The Same and the Other: A comparative study of abuses of dominance in Chile and South Africa·

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> *"To say that the law on abuse of dominance should develop a stronger economic foundation is not to say that rules of law should be replaced by discretionary decision making based on whatever is thought to be desirable in economic terms case by case. There must be rules of law in this area of competition policy, not least for reasons of predictability and accountability. So the issue is not rules versus discretion, but how well the rules are grounded in economics."*[1]

1. Introduction

That competition law has become widespread is a fact now widely acknowledged.[2] While competition law statutes have been part of the legal systems of developed countries for a long time, in developing economies the adoption of explicit rules happened mostly during the 1990s. Recent scholarship has made important advances towards examining how the broader characteristics of an economy might affect the type of competition law regime it should enforce.[3] However, the effectiveness of competition enforcement in developing countries remains largely underexplored.[4] Likewise, while there is growing agreement on the use of economic tests for assessing anti-competitive conduct, the use of economic tools and the so-called 'effects based approach' outside Europe and the US has only a handful of serious assessments. Our aim is to fill this gap by providing an in-depth comparative study between Chile and South Africa – two developing countries with arguably successful competition regimes.

Importantly for our purposes, both countries are similar in a number of important respects that, as we argue here, turn the conduct of dominant firms and their ability to abuse their position into a critical issue. At the same time, there are enough differences in their experiences to enable us to draw comparative insights.[5]

· We acknowledge the comments of Francisco Agüero and Carolina Werner. For the Chileans, all errors belong to the South

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[1] Vickers (2005).

[2] *See* Kronthaler & Johannes (2007: 137). The International Competition Network had 117 member agencies in 103 jurisdictions by 2011 (see ICN, 2011).

[3] See, e.g., Tapia (forthcoming, 2012); Gal (2003); Kovacic (2011); Gal (2004); Fox and Mateus (2011); Fox (2011).

[4] In fact, the promotion of expansive competition enforcement in developing countries has been criticised for a number of reasons, including that interest groups are concentrated and too influential, and that institutions are not sufficiently developed to cope with the required sophistication. E.g., Mateus (2010); Rodriguez & Menon (2010) *Policy: Shortcomings of Antitrust in Developing and Reforming Economies,* The Hague: Kluwer Law International, 2010.)

[5] Besides the aspects highlighted in the main text, the two countries are also similar in having undergone transitions to democracy, from the end of the Pinochet dictatorship in 1989 in the case of Chile, and in South Africa from apartheid, with

At the macroeconomic level, Chile and South Africa are akin in having concentrated industrial economies, based mainly on mining, with markets that are relatively isolated by geography from other industrialised countries.[6] Chile is a somewhat smaller country, with a population of around 18 million, compared to South Africa's 45 million. Both countries have been classified as middle income since at least in the early 1990s, when they had similar GDP per capita around US$3000.[7] Chile's economy has performed better than South Africa over the past 20 years – with an average GDP growth of around 7%, compared to 4% for South Africa. By 2010 Chile thus had a substantially higher GDP per capita, at around US$12,431 per person compared to South Africa at US$7,275 per person.[8]

Focusing on competition, South Africa and Chile both have well-established institutions. A decade or so ago, each adopted a substantially revised competition law, incorporating a new institutional design. South Africa passed its Competition Act in 1998, coming into effect in 1999. The law created a Competition Commission (CC), as the primary investigative body, and the Competition Tribunal (SACT) to adjudicate cases. In 2003, Chile introduced major reforms to the Competition Act, creating a single independent 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).[9]

This institutional structure is rather unusual, with separate specialist tribunals.[10] Chile is the only country in the Americas to have a separate specialised Tribunal, while South Africa is unique in Africa in this regard.[11] Worldwide, similar structures are only found in Canada and Israel. Our purpose is not to argue for or against such an organisation, but to assess how it has worked in practice. One implication of a specialist adjudicative body on which sit economists as well as lawyers is that it supports the hearing of extensive expert economic evidence. This is indeed a feature of both the Chile and South Africa experiences.[12]

Unlike the institutional structure, the legal provisions proscribing anti-competitive arrangements and conduct differ substantially. While Chile has a broad provision condemning anti-competitive conduct, with subsections giving some more detail as to the different types of conduct covered, South Africa does not have such general prohibition. The South African law specifies, in separate provisions, prohibitions of defined anti-competitive conduct along with the criteria and, in some cases, the tests to be applied.

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the first democratic election in 1994. The democratic governments in each country were charged with addressing the legacy of these regimes in the economic sphere, with the emphasis on equitable economic development.

[6] Regarding the concentrated nature of the markets, the Chilean situation is similar to other Latin American countries. See Tapia (forthcoming 2012).

[7] World Bank, World Development Indicators.

[8] World Bank, World Development Indicators.

[9] There are two particular areas of difference that we do not assess. The first is that South Africa has compulsory pre-merger notification, while Chile does not. The second is that South Africa introduced a corporate leniency policy in 2004 which has been very important in successful cartel enforcement (Lavoie, 2009; Makhaya *et al.*, 2012). Chile only introduced a leniency programme recently in 2009, but it has not been very successful due to some particular institutional circumstances.

[10] On institutional structures, see Tapia & Montt (2012).

[11] Brazil and Spain had similar structures, but have introduced amendments in the past five years to change to a unified institution. Several other African countries, for example Tanzania, have tribunals that serve as the first body to which appeals can be brought.

[12] In countries with other systems this evidence will typically be submitted by parties as part of the investigation, but not subject to the same process of public hearing and interrogation. Expert testimony may also be given in courts, but where the panel of judges are not specialists in competition law nor include expert economists.

The focus of our assessment is on abuses of dominance. A key reason for this is the importance of the conduct for small and medium economies.[13] In them, monopoly position is often not based on innovation, but entrenched in mature markets, where severe asymmetries of information mutually reinforces scale economies, and large business conglomerates are present in several markets. Another reason is that despite some commonalities on the surface, a number of important differences subsist in the way different jurisdictions treat abuses of dominant position (particularly exclusionary abuses).

As in other places, South Africa and Chile face the challenge of establishing guiding principles that allow discerning between lawful and unlawful conduct. Notwithstanding the different nature of the laws, and the generally weak impact of the law & economics discipline in both countries, their respective competition agencies and tribunals have adopted an economic approach to abuse of dominance.[14] This raises the question of what legal standards and presumptions, if any, should be applied, and what evidence must to be gathered and interrogated for decision-making. The task is to establish and apply workable tests for enforcement that are based on sound economics and, at the same time, take account of the realities of the economies.[15]

The paper goes as follows. In the first section we present an overview of both regimes, describing the provisions of the respective Competition Acts, the main institutions and a statistical summary of the enforcement record in each country (section 2). Then, we assess the main cases and the standards applied from a comparative perspective, focusing on both exclusionary and exploitative conducts (section 3). Concluding remarks follow (section 4).

