

Incipient Digital Markets: Insights from Chilean Case Law

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I. Introduction

“*Digital-Mania*” in Competition Law has finally arrived in Chile, one might think at first sight. On the one hand, several academic activities discussing “challenges” to Competition Law have taken place. On the other hand, the national competition authorities, the Fiscalía Nacional Económica (“FNE,” Chilean Competition Authority) and the Tribunal de Defensa de la Libre Competencia (“TDLC,” Chilean Competition Court),² have decided a number of cases regarding different digital markets – specifically, those for delivery apps, e-commerce marketplaces, maritime information apps, and streaming platforms.

In this context, some calls for broader intervention on local digital markets have arisen. These calls have included proposals for a digital market inquiry to be led by the FNE,³ and the exercise of “hybrid institutional solutions” when a reduction of competition standard is met, including both enforcement and regulation tools⁴ with the involvement of both the FNE and the TDLC. These lines of thought can be contrasted with recent Chilean case law, which, with relatively consistency, holds that local digital markets are still incipient, at early stages of development.

Given this situation, this article tries to explain

the concept of “incipient markets” as applied to the Chilean digital context from the perspective of Chilean case law, and its wider implications.⁵

II. The Approach in Chilean Case Law

The concept of incipient markets has been used directly by the FNE in four cases regarding digital markets, in context of unilateral conducts (“*Mercado Libre*” and “*Dark Stores*”) and merger control (“*Uber/Cornershop*” and “*GSDN*”), and indirectly in one case before the TDLC (“*Grupo Latino*”).

In *Mercado Libre*, the FNE analyzed discounts offered to sellers by Mercado Libre, one of the main digital marketplaces in Chile and Latin America, if they used delivery services that had a collaboration agreement with the platform. The FNE held that the e-commerce market was “*still in an early stage of development*,” dynamic based on competition for innovation.⁶ This could be explained by the low sales by consumers in comparison with other countries (like the UK) and strong variations on incomes from commissions and market shares, even with the existence of another platform with a higher market share than Mercado Libre. At the

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² Francisco Agüero, *Chilean Antitrust Policy: Some Lessons Behind Its Success*, 79 LAW AND CONTEMPORARY PROBLEMS No. 4, 123, 134–38 (Dec. 2016).

³ Felipe Irrarrázabal, *Era Digital y Pelea de Perros Grandes*, EL MERCURIO (Sep. 8, 2019).

⁴ Andrés Fuchs & Nader Mufdi, *Derecho de La Competencia y Regulación de Mercados Digitales: Desafíos y Propuestas Para Latinoamérica*, DIÁLOGOS CECo (2021), at 44, <http://www.centrocompetencia.com/category/dialogos/>.

⁵ The concept of incipient can also be taken from the “Product Life Cycle” model, used in marketing and management literature. This model develops four “stages” of a product: (i) Market Development, (ii) Market Growth, (iii) Market Maturity and (iv) Market Decline. In the first stage, firms compete for technological leadership before a new demand, with typically gross margins but with the absence of high returns of capital, due to investments in innovation.

See Theodore Levitt, *Exploit the Product Life Cycle*, HARVARD BUSINESS REVIEW (Jan. 11, 1965), <https://hbr.org/1965/11/exploit-the-product-life-cycle>. and Hui Cao & Paul Folan, *Product Life Cycle: The Evolution of a Paradigm and Literature Review from 1950–2009*, 23 PRODUCTION PLANNING & CONTROL 641 (Aug. 2012).

