Digital Platforms & Economic Dependence in Chile
Any Room for Competition Theories of Harm without Dominance?

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As in the rest of the world, Latin America has witnessed the advent and rapid growth of digital platforms in different markets (e.g. the leading e-commerce Mercado Libre[3]). This is undoubtedly good news for the region, because of the multiple benefits of market digitization —from transaction costs' reductions to the rise of new marketplaces for small and medium enterprises.[4] However, as already alerted by several academic and institutional reports worldwide,[5] the arrival of these new players also brings new threats to individuals and the well-functioning of markets. In the digital context, these threats can rapidly become real harms. Therefore, it is crucial to open up the debate on how Latin American countries —and particularly, how competition laws and policy of each jurisdiction— are prepared to face the challenges of the digital era. Our focus in the present work is on Chile.

One of such threats are the abuses of economic dependence that digital platforms can impose on its weaker trading partners. These dependence relationships can have a double effect. Downstream, economic dependence may result in the exploitation of weaker parties that cannot compete on an equal footing against bigger ones. Horizontally, economic dependence may raise entry barriers since the platform's trading partners cannot switch to a different platform without

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[3] See e.g. https://www.ft.com/content/446558a8-c0b2-449c-97a5-53b3956cd427
[4] See Carlos Felipe Jaramillo, "Cerrar la brecha digital para combatir la pobreza en América Latina y el Caribe" (16 October 2020) <https://blogs.worldbank.org/es/latinamerica/cerrar-la-brecha-digital-para-combatir-la-pobreza-en-america-latina-y-el-caribe> last accessed 29 January 2021.
[5] See e.g. J. Crémer, Y. de Montjoye and H. Schweitzer, "Competition Policy for the Digital Era" (May, 2019), [Cremer Report] link; J. Furman et. al., "Unlocking Digital Competition, Report of the Digital Competition Expert Panel" (March, 2019), [Furman Report] link; Australian Competition & Consumer Commission, "Digital Platforms Inquiry- Final Report" (July, 2019), link; Stigler Center for the Study of the Economy and the State, "Stigler Committee on Digital Platforms – Final Report" (September, 2019), [Stigler Report] link; German Ministry of Economy, "A New Competition Framework for the Digital Economy" (September, 2019), [German Ministry Report] link; DICE Consult, "Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen" (August, 2018), [DICE Report] link.

engaging in significant costs, which might result in a lock-in effect. If so, due to the economics of platforms, the market may tend towards *tipping* scenarios in which one player —the winner— takes the whole market. This has opened the debate on how to tackle cases of abuse of economic dependence in the digital context, especially when they may have an impact on competition. Different academic works argue how in some jurisdictions (e.g. Germany, France, Belgium) the rules for economic dependence abuses may be suitable to tackle some of the theories of harm involving platforms without clear dominance.[6]

In Chile, there are no explicit rules for cases of economic dependence with effects on competition. However, the Chilean legal framework —via Law 20.169 and Decree Law 211 (hereinafter "DL 211")— cover scenarios of abuse of economic dependence by a digital platform when **(i)** the abusive conduct has an effect on competitors (resulting in torts from unfair methods of competition) without entailing anticompetitive effects; **(ii)** the abusive conduct has anticompetitive effects (either exploitative or exclusionary) and is carried out by a dominant firm (although there may be methodological issues for proving dominance). Yet, **(iii)** if the abusive conduct has anticompetitive effects, but is carried out without holding a dominant position, it is not evident that the legal framework provides an adequate protection to competition. This is the case of **(iii.a)** a non-dominant platform whose conduct *allows it to attain* dominant power, and **(iii.b)** a non-dominant platform whose conduct distorts competition downstream or upstream. Digital platforms, due to their own economic rationale, increase the risk of non-dominance scenarios. Against this backdrop, we present a legal interpretation that considers a theory of harm to competition for non-dominant digital platforms. We conclude that Chilean statutory laws offer sufficient space to address this type of risks when the non-dominant platform attains dominance due to abuse of economic dependence, thus there is no need of a legal reform. However, a political enforcement decision from the competition authority, on the one hand, and an evolution of the case law, on the other hand, would be required. Conversely, if the non-dominant platform distorts downstream competition without attaining dominance, it is unlikely to build a solid theory of harm to competition. This is because, in our understanding, under DL 211 economic dependence can be invoked instead of dominance to the extent that it

[6] See e.g. I. Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448; T. Tombal, 'Economic Dependence and Data Access' [2019] 25; P. Bougette and others, 'Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn From an Industrial Organization Approach?' (2019) 129 Revue d'économie politique 261; J. Drexl, 'Connected Devices – An Unfair Competition Law Approach to Data Access Rights of Users' [2020] 48.

is the cause of an unfair conduct. Yet, to consider it an anticompetitive infringement, DL 211 also requires this unfair conduct to be aimed at attaining dominance.