2. Overview of legal regimes and enforcement record

To locate our comparative analysis, we start by setting out the legislative and institutional framework in each country and giving a brief overview of the enforcement record. This overview raises interesting areas of similarity and difference that we assess in more detail in examining key cases in the section that follows.

2.1. Chile

2.1.1. Substantive provisions in the legislation

The Chilean Competition Act (Law Decree No 211/1973) is unusually broad (OECD, 2010). Article 1 states the purpose of the Act is 'to promote and defend free market competition'. No explicit consumer welfare or efficiency objectives are stipulated, although unsurprisingly these have been explicitly mentioned in a number of particular decisions.[16]

[13] See, for example, Brusick and Evenett (2008).
[14] OECD (2010); Roberts (2012).
[15] Because '…more economics does not always mean better law' (Sibony, 2012: 39).
[16] See, for example, TDLC rulings 24/2005, 1/2004, 16/2005 and 1/2004.

The substantive provisions are contained in Article 3, which indicates that

> 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.
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> 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 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

As article 1, article 3 is broad and flexible. Its first paragraph generally provides that any deed, act or agreement (including a contract) that prevents, restricts or hinders free competition or tends to do so, is subject to sanctions under law. Although subsections in the second paragraph specifically refer to the traditional categories in competition law, they provide only illustrative detail. For this reason, in practice many cases are brought by parties or the FNE under the first paragraph. This produces some important procedural differences (particularly in collusion cases); and to some extent, has curbed more refined developments on the interpretation of the provision.

2.1.2. Institutions and powers

There are two main institutions in Chile: the TDLC and the FNE. Their respective structures and functions have been described in full detail in previous documents, so we only refer here to the most salient aspects.[17]

The TDLC is headed by a President and has another four expert members (by law, two economists and three lawyers), the five members being appointed for six-year terms. The President must be a 'professionally prominent lawyer' with ten years of experience in competition matters, economic or commercial law. The President of the Republic appoints the President from a list of five candidates proposed by the Supreme Court, selected through public examination of their qualifications. The President of the Republic also appoints two of the members from two lists of three candidates each, proposed by the Central Bank Council and selected through public review of their qualifications. The Central Bank Council appoints the two remaining members, and their qualifications are also subject to public review. Strikingly, member or the TDLC are *not* excluded from engaging in other professional activity. All the five members attend hearings and vote on decisions. In addition to the

[17] See, e.g., OECD (2010).

five judges, the TDLC has a staff of six professionals, lawyers and economists, headed by the Secretary of the Tribunal.

Procedures before the TDLC is quite speedy (indeed, the extension depends on the nature of the case). There are two main procedures, adversarial and non-adversarial, both initiated when the FNE or a private party files a complaint.[18] Since abuse of dominance cases are dealt with within the first one, in the following description we mainly refer to it. Regarding abuses, antitrust private litigation has generally been more active than public litigation.[19]

After notifying the complaint, the TDLC may call to a settlement conference. If this is considered unnecessary or the parties do not reach an agreement, the TDLC sets out the *auto de prueba* (i.e., resolution of proof), which identifies the scope of the case and the facts that the case will turn on. This also guides the hearing of factual witnesses. As we will see, while it may (and has) been challenged on this, it makes the hearing of the case proceed more quickly than in South Africa. However, speed does not necessarily equal substance. A practical problem has been that only one member of the TDLC (who can even be a substitute) attends the hearings of witnesses, therefore undermining the 'power' of the proof witnesses may provide to the tribunal.

The Competition Act allows the TDLC to impose fines and/or behavioural or structural remedies. Orders can amend or eliminate anticompetitive acts, contracts, agreements, schemes or arrangements in violation of the Act.[20] 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 tax units (approx. US$30 million) for cartel offenses and 20.000 tax units (approx. US$19,750,000 million) for other infringements.

The Act also gives the TDLC the faculty to propose the Executive amendments to the legislation – a faculty that the TDLC has used in several cases.[21] For example, in both *Transbank* (2005) and *CCS I* (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* (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 restructuring its tariffs for airfreight transport'.[22]

[18] In the latter case, the filing is immediately communicated to the FNE.
[19] See below, section 2.1.3.
[20] E.g., mandatory requests to modify internal procedures were made to private dominant firms in *GTD/EFE* (2008) and *Atrex/SCL* (2008).
[21] Chilean Competition Act, article 18.3).
[22] The TDLC also imposed several other regulatory measures to the dominant firm.

Final decisions of the TDLC are subject to the judicial oversight of the Supreme Court of Justice (the highest court in Chile). The Supreme Court reviews cases brought under a special recourse called "complaint recourse" (*recurso de reclamación*).[23]

The FNE (*Fiscalía Nacional Económica*) investigates and prosecutes. The FNE is headed by the National Economic Prosecutor, who must be a lawyer by profession and is appointed by the President of Chile after a public contest handled by the special State agency in charge of recruiting high-level public officials. The deputy head of the agency and the directors of the main areas are also recruited using this mechanism. The FNE is 'a decentralised public service, with legal status and own assets, independent from any other agency or service' and the Economic Prosecutor is directed by law to 'discharge his duties independently', to 'defend the interests entrusted to him […] based on his own discretion' and to represent 'the general economic interests of the community'.[24] Accordingly, the Prosecutor may only be removed subject to a prior motion at the Supreme Court.

The FNE has a total number of 107 people. It is currently divided in four divisions: enforcement, litigation, mergers and research, and administration. Besides, the Economic Prosecutor and its deputy share a small team. Each of the three operative divisions comprises a mixture of lawyers and economists.

Since 2010 the agency has followed a strategy of prioritisation. Goals and priorities are set internally on a yearly basis according to a methodology that weighs a number of criteria and indicators to determine the importance of sectors and the relevance of the conduct in relation to their impact on consumer welfare.[25] In turn, resources are allocated according to a number of management control systems, such as: (i) the Strategic Planning, which establishes the mission and purposes and institutional performance indicators; (ii) the Consolidated Management System (SIG), which details responsibility groups, relevant commitments, goals and indicators, recommendations for improvement and quarterly reports; and (iii) the Risk Management Plan, which includes a risks template and a treatment plan.

The FNE has similar powers to any other modern competition agency. In its investigations, the FNE can compel the production of documents and the co-operation of public agencies, state owned companies, firms and individuals, and the power to request information from any government agency. It can summon anyone with potential knowledge of an infringement to testify as a witness (including the defendant's representatives, managers and advisors). It can inspect the premises of the investigated entities on a voluntary basis and also can carry out dawn raids and do wiretapping.[26]

[23] The scope of the review is not defined in the competition statute, and has been interpreted in the broadest possible terms.

[24] Only for budget purposes, the FNE is part of the Ministry of the Economy.