⁶ *Denuncia por restricciones verticales en contra de Mercado Libre*, No. 2624-20, slip op. ¶ 34 (2020), https://www.fne.gob.cl/wp-content/uploads/2020/09/inpu_2624_2020.pdf.

same time, these discounts would not lead to competitive advantages not replicable by other competitors. Finally, these discounts could be justified on economies of scale and so-called “efficiencies,” such as the observation of the delivery fee before acquisition of the product, or the payment of delivery jointly with the product. In such a case Mercado Libre would not have market power and its conduct would be justified. In this case, the FNE opted for a more traditional approach by analyzing only market power and the efficiencies of the conduct, rather than digital-related theories of harm like refusal to economies of scale or network effects generated by the Marketplace against other delivery services.⁷ Moreover, the preference for market power and entry barriers over network effects would be more proper of mature markets.⁸

In the case of *Dark Stores*, the FNE analyzed a potential *Self-Preferencing* conduct generated by the vertical integration between delivery platforms and Dark Stores and Kitchens (stores and restaurants without public access). The FNE held that these stores were “*business models that are in an incipient development stage by the denounced platforms.*”⁹ In fact, out of three platforms, one did not have Dark Stores. Another only rented this infrastructure in exchange of exclusivity by stores. Finally, a third platform which did have effective integration, had sales equal to less than 1 percent of the sector in question. Therefore, there would be no anticompetitive risks. However, during the same investigation the FNE identified the existence of Most-Favored Nation and exclusivity clauses on platform-store contracts, leading to a new inquiry on the matter.

In *Uber/Cornershop*, probably the most

important digital case decided in Chile so far, the FNE approved the acquisition of Cornershop, a Chilean grocery delivery app with operations in Chile, Mexico, and recent entry in some states in the U.S., by Uber, which is active in Chile as Uber Rides and Uber Eats. By and large, the FNE held that the segment for supermarket online sales was “*still incipient,*”¹⁰ even in the context of COVID-19. In this context, innovation processes would be progressive and not disruptive, and therefore the merged entity would not be able to generate *tipping*.¹¹ In fact, *tipping* was likely to occur in markets with disruptive innovation projects with strong economies of scale and scope, as well as positive network effects. However, in the supermarket delivery app market, innovation processes would be more progressive than disruptive, and there would be limits to economies of scale and scope, while networks effects would be conditioned by the scale of users necessary to compete in the market. At the same time, the supermarket side of the market would be concentrated, with only four main players that could exercise negotiation power against a new app. The COVID-19 crisis produced a demand shock through consumers regarding delivery apps that would explain the acceleration of innovation processes for supermarkets. Specifically, firms have responded with “*new services, the adoption of new technologies, and delivery and logistics systems for the commercialization of products, due to the relative importance that e-commerce has acquired over other sales channels during this period.*”¹²

In *GSBN*, the FNE approved a Joint Venture between shipping companies, port operators, and a logistics operator for the creation of a private Blockchain-based platform to be used as software for the digitalization of maritime

⁷ OECD, *Abuse of Dominance in Digital Markets* 37–38 (2020).

⁸ Daria Kostecka-Jurczyk, *Abuse of Dominant Position on Digital Market: Is the European Commission Going Back to the Old Paradigm?*, XXIV EUROPEAN RESEARCH STUDIES JOURNAL No. Special 1, 120, 123 (European Research Studies Journal 2021).

⁹ *Denuncia por eventuales abusos de posición dominante contra plataformas de reparto*, No. 2639-2020, slip op. ¶ 12 (2021), https://www.fne.gob.cl/wp-content/uploads/2021/05/inpu_004_2021-Rol-2639-20.pdf.

¹⁰ *Adquisición de Cornershop por parte de Uber Technologies, Inc.*, No. F217-2019, slip op. ¶ 35 (2020), https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F217_2020.pdf.

¹¹ *Adquisición de Cornershop por parte de Uber Technologies, Inc.*, No. F217-2019, slip op. ¶ 141 (2020), https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F217_2020.pdf.

¹² *Id.* ¶ 79.

processes and documents. Regarding the risks involved in the elimination of a potential competitor, the FNE held that, in “*an incipient market, at a starting stage of development, different actors in the industry of IT services for maritime transport around the world (...) could eventually have an interest in participating*”¹³ without excessive costs.¹⁴ At the same time, the platform would be available to third parties. Regarding coordinated risks, the FNE identified that, because of Blockchain, the information shared would be encrypted and, therefore, available to the interested parties only. In general, the Blockchain-based platform would work as an agreement between companies (i.e. subject to mandatory notification as a Joint Venture), but not necessarily an anticompetitive one (i.e. the information exchanged would not generate coordination risks).¹⁵ At the same time, no sensitive information would be shared on the platform.

