffs charged by mobile phone operators in accordance to the network of destiny of the calls. All

[32] Note that the two South African cases are similar to the *Voissnet* case in Chile in that they are essentially about the access (including pricing and other terms) to the fixed line network on the part of firms providing value added services, including internet services.
[33] The DL 211, art 18(3), gives this faculty to the TDLC.

the operators and the FNE intervened in the proceedings. In 18 December 2012 the TDLC issued a General Instruction to the market. It found that the differences between that tariffs charged by the companies for calls ended in its own network (on-net calls) vis-à-vis other networks (off-net calls) were much higher than the interconnection charges set by the sector regulator and did not rest on any efficiency consideration. It concluded that the difference have the effect of excluding competitors and tackle the development of the market, increasing market power of the incumbents. To mitigate these effects, the TDLC instructed that firms cannot commercialize plans with different prices for on-net and off-net calls anymore, nor to provide plans with more or less minutes depending on the final destination of the call (on-net or off-net). The measures apply from the date of the access charges decree the regulator issues every four years. In the meanwhile, the TDLC adopted a number of provisional measures so as the difference between charges would progressively decreased.

The FNE also requested an analysis of the so-called 'packs', or bundling of telecommunication services. The TDLC affirmed that even though such strategy could be justified on efficiency grounds, there are also risks of exclusion in presence of entry barriers or if some firms do not have the ability of delivering all the services. Hence the TDLC established there conditions for the bundling: (i) a guarantee that every client will always have the option to get the bundled services individually, with no obligation whatsoever of contracting further services; (ii) a limitation on discounts for bundled services; and (iii) before the implementation of mobile 4G technology, a banning on all discounts or benefits for bundled products in fix and mobile telephony, and fix and mobile internet.

Finally, in the mobile phone market, standards were set in 1988, although there was already an early entrant since 1981. The 1988 regulations created two concessions area, with two licenses in each of them, to be granted on a first-come, first-serve basis. In 1989 CTC, the local telephone monopoly, requested permission to enter into the mobile phones market. The former Antitrust Commission granted access due to the fact that mobile services were relatively new, with high costs and were not a substitute of fix telephony (Resolution 306/1989).

In November 1996 three nationwide PCS licenses were granted. In 1999, after intricate antitrust litigation, the regulator introduced the 'calling party pays' principle, under which callers are forced to pay for all charges (including the regulated access charges) when using mobile phones.[34] Later on, in 2008, in relation to the 3G services, the TDLC allowed incumbents to participate in the tender process to grant licenses to provide 3G services, as long as they comply with applicable norms and the other general application requirements that the contest rules establish, because that would foster broadband competition (Resolution 27/2008).

In *OPS/Telefónica* (Sentence 88/2009), the TDLC ruled that *Telefónica Móviles de Chile* (a subsidiary of CTC) engaged in arbitrary price discrimination, which had the effect of subjecting its competitors to margin squeezes in the market of on-net landline-mobile phone termination services, and in refusal to sell, with the objective of transferring its dominant

[34] See also *Antitrust Commission*, Resolution 547/1999.

position in the mobile telephony market to the connected market of on-net landline-mobile phone termination services. Although the TDLC described the conduct as margin squeeze, it did not really carry out the necessary analysis for an effect-based assessment.[35] In particular, the TDLC did not produce any analysis to determine whether for the price offered to the plaintiff, the downstream subsidiary of the defendant could have made profits in the markets. The TDLC appears to have sanctioned the conduct as if it was arbitrary price discrimination by the owner of an essential input at the expense of its downstream competitors. These were charged more than those non-competitors that made a less-intensive use of the network. Furthermore, this conduct involved a change in the pre-existing contractual conditions.

In *MVO* (Sentence 104/2010), the TDLC dismissed a claim brought by the FNE against the three major mobile companies that had arguably refused to offer infrastructure and inputs for developing virtual mobile operators' technology. Even though it was found that the three major companies had joint market power regarding access to the necessary services and infrastructure for the operation of VMO, the TDLC considered that: (i) it had not been established that the defendants' opposition (within the administrative procedure) to the concession requests for VMOs –in 2006– had had the 'unmistakable objective of preventing or hindering free competition'; (ii) the delay in the dictation of the required administrative decrees to start VMOs was not attributable to the defendants; and (iii) in this case, the conduct of 'refusal to sell' could not be configured, because the VMOs did not fulfill the administrative requirements to provide public services of mobile telephony at the time. The Supreme Court later overturned the decision, reversing the findings of the TDLC and condemning the mobile companies and imposing a total amount of fines of around US$8.1 million.

5. Concluding remarks

Vickers' 'mid-Atlantic viewpoint' posited a growing convergence between economists on both sides of the north Atlantic (hence the mid-ocean view) while substantial differences in legal standards remained.[36] However, the convergence in competition economics thinking is quite consistent with differences in policies towards abuse of dominance because, as Vickers observes, 'the European economy has historically been more monopolised than that of the US, and its competitive self-righting mechanisms may be less robust.'

Our view from two economies in 'the south' reinforces the need to understand the evolution of competition regimes in their proper historic context and realities of the economics in question. The competition regimes of Chile and South Africa have faced similar questions in terms of the expectations that they will tackle entrenched dominant firms but, despite very similar institutional set-ups, have come up with quite different answers. Our assessment is that, while principles and policy have been important, most notably in the framing of the respective laws, an important part of the explanation lies in what Kovacic and Hyman term

[35] See also *GPS/Entel PCS* (78/2008), which is the only other case classified as margin squeeze so far in Chile.
[36] John Vickers, 'Competition law and economics: A mid-Atlantic viewpoint', Eur. Comp. J., 3 (2007), 1–15.

the ‘engineering’ of how the authorities work in practice.[37] This is the internal make-up of the institutions and the decisions that they take about how to do their work. While the TDLC has been relatively proactive in framing and running hearings, the SACT has allowed parties to drive the process to a greater extent, providing ample scope for respondents to pursue legal strategies. Extensive evidence, including from economic experts, has been heard in cases, but only in very few cases and when the cases are finally heard.

Antitrust cases in the telecommunication sector provide good examples of the conduct pursued by incumbents as well as of the way in which the conduct has been addressed by the competition authorities. It appears that despite relatively small sanctions, the competition regime in Chile has reinforced the move to liberalisation and effective rivalry to the incumbent fixed-line operator, while in South Africa, despite much higher possible sanctions, the incumbent has been able to continue with conduct undermining rivalry and substantially delay the cases brought. Even the case regarding conduct a decade ago still has a lengthy appeals process to run. Assuming the conduct itself did earn a return in the form of prolonged supra-competitive margins the delay in a penalty being imposed substantially weakens any impact of competition enforcement.

[37] William E. Kovacic and David A. Hyman (2012) ‘Competition Agency Design: What's on the Menu?’, George Washington University Legal Studies Research Paper No. 2012-135.