[25] Priority-setting, however, is subject to several constraints. The most general constraint is the annual budget, submitted to the Ministry of Economics for approval, and ultimately approved by the Ministry of Finance. The FNE's budget includes, amongst others, a detailed purchase plan of goods and services, a training plan for the FNE's staff, and an international agenda that details the FNE's participation in international fora and other activities. These aspects are agreed with the Ministry of Finance in terms of specific indicators of institutional performance the FNE's must fulfil annually – for example, number of contributions to international organizations, number of advocacy activities, etc.

[26] Dawn raids and wiretapping require authorisation from the TDLC and the issuance of an order from a judge of the Court of Appeals.

The results of an FNE investigation may be (i) an administrative decision closing the investigation; (ii) a report to the TDLC in a proceeding (either adversarial or non-adversarial), in which the TDLC asks for the FNE's opinion; or (iii) an *ex officio* complaint (*requerimiento*) seeking a fine or other remedy.

2.1.3. Enforcement record

Since the establishment of the TDLC in 2004, Chilean authorities have been increasingly active in enforcing the Competition Act. The FNE has investigated an average of 45 cases per year, being approximately 15 initiated *ex officio* and 30 by denounces of particulars. Typically, it has taken around 29 months for the FNE to complete investigations related to abuses of dominance.[27] FNE officials have declared that since the introduction of the strategy of prioritisation in 2010, the importance of abuses of dominance cases has decreased, at least *vis-à-vis* collusion. Nonetheless, if this is relatively clear from the TDLC case-law (as it is shown further below), it is not necessarily the same at the agency level. In 2011, the FNE still launched 12 investigations related to abuses of dominance, but the confidential nature of investigations on collusion prevents an assessment of the assertion.[28] Moreover, as of December 31st 2011, there were 17 roll-over investigations on abuses from previous years.[29]

Since its formation the TDLC has issued a total of 121 judgements in adversarial procedures[30], within and average time of almost 2 years in trial cases and 9½ months in abbreviated cases.[31] The official account of the TDLC informs that, overall, there has been a sharp rise in collusion cases, which took priority over abuses of dominance cases. According to the TDLC, in 2011 33% of the cases were of the first group and only 10% belong to the second. If this were true, it would be a notorious departure from the historical trend in Chilean competition law.[32]

However, the TDLC classifies another 38% of the cases as "imposition of artificial barriers to entry". These cases are, in reality, true abuses of dominance cases, so the conclusion mentioned in the previous paragraph is misleading. Furthermore, the difference is not merely a statistical issue. As will be shown, this is a practice deeply enrooted in the substantive standards applied by the TDLC.[33]

Of the total number of TDLC judgements, 67 have been subject to complaint recourse before the Supreme Court (approx. 56%), which has over-turned 9.[34] In addition, the Supreme Court has found

[27] Investigations on cartels seem to be completed faster: 22 months (see GCR, 2012).
[28] Investigations on cartels are confidential.
[29] In fact, in August 2011 there were 34 abuse of dominance investigations underway, the highest number that year. In total, the FNE closed 20 abuse-related investigations in 2011.
[30] Source: TDLC (2012). In addition, the TDLC has issued 39 decisions on non-adversarial procedures and has approved 5 settlements.
[31] Abbreviated cases are those where there is no proof. The average time is 615 days in trial cases and 287 days in abbreviated cases, according to the TDLC (2012).
[32] Moreover, it would coincide with the FNE's aim to target more collusive rather than abuses of dominance cases. However, the policy is too novel to assess its impact.
[33] See section 3.3 below.
[34] In 2011, the TDLC issued 9 judgements in adversarial procedures, 5 of them being subject to complaint recourse.

there was a contravention in one case which the TDLC had dismissed (of predation, which turned on the appropriate definition of costs).[35]

As shown in Annex 2, up to August 2012 the TDLC has reviewed 57 cases regarding abuse of dominance and has sanctioned and fined 19. The FNE has referred 21 of these cases.[36] This compares with 30 cases between private parties with no direct intervention from the FNE, a number that represents 59% of the total number of cases before the TDLC. Nine of those cases regarded exploitation practices mostly towards consumers but in some cases also towards suppliers -the later, for infractions to requirements established previously, during the former system of commissions. 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.

By sector, telecommunication cases are the majority, representing 16% of the total number of adversarial cases filed before the TDLC.[37] On adversarial procedures, it is followed by fuels, groceries, concessions and transport, each of them representing 8% of the total number of cases.[38] It is harder to provide accurate data on cases by conduct. As seen, many cases are just presented before the TDLC using the broad provision of Article 1 paragraph 1, leaving to the TDLC the specification of the conduct. Also, many cases are classified generically (e.g., exploitative abuse of dominant position). Thus, the most common conduct dealt with by the TDLC seems to be price discrimination (in 12 of the decisions), followed by predation (7). Other conduct on which the TDLC has made several findings of abuse is requiring conditions that exclude rivals (such as retailers requiring suppliers to boycott rival and bank cards requirements).

On damages, private litigation remains low. Up to 2012 meagre four cases have been brought by private parties against wrongdoers in abuses of dominance cases (two on predatory pricing[39], one on discrimination[40] and one on exclusionary abuse[41]).

2.2. South Africa

2.2.1. Substantive provisions in the legislation

The objectives of the South African Competition Act (Act 89 of 1998 as amended) are broad, but not in the Chilean sense of having an over-arching broad enabling provisions but in listing a large number of purposes, as follows (given in section 2):

[35] On non-adversarial procedures, 5 decisions have been subject to recourse to before the Supreme Court and one over-turned.
[36] 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. In the table in Annex 2, these cases are number 7, 16, 26 and 29.
[37] Telecoms also amount for 17% of the applications for non-adversarial procedures.
[38] On non-adversarial procedures it is followed by ports (15% of the total), fuels (9%) and the electric power sector (9%).
[39] *James Hardie* and *DAP v. Lan*.
[40] *Constructora Independencia v. Nuevo Sur Maule*.
[41] *Phillip Morris v. CCT*.

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.

The Act deals with two main areas: prohibited practices (covered in Chapter 2 of the Act) and mergers (covered in Chapter 3). The prohibited practices are separated into restrictive practices, further distinguished into prohibited horizontal and vertical restrictive practices (in sections 4 and 5 respectively) and abuses of a dominant position in section 8, under separate sub-sections. Prohibited price discrimination is covered in section 9.

The striking difference with Chile is the specification of separate conduct as discrete contraventions rather than with over-arching provisions. 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. 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.

Price discrimination 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.

2.2.2. Institutions and powers

Following the initiation of an investigation either through receiving a complaint or through its own initiation the South African Competition Commission has extensive powers to investigate. These include the ability to summons information, to conduct interviews under oath, and to conduct search and seizure of company premises (so-called dawn raids). The latter requires obtaining a warrant from a judge.