Finally, in *Grupo Latino* the TDLC analyzed the request for termination of certain behavioral remedies imposed by the court itself in 2007 following a merger in the local radio stations market. In its presentation before the TDLC, the FNE held that the presence of streaming platforms (like YouTube and Spotify) would not compete directly with radio stations.¹⁶ According to the FNE, these platforms would be complementary rather than substitutes. However, the TDLC didn’t follow this argument. According to the court, at least among younger generations of consumers, platforms would exercise competitive pressure on radio stations in the advertising segment.¹⁷ According to the TDLC, “*the demand for advertising is a demand derived from the audience, therefore the audience is, directly or indirectly, one of the*

most valued variables by advertisers, who are interested in accessing the greatest number of audiences at the lowest cost possible.”¹⁸ In sum, platforms and radio stations should be considered part of the same relevant market. In this case, the level of complementarity or substitutability could be explained precisely by the stage of development of the platforms. According to the FNE, the development of platforms would not currently be enough to exercise competitive pressure. According to the TDLC, some characteristics of streaming platforms (like the advertising-based “free option”) would have similar features to radio stations.¹⁹ Hence, the segment would have the “necessary” development to be considered part of the same relevant market.

III. Conclusions

In sum, according to Chilean case law, some digital markets (delivery apps, e-commerce marketplaces, maritime information apps, and streaming platforms) could be characterized as “incipient markets,” with the following characteristics: first, in the case of e-commerce marketplaces, we find that traditional competition analysis leads to similar conclusions to those following from a “more digital” approach, which would make it unnecessary to develop a new approach for addressing new digital competition issues. Second, in the case of delivery apps, there should not be any anticompetitive risks in the short-medium term. These markets would be characterized by a process of progressive innovation-based competition that should not generate *tipping* by itself, and therefore, should not lead to a dominant actor. Third, in the case

¹³ *Asociación entre CMA CGM, COSCO SHIPPING Lines, COSCO SHIPPING Ports, SIPG, Hapag-Lloyd, PSA, Hutchinson Ports, OOCL y Qingdao Port Lines*, No. F243-2020, slip op. ¶ 41 (2020), https://www.fne.gob.cl/wp-content/uploads/2020/10/inap1_F243_2020.pdf.

¹⁴ *Id.* ¶ 42.

¹⁵ Thibault Schrepel, *Collusion by Blockchain and Smart Contracts*, 33 HARVARD JOURNAL OF LAW & TECHNOLOGY No. 1, 117, 131 (2019).

¹⁶ Fiscalía Nacional Económica, *Aporte de Antecedentes “Consulta de Grupo Latino de Radiodifusión SpA Para Que Se Revoquen o Dejen Sin Efecto Las Medidas de Mitigación N°1 y N° 2 Impuestas Por La Resolución N° 20 de 2007”* ¶¶ 113–115 (2021).

¹⁷ *Resolución N° 64/2021 (“Consulta de Grupo Latino de Radiodifusión SpA para que se revoquen o dejen sin efecto las medidas de mitigación N°1 y N° 2 impuestas por la Resolución N° 20 de 2007”)*, slip op. ¶ 35 (2021).

¹⁸ *Id.* ¶ 38.

¹⁹ *Id.* ¶ 41.

of maritime information apps, this approach would suggest a special deference to innovative solutions capable of addressing traditional competition problems. Fourth, in the case of streaming platforms, there is still some discussion regarding whether products or services in incipient digital contexts should be deemed capable of exercising competitive pressure on products or services in mature traditional markets. In general, it appears that no particular intervention should be attempted until the market itself has developed, primarily due to the absence of dominance and

anticompetitive risks. In this context, it is not clear whether more aggressive enforcement would be needed in the case of still immature markets.

Since these cases reveal features specific to the local economic reality, it seems a fair statement to say that the issue of digital competition in Chile is still in its early stages: the major and broader discussions currently taking place abroad have not fully landed in Chile quite yet.