This work is structured as follows. **First**, we briefly describe the rationale of digital intermediary platforms and the economic dependence of those who interact through them. **Second**, we distinguish two types of economic power —dominant power and uneven bargaining power— and explain their normative foundation in the light of commercial practices a platform could carry out in a context of economic dependence. **Third**, we discuss the goals of Chilean competition law vis-à-vis some literature on competition and developing countries. **Fourth**, we analyse the relevant Chilean legal framework for addressing cases of abuse of economic dependence. To this end, we divide the section according to the four scenarios mentioned in the previous paragraph. **Fifth**, we conclude.

1. Platforms and economic dependence

As transactions —both economic and social— move to the Internet, the role of digital intermediary platforms (hereinafter "platforms") in the economy has increased as facilitators of interactions between the several economic agents (users, buyers, sellers, advertisers, suppliers, etc.). At a global level, some platforms have reached a large size, in some cases becoming part of digital conglomerates with a multinational presence, among which are the so-called Tech-Giants.[7] In Chile, while there is a consolidated presence of platforms that base their business on exploiting the attention of users (e.g. social networks or video platforms), in other sectors platforms are in early stages of expansion[8] (e.g. e-commerce in Chile[9]).

In their expansive or developing stage, the platforms seek to increase the amount of users who interact through them. In general terms, more users on one side of the platform, gives more value to the users of that side and/or the other sides (direct and indirect network effects).

[7] Also known as GAFA (Google, Apple, Facebook and Amazon).
[8] The expansion goal of digital conglomerates has three steps: first, they create a business with a great amount of free cash flows (e.g. e-commerce). In a second step, they invest in better AI systems and acquiring other businesses from where to extract more and better data. In the third stage, the y start investing in their own digital ecosystems, e.g. with computer chips or AI systems.
[9] In the Investigation case N° 2624-20 about the firm Mercado Libre, the Chilean National Economic Prosecutor's Bureau ("FNE") states that the market of intermediary digital platforms is "(ii) a market in early growing stage; and (iii) dynamic, so the incumbents and potential entrants have the ability to rapidly grow over time, mainly based on innovation". To affirm the latter, the FNE quotes an OECD Report, but taking as if it were always true something that, in fact, can or cannot be present in a market dynamic and is extremely difficult to measure—i.e. the competition for the market.

Already in the world-renowned US Microsoft case this effect was reported when it was pointed out that developers preferred writing applications for operating systems that had enough consumers, and consumers preferred operating systems that already had multiple applications, an effect that is recognized as a barrier to entry.[10] Additionally, in the data economy, the more members, the more and better data, which allows for improved service/user experience (data-based network effects).[11] In other words, by acting as an intermediary, the platform captures revenue, but also internalizes positive externalities, adding value to its whole infrastructure. The positive feedback generated by network effects, in addition to economies of scale and scope, can lead to a platform reaching a size where, for its rivals, it is no longer profitable to compete.[12] Once this tipping point is reached, it is easier for the platform to win the whole market.[13] This economic rationale defines how and for what purpose platforms compete.

On the other hand, the platforms' business models seek to create a long-term relationship with users and suppliers.[14] In this regard, the platform can track those who participate in it (via personal accounts and devices) and extract data to create profiles, study preferences and predict behaviour.[15] This generates efficiencies related to the personalization of services, which reduces the efforts to match supply and demand. The information obtained from the data analysis generates value that, added to the positive network externalities, increases switching cost for users and suppliers.[16] Regarding users, switching costs could be lower if they interact through several platforms (multi-homing).[17] However, many times this is not the case since users incur in convenience costs or the platform sets strategies to make muti-homing unlikely.[18] Regarding suppliers, switching costs also depend on whether they had to adapt their technology and business model to the platform's requirements.[19]

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[10] United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001) Finding of facts 30 and 36.
[11] More on direct and indirect network effects, see e.g. Stigler Committee on Digital Platforms, Final Report, 2019, p. 51; OECD, An Introduction to Online Platforms and Their Role in the Digital Transformation (OECD 2019); Franck and Peitz, 'Market Definition and Market Power in the Platform Economy' [2019] 96.
[12] Furman Report.(n 5).
[13] See Franck and Peitz, 'Market Definition and Market Power in the Platform Economy' [2019] 96. "From a short-term view, market tipping is socially desirable insofar as network effects have maximum effect. Yet, market tipping may be less benign from a dynamic perspective".
[14] See e.g. Y. Lim, ´Tech Wars: Return of the Conglomerate - Throwback or Dawn of a New Series for Competition in the Digital Era´ [2017] <https://ssrn.com/abstract=3051560> accessed 29 July 2019; See also M. Bourreau and A. de Streel, 'Digital Conglomerates and EU Competition Policy' [2019], for a more detailed explanation about the incentives to create conglomerates serving multiple consumer needs.
[15] See Stigler Report (n 5), Furman Report (n 5), as well as Cremer Report (n 5).
[16] Ibid.
[17] Cremer Report (n 5), p. 57.
[18] See e.g. Stigler Report, p.43 y 61.
[19] J. Farrell and P. Klemperer, 'Coordination and Lock-in: competition with Switching Costs and Network Effects', en M. Armstrong y R. Porter, *Handbook of Industrial Organization Vol. 3* (North-Holland 2008).
[19] See e.g., Furman Report (n 5) p 36.