The Commission is structured into divisions, with the main ones being Mergers and Acquisitions, Enforcement and Exemptions, Legal Services, Policy and Research, Advocacy and Stakeholder Relations, and Corporate Services. In 2011 the cartels enforcement work was moved to a dedicated Cartels Division.

The structure thus combines the main areas of work in terms of the sections of the Act and the processes of investigation and prosecution, with the Legal Services and Policy and Research Divisions providing in-house legal and economics capacities. Case teams for major cases thus typically involve members of three divisions, combining investigators, lawyers and economists. The Commission's staff has grown to 171 in 2012.

The Commission has one year to investigate a complaint lodged with it, with extensions possible with the agreement of the complainant. Major enforcement cases have typically taken at least two years from complaint to referral to the Tribunal. The Act has a prescription provision which stipulates that the Commission cannot investigate conduct that ended more than three years before the complaint was made.

Until 2007 the Commission's enforcement work was almost entirely based on investigating complaints lodged with it. The Commission receives many of these, normally around 200 to 300 each year.[42] A large proportion has not been well-founded in setting out a probable contravention of the Competition Act, but may instead involve commercial disputes between parties.

In 2007, the Commission adopted a prioritisation framework for enforcement, which saw it identify broad sectors where it undertook initial scoping to identify competition concerns and initiated its own investigations.[43] The prioritisation framework involves taking into account the likelihood of contraventions of the Competition Act, the impact on the economy and poor consumers in particular, and the government's economic policy priorities. In addition, there have been many applications under the Commission's Corporate Leniency Policy (CLP) which have led to initiation of investigations into cartel conduct.

[42] Competition Commission and SACT (2009).
[43] Ramburuth and Roberts (2009).

The SACT has three full time members and 8 part-time members. A case is heard by a panel of three. Most of the tribunal members have a legal background. The SACT is supported by a secretariat, including case managers.

SACT members are appointed by the President on the recommendation of the Minister of Economic Development for a maximum of two five-year terms.

There has been a high degree of continuity. The Chair and Deputy Chair of the Tribunal in the first decade were both on the former Competition Board and leading members of the team responsible for the Act and setting up the institutions. The Deputy Chair succeeded the Chair in 2009. The three Competition Commissioners were also closely involved with the legislation. The first Commissioner was the government official responsible for the policy framework and legislation. The second Commissioner had been on the team and then Chief Legal Counsel of the Commission. The third and current Commissioner chaired the negotiations on the draft legislation between government, organised business and labour, and was the first CEO of the Tribunal.

On referral of a case by the Commission (which resembles pleadings), papers are filed by the parties. There is then a discovery process (often very extensive) and the filing of witness statements before the hearing itself. In practice, there have generally been challenges at one or several of these stages before the substantive hearing of the matter. The hearings proceed with opening arguments, factual and expert evidence and closing argument.

Expert economic evidence has been the norm, not being unusual to find several economists from some of the leading international competition consultancies involved in a case. The extensive economic evidence is linked with lengthy hearings of factual witnesses. These both occur in an adversarial setting with lengthy and intense cross-examination by counsel, sometimes spreading out over a long period of a year or more. However, while this has led to very long and drawn out hearings, it is not clear that this has led to the most effective interrogation of the economic analysis. Until recently, the SACT did not identify its own economic experts to advise it nor did it seek to constrain the range of analyses that could be presented (and had to be met) by each side. The Commission and independent complainants are also at somewhat of a disadvantage given the firepower that can be brought to bear by well-resourced parties in the form of international economists advancing all manner of theories and models.

A penalty may be imposed for a first contravention of sections 5(1) (resale price maintenance), 8(a), 8(b), 8(d). Sections 5(2) (vertical restrictive practices), 8(c) and 9 do not have a penalty for a first contravention. The Tribunal 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.

Appeals are to the Competition Appeal Court, a division of the High Court with the specific mandate to deal with such cases, and thereafter to the Supreme Court of Appeal and possibly to the Constitutional Court.

2.2.3. Enforcement record

Compulsory pre-merger notification (above specified thresholds defined in terms of turnover or assets) meant a large part of the Commission's energies in its early years were taken up with mergers. Merger cases also accounted for almost all of the Tribunal's work and influenced the way in which rules and procedures were adopted. Cartel enforcement picked up with the CLP becoming effective, from around 2007.[44] Since 2007 these cases have taken up substantial resources on the part of the Commission.

In terms of abuse of dominance, there has been a steady, albeit relatively low, flow of referrals by the Commission. Nineteen abuse cases in total were referred to the Tribunal in the 13 years to 31 August 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. All of these cases are described in Annex 1.

The SACT made a determination on eleven while five cases were the subject of settlements with the Commission, one of which the SACT did not confirm. The remaining five cases referred were at various stages in the process of hearing.

Of the eleven cases the Tribunal 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*). In addition, four of the five settlements were confirmed by the Tribunal and three of these 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.

The 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. Most cases have involved former or current state owned companies (*Sasol*, *Mittal Steel*, *Telkom*, *SAA*, *Safcol*, *Foskor*). In terms of sectors, heavy industries (steel and basic chemicals) have been most important, following by four cases in agriculture and forestry, where there has historically been substantial state support (*Safcol*, *Patensie*, *Senwes* and *Rooibos*), and telecommunications and airlines (two each).

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 (Annex 1).

3. Comparative review

The most obvious differences between the two countries are in the legal provisions and in the number of cases. Chile has broad legal provisions and has decided a large number of cases. South Africa, by comparison, has specifically framed provisions and has decided very few cases. This may be because it has grappled with more difficult cases in extended hearings on the merits, while the Chilean Tribunal appears to have been faced with many more cases of a more straightforward

[44] Makhaya *et al.* (2012).

nature. However, although the SACT has been faced with extensive evidence and has had long and drawn out hearings, it is not obvious that it follows that these are quite different cases by their nature to the Chilean ones.

Instead, the framing of the South African Act has allowed for the extensive contesting by respondents of even relatively straightforward contraventions. Of the five Tribunal decisions that have not been overturned (as of August 2012) three of the decisions arguably relate to what could be viewed as relatively simple conduct. In *Patensie*, *Senwes* and *Telkom*, firms that were bequeathed with overwhelmingly dominant positions both decided and followed through on clear exclusionary conduct which either constructively or overtly refused access to key facilities. *Patensie* was decided relatively quickly, and related to arrangements by a former co-operative for the packing and transport of citrus fruit in a particular local area. In *Senwes*, the long appeals related to how the conduct had been characterised as a margin squeeze; in other words what 'pigeon-hole' of the South African Act the conduct should be placed into. In *Telkom*, in addition to the SACT finding that Telkom did refuse access to an essential facility, there were other charges, which the Tribunal dismissed, including excessive pricing and price discrimination. The long delays related to challenges brought by Telkom relating to the Commission's referral and its right to bring it.[45]

The other two decisions of the five are both against SAA regarding loyalty rebates, which we discuss below. In addition, there have been important interrogation of the appropriate standards for abuse of dominance in cases that have been over-turned or dismissed by the Tribunal. The Competition Commission has also been looking to bring cases which establish precedents and three of the cases waiting to be heard deal with predation, excessive pricing and exclusive dealing as an inducement not to deal with a competitor.

