

Looking towards the future

Thoughts on competition enforcement and protecting consumers within Chile's institutional design

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Small economies face unique competition policy challenges

- Small economies generally face different welfare maximization issues than large economies
- Markets tend to have weaker self-correcting tendencies
- **Appropriately designed and efficiently enforced competition policy could be more important in small economies than in larger ones**
 - Michal S. Gal, “Size Does Matter: The Effects of Market Size on Optimal Competition Policy,” 74 S. CAL. L. REV. 1437 (2001)

Small economies confront particular institutional challenges

- Highly concentrated nature of many small economy markets raises relatively large number of antitrust issues
- Costs of antitrust proceedings often not a linear function of size
- **Resource scarcity is one of the most important institutional features of small and emerging economies**
 - Michal S. Gal, "When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce," 41 LOYOLA UNIV. CHI. L. J. 417 (2010)

Effects of resource scarcity

- **Ex post:** ability of the enforcement authorities to detect and sanction legal violations will be constrained
- **Ex ante:** lower probability of detection and sanctioning by enforcement authorities lessens the deterrent effect on market participants
- **Objective:** maximizing the existing endowment through resource allocation and institutional design to attainment competition policy goals

Chile's bifurcated adjudicatory approach

- Specialized competition tribunal allows for a small body of judges to develop expertise in the application of antitrust
- Adjudicatory proceeding for independent tribunal protect due process rights of defendants
- TDLC (and SC) case law particularly important in the Chilean context given the broad “common law” like approach of DL N° 211
 - Provides the law with a significant degree of flexibility
 - But can also result in uncertainty for both enforcers and market participants.

Chilean case law

- Practitioners generally view the TDLC's rulings as having a high level of clarity and coherence with respect to their economic reasoning, and due process rights respected; however, certain key concepts, such as “abuse of dominance” remain undefined
 - Francisco Agüero & Santiago Montt, “Chile: The Competition Law System and the Country's Norms,” in *The Design of Competition Law Institutions: Global Norms, Local Choices* (2013)
- Principles on abuse of dominance are not yet settled and robust enough to produce legal certainty and give guidance to economic agents to assess the legality of their actions.
 - Javier Tapia, “Dime de qué presumes y te diré de qué careces: el tratamiento jurisprudencial de los abusos de dominancia en Chile” (forthcoming 2013)

Rules for small economies

- The design of antitrust rules routinely confronts a tension between the advantages and drawbacks of bright-line rules relative to less structured standards.
- Resource scarcity affects costs involved in applying substantive rules
- Simple and clear rules that are easy for judges, lawyers and business people to apply
 - Santiago Montt, “Sistemas legales de menor tamaño y libre competencia,” (Nov. 4, 2010)

“Modern” rule of reason

- Evolution into “defined and structured legal frameworks that have been developed by government enforcement agencies and across many of the circuit courts of appeals”
 - Andrew I. Gavil, “Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice,” 85 S. Cal. L. Rev. 733 (2012)
- *PolyGram Holding, Inc. v. Fed. Trade Comm’n*, 416 F.3d 29 (D.C. Cir. 2005):

If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and... the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.

TDLC & appropriate rules for Chile

- TDLC provides institutional capability to apply decision theory in the Chilean context to elaborate **clear enforcement standards** that minimize error and process costs
- Example: Interlocking directorates between competitors
 - Case-by-case adjudication
 - Simple bright-line rule
- **Benefits for both enforcement authorities and businesses**

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□ **Mandatory pre-merger notification**

- Appropriately designed thresholds for transactions most likely to pose competitive risks

□ **Sanctions proportionate to illicit gains**

- Optimizing *ex ante* deterrent effect of fines

□ **Improving leniency program**

- Important tool for increasing detection rates of cartels

Damages & collective actions

- Article 30° follow-on damages actions not widely used to date
- Even when compensation is the primary objective, an effective damages regime can enhance deterrence by increasing total costs to wrongdoers
- For consumer cases, when the amount of damages per claimant is very low, only opt-out collective actions are likely to deliver effective redress
- Could stand alone collective actions be used before the TDLC?

Conclusions

- Chile's current institutional structure provides an opportunity for confronting issues of resource scarcity that confront small economies
- The TDLC is uniquely positioned to take into account error and process costs when defining relevant standards under DL N° 211
- Additional reforms are advisable, including pre-merger notification with appropriate thresholds, and viable mechanism for consumer class actions

For more information

- Daniel A. Crane, *Institutional Structure of Antitrust Enforcement* (2011)
- Joshua P. Davis & Robert H. Lande, “Defying Conventional Wisdom: The Case for Private Antitrust Enforcement,” *GA. L. REV.* (forthcoming 2013)
- Michal S. Gal, *Competition Policy for Small Market Economies* (2003)
- *Informe de la Comisión Asesora Presidencial para la Defensa de la Libre Competencia* (July 2012)
- Javier Tapia & Santiago Montt, “Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust,” *The Global Limits of Competition Law* (2012)
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