The Chilean regime has allowed more rapid decision-making in apparently straightforward cases without the same depth and breadth of analysis as the SACT. The majority of findings on the grounds that a firm strategically raised artificial barriers to entry or expansion of competitors are actually similar to the findings of the SACT. We assess the decisions in more detail below.

3.1. Standards applied

In both countries the employment of an effects-based approach means that the standards are developed through cases – only with contested cases does the tribunal in each country develop the case law and the precedent. Therefore, the pace and areas of progress depend on the cases that are brought as the regime matures and –crucially– the nature of the legal regime. In Chile there have been many more cases, and a greater degree of success in sustaining the TDLC findings before the Supreme Court. The fewer findings (just five) sustained in South Africa might at first sight appear at odds with the specification of separate conduct. However, in practice 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.

[45] Note also that in both *Patensie* and *Senwes* the Tribunal found under a section where there was no penalty, or decided not to impose a penalty.

The higher number of cases in Chile reflects an ability to arrive at more speedy decisions. The explanations lies on 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 dominant firms alleged weak –if any– efficiency justifications.[46] The flexibility embedded in the Chilean legal provision has allowed the TDLC to deal with them using a sort of 'shortcut' where there is such (super)dominance[47] and the conduct, on the face of it, *evidently* harms competition.[48] As we shall see, the 'no economic sense' test[49] has apparently underpinned the reasoning of the TDLC in most cases. This refers to the conduct not having an apparent rationale absent the exclusionary effect.[50]

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, sacrifice and what is an equally efficient competitor.[51]

By contrast, the South African abuse cases similarly almost all relate to firms that can be characterised as super-dominant, with market shares of 80% of more. However, the specific nature of the legal provisions has meant that the SACT has had to consider effects – 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.[52] 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.

[46] For example, in a sanction for predatory pricing, the defendant did not argue against the accusation of selling below avoidable costs, facilitating the process (Sentence No 28). 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 inferior to the value of the binding product (Sentence No 97).

[47] 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*, 2012), it has done it in a rather confused and undefined way.

[48] For instance, in *CCS II* (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).

[49] According to this test, conduct is deemed illegal only if the "conduct likely would [not] have been profitable if the existing competitors were not excluded and monopoly was not created" or if the conduct "likely would [not] have been profitable if the nascent competition flourished and the monopoly was not maintained" (*see* Werden, 2006: 415). The test is rooted in Areeda & Turner (1975).

[50] In *Transbank* (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).

[51] Questions such as the role of presumptions or whether there should be a *de minimis* rule have not even appeared in the analysis. Nor has the TDLC made the relative assessment of the possible errors of the system (type I or type II). Until recent times, the main certainty arising from the case law was that the notion of abuse was objective, so the 'intent' was irrelevant. However, *CCS II* (2012) expressly declares that 'there are no records in the file to conclude that CCS has had the true intention of excluding [its rival] from the market…' (para. 30. A similar statement is made at para. 32).

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

3.2. Exclusionary abuses

With the exception of one condemnatory sentence (a predatory pricing case[53]), on exclusionary cases the TDLC has always established that the sanctioned firm has strategically raised artificial barriers to entry or expansion of competitors that had not been justified by efficiencies. Implicitly, then – though never stated –, the reasoning of the TDLC is directed to avoid 'unnecessary restriction 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.[54] In economic terms, this equals the use of the 'no economic sense test', had its application been possible in the cases.

We consider the treatment of exclusionary conduct in three main categories: inducing a firm not to deal with a competitor, such as through loyalty rebates and alternatively (*de facto*) exclusive dealing (3.2.1.); margin squeeze and (constructive) refusal to supply a competitor to a vertically integrated dominant firm (3.2.2.); and predation (3.2.3.).

3.2.1. Conditional rebates and exclusive dealing

Both South Africa and Chile have interestingly made findings in anticompetitive rebates cases based on the extent of dominance, the nature of the rebates (individualized and retroactive) and the effect that can be inferred from this, and the absence of efficiency justifications. In the case of *SAA*, the SACT assessed the coverage of the rebates and their effect on rivals' performance, drawing on witness evidence on their impact on behavior of customers (in this case, travel agents). It further identified the fact that the features of the rebates meant they generated very high powered incentives.[55] While there was assessment of the size of the contestable market (the proportion of the market which the smaller rival could reasonably hope to win customers by vigorously competing), there was no assessment of whether rivals could match the rebates taking into account costs and margins. The second *SAA* case went into greater detail on these points. In the Chilean case *Fósforos*, the plaintiff did not provide information on costs necessary for the tribunal to produce a more economic assessment.[56] The TDLC presumed the illegal nature of the practice using the following elements: (i) the market power of the defendant (95% market share), (ii) the retroactive and individualized character of the discounts, and (iii) the absence of economies of scale or other type of efficiencies that could justify the behavior. Arguably, this was appropriate, given the (nearly evident) facts of this case. Nonetheless, a more sophisticated analysis would be required where the market share was less and there were efficiency reasons for creating such incentives for customers.

In settlements concluded by the FNE in a further two exclusionary conduct cases, approved by the TDLC, parties ended arrangements directly aimed at excluding rivals from particular market segments, or targeted groups of rivals. In the first case, the FNE filed a complaint against the

[53] *Loncomilla* (2005).
[54] Posner (2008) (indicating 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).
[55] See Jenkins *et al.* (2012).
[56] *Fosforos* (2009).

dominant brewery for entering into exclusive dealings with bars and restaurants. One of the company's defending arguments was that these dealings represented only a small portion of the relevant market and as such they lacked exclusionary character. The FNE counter-argued that the exclusivity pointed towards the strategic niche of higher purchasing power neighborhoods, where the principal potential competitors, craft brewers, were more likely to enter the market. The litigious process ended with the commitment by the brewery to terminate all exclusionary contracts.

In the second case the FNE lodged a lawsuit against the main distributors of Coca Cola products for discounts that were subject to refusal to sell budget labels (so-called "B Brands"). This exclusivity never reached the main competitors. Initially, the defendants denied the charges, but later on they decided to put an end to the trial by agreeing to take on a series of relative commitments – among others, on the form of structuring their discounts and the concession, for limited time, of part of their coolers in those stores with no second refrigeration equipment.

These determinations are somewhat similar to the exclusive agreement struck down by the SACT in *Patensie Sitrus*. This related to a former co-operative's articles of association stipulating that all the farmers must deal exclusively with it.

3.2.2. Margin squeeze and refusal to deal

The TDLC has ruled in one case described as a margin squeeze, although without the necessary analysis for an effects-based assessment.[57] 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. In effect, 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, which made no economic sense and involved a change in the pre-existing contractual conditions.

South Africa has also arrived at margin squeeze, not identified in the Act as a particular form of conduct, through characterization of conduct not initially understood in these terms. This case is also precedent-setting for how the effects of conduct link to subsections of the Act. The *Senwes* case related to more favourable silo storage tariffs being charged to farmers who sold grain to Senwes (the owner of the silos and also a large grain trader) as opposed to independent grain traders. While the Commission had referred the case largely in terms of storage tariffs to farmers as compared to independent traders, the SACT recognized the critical issue to be of the effect of the tariffs on independent traders as compared with Senwes own trading arm.[58] The Supreme Court of Appeal (SCA) over-turned the SACT decision as the referred complain had covered the effect that the SACT termed a margin squeeze (in finding a contravention of 8(c)) in support of the 8(d)(i) charge of inducement not to deal with a competitor, which the Tribunal found had not been established.[59] And, some of the evidence of Senwes favouring its own trading arm by not levying charges for silo fees and information, as well as conditions on the provision of finance to farmers, had not been

[57] *GPS v. Entel PCS*, which is the only case classified as margin squeeze so far in Chile.
[58] SCA decision in Senwes v Competition Commission of South Africa, case no 118/2010.
[59] SCA decision in Senwes v Competition Commission of South Africa, para 42 and 43.

covered in the referral.[60] In whether the SACT was entitled to go beyond the terms of the referral in performing its inquisitorial role the SCA found that the tribunal has no power to enquire into and decide any matter not referred to it.[61]

In addition to dominance, the evidence had focused on the effect on independent traders' margins, the impact in terms of their performance (declining market shares) while they were 'as efficient competitors', as well as various evidence in the hearing relating to Senwes intent. The Constitutional Court over-turned the SCA decision as it found that there was no doubt on the respondent's part about the substance of the case being made and that the Tribunal as an inquisitorial body had latitude to run the hearing and make its decision as long as there was no prejudice to the respondent. This is an important decision enabling the SACT to properly assess the evidence and analysis of effects, where in this case there was little dispute about what was led in terms of the core conduct and its alleged anti-competitive effect, even if there were differences in terms of the 'pigeon holes' into which the conduct was placed.

In 2012, the SACT made its second finding of a margin squeeze and refusal to supply nature, this time against the fixed-line telecommunications firm Telkom regarding the supply of its services to value-added network services providers with which it also competed. The SACT found under refusing access to an essential facility (8(b)) and inducement not to deal with a competitor under 8(d)(i). The core of the case related to the provision of access to the fixed line telecommunications network (over which Telkom had first a legal and then de facto monopoly) to providers of value added network services (VANS) who competed with Telkom's own offerings. At the same time as effectively refusing access Telkom had informed customers of independent VANS about the problems such firms faced, inducing them to rather deal with Telkom.

In refusal to deal cases, the TDLC has established requirements that are, at least on the surface, similar to those applied by European case-law either on refusal to supply cases or the so-called essential facilities doctrine. From the policy perspective, this means that in the view of the TDLC, competition law is a suitable instrument to establish duties to deal with rivals. In Chile, many competition cases have been applied as a sort of "can opener" of markets.[62]

Nevertheless, a review of the specific requirements does not allow drawing analogies between Chilean and other jurisdictions, due to the somewhat ambiguous nature of those requirements. First, the ability of a firm of 'acting' (currently) or 'keep acting' (in the future) in the market must be 'substantially affected' as a consequence of the conduct of a firm and the scarce degree of upstream competition.[63] Although at first glance this is equivalent to the requirement of essentiality, it is not entirely clear whether 'substantially affected' actually means 'indispensability'. In fact, *CCS II* (2012) refers specifically to the latter. Secondly, the TDLC demands economic feasibility of replicating the facility (a seaport and a publication containing commercial information, respectively) within a reasonable period of time.[64] A further requirement is that the conditions for giving access to the

[60] SCA decision para 40.
[61] SCA decision para 51.
[62] The phrase was coined by van Miert (2000). For the European approach, see also Tapia & Mantzari (forthcoming, 2012).
[63] See *Micom v. Enap* (2008) and *OPS v. Telefonica* (2009).
[64] *Punta de Lobos* (2006) and *CCS II* (2012).

facility have a technical or economic justification.[65] Finally, the TDLC requires leverage: the refusal must have the aim of keeping or increasing a dominant position in the downstream market. However, as it is well-known, in other jurisdictions leverage is generally not considered a requirement for establishing the unlawfulness of the conduct.[66] Market power is irrelevant, as long as the owner of the facility acts in the downstream market. In this case the refusal may have the ability to damage consumers by avoiding the entrance of a maverick or a firm that innovates.

3.2.3. Predatory pricing and analysis of appropriate cost benchmarks

Predatory pricing is the area where the TDLC's case-law seems more consistent – at least in some important respects. First, the legal provision of the Chilean Competition Act that deals with predation (article 3 "c") requires that the object of the conduct is 'reach, maintain or enlarge a dominant position'. There have been a number of cases where the TDLC has dismissed complaints due to the absence of dominance.[67] However, as the TDLC has also repeated, the Act does not demand to *actually* hold a dominant position, being sufficient that the conduct is 'apt' for reaching it (the 'suitableness' requirement). Therefore, the degree of market power needed to engage in predatory pricing is less than the required in other abuses of dominance.

Second, the measure is objective: the TDLC has hold that a firm engages in predatory pricing if sells its products below average avoidable costs – that is, the average variable costs, but considering also fix costs.[68] Both the requirement of dominance and the assessment on costs follow the approach that has been used by the EU and the US competition authorities.[69] However, whilst in the past the former allowed condemnations when the price is above the average avoidable cost, but below average total cost (showing anticompetitive intent), that possibility has been always rejected in the US case law[70]. In Chile, although there have not been sanctions for pricing above that measure.it remains unclear whether the TDLC salutes or excludes this alternative.

Precedents are less clear in the case of the recoupment. On this, the TDLC seems to differ from the US approach and align closely to the European: the standard of proof is one of 'reasonable expectation of recoupment' in the short term – not actual evidence thereof. However, it is not clear whether such possibility is inferred from the market power (in which case the recoupment is superfluous) or should be proved by other means (a requirement less likely to fit in the legal framework though).

The South African Tribunal has not decided a case of predatory pricing, and only one case has been referred (*CC v Media24*).[71] On the face of it, the South African Act has a clear specification of the test

[65] See *Voissnet* (2006). Implicitly, the reasoning of the TDLC in the case relies on the fact that access to the facility was already granted. However, in *Punta de Lobos* (2006) the TDLC indicates that despite the fact the refusal to deal was not proved, if the plaintiff had done so the TDLC would have granted remedy (i.e., access to the facility) (para. 72).
[66] But see Salop (2009).
[67] For example, *Hardie* (2006) (reversed by the Supreme Court), *GPS v. Entel PCS* (2008), *Vallejos v. Naviera* (2010).
[68] However, in *Arauco* (2008) the TDLC held that pricing below costs for a promotional period is not a predatory conduct.
[69] This is in line with the approach adopted by the European Commission (2009) and the DOJ (2008).
[70] Confront *AKZO Chemie BV v. Commission*, case C-62/86 [1991], para. 72 and *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 US 209 (1993), 212.
[71] There has been a case of interim relief, where relief was not granted.

in s.8(d)(iv) – namely, that the price must be below marginal or average variable cost.[72] In this, the legal provision took what was embodied in case law of other countries at the time and wrote it into the South African Act. While this may appear to provide greater certainty this is only the case if it is clear how these cost benchmarks should be defined and measured. In addition, while the legislation appears to anticipate a 'plain vanilla' type of predatory strategy, these are likely to be more the exception. There are high costs to the dominant firm from such a strategy and it is more likely that pricing strategies aimed at driving out rivals will take the form of pricing to a segment of the customer base (as is the logic of loyalty rebates). Indeed, the case referred relates to the pricing of what might be understood as a 'fighting brand' and an important part of the case will be how average variable costs may be understood.

In addition, this prevents the standard from evolving with the literature and case law. Indeed, as observed by Church and Ware (2000: 660) '[a]t the same time as the Areeda-Turner standard has been increasingly embraced by the antitrust courts, it has been roundly condemned by economists.' The literature and case law has moved on to emphasise average avoidable costs, recognizing the more realistic position of multi-product firms, as, for example, the approach in the EC guidance paper on abuse of dominance. It is also important to recognize that efficient rivals may need to achieve a certain scale to be able to match the incumbent's average costs. This all implies that considerable effort in the referred case in South Africa will be on definitional and measurement debates about average variable and average avoidable costs, quite separate from whether there is an anti-competitive effect.[73]

3.3. Exploitative abuses

As in Europe and other jurisdictions (and unlike the US), both Chilean and South African laws permit to sanction exploitative abuses, such as excessive pricing and price discrimination. On these topics, as with exclusionary conducts, differences in the wording of the respective Competition Act have also made a big difference in practice. Thus, the flexibility of Chile law has meant more effectively addressing 'fairness' in competition. Following other competition authorities around the globe, Chilean competition authorities have attacked excessive prices very rarely.

In Chile, cases have been dealt with mostly by the recourse to the price discrimination provision. This has been possible because of the ability in Chile for a broad interpretation to be placed on the provisions. Under the South African Act, section 9 on prohibited price discrimination is framed very narrowly, with conditions that the transactions must be equivalent and must substantially lessen competition (implying that the different buyers between which the dominant firm is discriminating are competitors). This means that several cases taken by the Chilean authorities as price discrimination, of higher prices not justified by costs, would not fall within the South African price discrimination provision.

[72] Areeda and Turner (1975: 699-700).

[73] Loyalty rebates are another mechanism for pricing to a portion of the market, at a level that an as efficient rival cannot meet. These imply cost tests. However, the measurement will depend on the identification of the contestable portion of the market over which these prices and costs should be assessed (Bishop and Walker, 2011).

In the Chilean *CCS I* case (2007), the dominant firm charged certain amount of money for "clarifying" debts (that is, to register the extinction of liabilities for document sand debts). The FNE deemed the charge "illegal" and "discriminatory". While analysing the conduct, the TDLC observed that the charge in itself was legal ("not prohibited") and sustained in relevant costs of the firm.[74] Then, after carrying out a cost-analysis, it found that the tariff-structure used by the firm was not based on costs, but that 'there are economic reasons that would allow to justify the tariff structure based upon debt-segments'.[75]

A year later, in three cases the TDLC found price discrimination due to that the amount the firm was charging was not based on any relevant measure of cost or simply had no justification.[76] This resembles the 'no relation to the economic value of the product' test used in European law for excessive pricing.[77] As in Europe, however, the test is insufficient if viewed in terms of excessive pricing, although not necessarily as prohibited price discrimination. Unfortunately, the TDLC has been short on providing more details; however, once again the cases may appear relative 'easy' in that, of the three cases on high prices that were decided in 2008, in two of them the dominant firm blatantly breached the terms of the contract that ruled its actions.[78] In another, the differences in prices was very large and were for water and sewerage services literally on either side of a road, where there was regulation that applied on one side and not on the other (*Aguas Nuevo Sur Maule,* 2009). In South Africa such a case would have to be taken under excessive pricing provisions, given the restrictions in the price discrimination provision.

Within the framework of price discrimination, developments on exploitative conducts in Chile were promising until 2010. In this year *Emelat* (2010) reversed the trend, with the TDLC stating clearly that exploitative pricing is not an abuse by itself. The reasons for the change are not entirely clear. One possible explanation may be linked to public choice factors. In 2010 the TDLC appointed a new President, Tomás Menchaca, already a member of the tribunal since its inception in 2004. President Menchaca has been very vocal in defending the lawfulness of these practices – or, more accurately, the extremely limited scope that should be given to the provision in the Act that allows sanctioning exploitative abuses. He has forcefully expressed his opinion not only in judgments, but also in speeches and academic publications.[79] "The Tribunal is not a regulator", he typically argues. And this is exactly the same kind of reasoning expressed in *Emelat* (2010).[80] Therefore, even though the case

[74] The cost analysis was based in an economic report accompanied to the file.

[75] Oddly enough, the TDLC did not mention what those reasons were, and explained that 'the circumstance that an increasing tariff structure based upon debt-segments is economically reasonable does not allow to rule out that such a structure might be abusive, since not any progression is reasonable' and 'this Tribunal does not have antecedents to identify what would be the socially optimal tariff scaling'. However, it blamed the FNE, because the latter did not indicate how or why the tariff structure would be abusive.

[76] *Atrex/SCL* (2008), at para. 51; *GTD/EFE*, at para. 49; *Lan Airlines* (2007), at para. 39. But see *CCS I* (2007), where the TDLC stated that "there might be another economic justification" different than costs (para. 40).

[77] This criterion compares the cost of production with the selling price. It comes from *United Brands* (case 27/76 [1978] ECR 207).

[78] *Edelmag* (2008) and *Atrex/SCL* (2008).

[79] In a recent book chapter, for instance, he argues that 'it should not be sanctioned the mere fact that a firm, even a monopolistic firm, set high prices, although that may be an indications of its market power and the chance to abuse thereof, and notwithstanding the possibility of using regulation, even price regulation, in case it is a natural monopoly with great market power, when such regulation is economically justified' (Menchaca, 2011: 263 [authors´ translation]). He added two further arguments. First, the benefit of punish such practices would be very low and the costs high. Second, there is a risk of opening the door to regulation 'that would destroy the essential basis of the free market system' (*Id.*, at 264). Note that his opinion resembles closely that of Justice Scalia in *Trinko* (2004).

[80] For example, see para. 31.

was issued before his term as President, it could be conjectured that his thinking on the topic was already starting to be influential among his peers. Indeed, it is hard to establish causality: whether private parties or the FNE have not presented new cases *because* they have been discouraged from the new trend remains an unsolved issue.

As noted above, the restrictions on price discrimination in South Africa mean that the use of the respective legal provision would not be possible. For this reason, exploitative abuses present a complicated picture in comparative terms. The SACT addressed differential pricing under the excessive pricing provision which specifies that prices of a dominant firm may be excessive in relation to economic value (not defined in the Act). The *Harmong v Mittal Steel* case (2007) related to the pricing of flat steel to local customers at an 'import parity level' while there were large net exports and very low production costs in international terms.[81] The SACT found that the pricing by Mittal Steel SA was excessive, as it was a super-dominant firm charging the maximum possible prices (the price of imports) given substantial transport and related costs, and the large net exports which were effectively excluded from the local market. The Competition Appeal Court over-turned the decision and remitted it back to the SACT on the basis that the tribunal had not directly determined the economic value of steel. Before the SACT could consider this, the complainant (Harmony Gold) reached a settlement with Mittal Steel SA. There has thus been no concluded case of excessive pricing.

There has been one South African case of price discrimination, *Nationwide Poles v Sasol*. This highlighted the application of the specified tests, including that the pricing must be on equivalent transactions, and that the pricing must have the likely effect of substantially preventing or lessening competition. There is also a meeting competition defence and the opportunity to justify the conduct in terms of different costs. The case involved Sasol charging different prices for creosote sold to Nationwide Poles, a downstream firm using it to treat timber poles, compared to its competitors. The SACT found the pricing did constitute prohibited price discrimination. However, this finding was over-turned by the Competition Appeal Court. The CAC's decision was based on its view that while the specific competitor had been harmed, the harm to competition had not been proven in the absence of detailed evidence on the competitive significance of this firm and others in a similar position. The efficiency of the firm was not questioned, nor the harm to it. It subsequently went out of business.

Clearly the provisions in the South African Act are to limit the scope of prohibited price discrimination, which is understandable as price discrimination is a part of normal competitive rivalry. There is also no penalty for a first contravention of the Act under this provision. However, where the thresholds of equivalent transactions have been met and no credible cost or meeting competition justifications are mounted, the onus should perhaps rest with the dominant firm.

4. Concluding remarks

Following Vickers (2005), cited at the beginning of our paper, we are interested in whether rules have been established, whether they are well founded in economics, and if and how they have been

[81] See Roberts (2009) [Disclaimer: Simon Roberts acted as an economic expert for Harmony Gold in this case].

effectively applied. In the case of both Chile and South Africa, due to the institutional structure, this depends on decisions taken by the Tribunal, which develop the case-law as specialist adjudicative bodies (which include economists) and have latitude to set out their own processes for hearing the necessary evidence and expert analysis. However, the decisions can only be on the cases brought before them.

While the South African legislation is quite unusual in that it might appear to set rules to a greater extent in the specific provisions, there have been relatively few cases through which to establish these provisions have been applied and for some important types of conduct, such as tying and bundling or predation, there have not been any substantive cases. In South Africa it has also proved difficult to establish how tests are responsive to case specific factors as in almost each case the matter has had to proceed to the Competition Appeal Court. The specificity in the legal provisions has meant that the CAC has effectively engaged in the merits of the case, however, without the benefit of the full hearing process and without having the advantage of the balance of skills and experience in the Tribunal panel. There thus remains a high degree of uncertainty about the rules, especially where we understand 'rules' as going beyond the tests to include the framework for weighing-up the different factors.

By comparison, in Chile the generality of the legal provisions combined with specialist expertise of the TDLC gives it great interpretive scope. There have also been many cases on which the Tribunal has ruled – far more than in South Africa. On the surface, this has allowed the creation of some sort of standard of legality to be followed by firms, no matter how elusive and broad it is. However, beyond general criteria, principles are not settled and robust enough so as to produce legal certainty and give guidance to agents to assess the legality of their actions. Instead, a number of unresolved questions have not been dealt with. As a consequence, the boundaries of the rule of reason remain undeveloped. As in South Africa, this undoubtedly partly reflects the time for a regime to mature.

While the TDLC has grappled with issues of economics, this has been in a very small proportion of cases, such as *Transbank* (2005) and *CCS I* (2007). In a larger number of cases, the TDLC has essentially applied a form of the 'no economic sense' test. As these cases have often involved a firm that is overwhelmingly dominant and with no real efficiency justification, this has placed an onus on the respondent which they have not discharged and the TDLC has not had to grapple with extensive evidence of effects versus efficiencies. This appears to relate to the very nature of the markets analysed namely, following a trend in Latin-American markets, highly concentrated.[82] This has meant that the question for the threshold for dominance have generally become meaningless. There has, for example, been little (if any) cost analysis.

Our review raises several pointers for the way forward. Parties, including the FNE and Competition Commission, need to bring better and more challenging cases for what are, arguably, the strengths of having specialist tribunals with economics expertise to be demonstrated. The tribunals need to ensure that the hearings are run in such a way that the appropriate evidence is heard and is reflected fully in their decisions (as has been the case in some matters such as the loyalty rebates cases against SAA). The specificity of the provisions in the South African act have not necessarily aided this as in practice it has provided grounds for litigation around what 'pigeon holes' conduct should be placed in. Instead, understanding the effects of abuse of dominance means recognising

[82] Tapia (forthcoming, 2012).

that the conduct can have different dimensions, evolves along with the firm's strategy, and will not necessarily fit neatly into a single heading.[83] Also, the hearing of evidence should not imply excessively long processes. On both issues, a broad provision like the one in the Chilean Act seems to provide the necessary flexibility and suit better with the procedural rights of the parties.

Notwithstanding being 'the Same and the Other', the task remain the same: 'sorting sheep and goats' – that is, 'to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting activity'.[84] Both the case of Chile and South Africa shows that, although important areas for development remain, specialist adjudicative bodies are perfectly capable to successfully carry out this important task.

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[83] The recent South African Constitutional Court decision addressed this and empowers the Tribunal to hear cases in a way that allows it to properly inquire into the conduct and its effects.

[84] *Barry Wright Corporation, Plaintiff, Appellant, v. Itt Grinnell Corporation, Et Al., Defendants, Appellees.*, 724 F.2d 227 (1st Cir. 1983) (Judge Breyer).

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