Increasing switching costs can make it unrealistic for a provider to switch platforms and still operate in an economically viable way.[20] The result is an asymmetry of bargaining power to the detriment of those who depend on the platform. In other words, there is an *economic dependence*, as is known in comparative doctrine.[21] The brick-and-mortar retail sector,[22] several agro-industrial sectors,[23] and in the context of digital platforms show different market structures leading to dependence.[24] Yet, in the latter, there are two major differences. On one hand, economic dependence can be a decisive factor in the winner-takes-all race. On the other hand, platforms can be placed in a strategic position, as the *orchestrator* of marketplaces where other players —most of them not rivals of the platform— are going to compete. Therefore, it is critical to understand to what extent economic dependence regarding a platform may affect the well-functioning of the market.

2. Dominant power and uneven bargaining power

Economic dependence accounts for an unequal distribution of bargaining power.[25] This imbalance allows the holder of such power to exercise aggressive negotiation strategies both at the contractual level (e.g. tied sales, arbitrary interruption of trade relations) and extra-contractual level (e.g. refusal to buy or sell), which end up imposing an excessive economic burden on the weaker party. In comparative law, this type of uneven bargaining power is often called *superior bargaining position* or *relative market power*[26] (hereinafter, indistinctly, "bargaining power" or "relative power"). The exercise of relative market power can have, in turn, a feedback-loop effect, as it reinforces the existing situation of economic dependence.

[20] Ibid.
[21] M. Bakhoum, 'Abuse without Dominance in Competition Law: Abuse of Economic Dependence and Its Interface with Abuse of Dominance' in Abusive Practices in Competition Law (Edward Elgar Publishing 2018). "The concept of abuse of economic dependence is unknown to US and EU competition laws. However EU member states such as Italy, Germany and France have in their competition laws provisions dealing with uneven bargaining power, termed, also, as abuse of economic dependence".
[22] See e.g., Autorité de la Concurrence, Décision n° 10-D-08 du 3 mars 2010 relative à des pratiques mises en oeuvre par Carrefour dans le secteur du commerce d'alimentation générale de proximité, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/10d08.pdf.
[23] See P Bougette and others, 'Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn From an Industrial Organization Approach?' (2019) 129 Revue d'économie politique 261.
[24] Ibid.
[25] See Bakhoum (n 21).
[26] For example, in Germany, § 20 of the Act against Restraints of Competition provides that: "(1) § 19(1) in conjunction with paragraph 2 no. 1 shall also apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative or superior market power)."

Regarding digital platforms that provide services as a distribution channel, their strategic position as an intermediary and the size of suppliers who offer goods through it —many of which are small or medium businesses— allows them to be in a position of relative power vis-à-vis many suppliers. Under these circumstances, the platform can incur in various forms of abuses. The most obvious would be to increase unilaterally the commissions for transactions or enter into exclusivity contracts. A less obvious would be to use the information it obtains as intermediary to favour the marketing of its own branded products[27] or deny access to data that is relevant to users (e.g. about recommendations) and suppliers (e.g. about ranking).[28] Not being able to access such data can increase the cost of switching platforms, as it makes data portability more difficult, which in turn may increase the degree of dependence.

While these commercial practices are a manifestation of economic and contractual freedom, in some cases they might be abusive as they could undermine good faith and/or fairness in commercial relationships. In other words, these normative foundations serve as a basis for establishing a boundary between practices with relative market power that are socially acceptable and those which are not. Both at a national and comparative law, the materialization of this dividing line is found mainly in the field of contract law and unfair commercial practices laws.[29]

On the other hand, from the perspective of the market's functioning, although imbalances of bargaining power are inherent in all markets —so much so that they are usually considered a sign of competition—,[30] the exercise of relative market power could, under certain circumstances, cause negative effects on the market structure. As such, a second normative foundation for limiting relative market power could be competition.[31]

For instance, taking the commissions' example, if the platform's relative market power allows it to raise commissions only to certain suppliers, the resulting differentiated charges can lead to

[27] For instance, in the recent process of the European Commission against Amazon. https://ec.europa.eu/commission/presscorner/detail/es/ip_20_2077.
[28] Cremer Report (n 5), p. 57.
[29] Bakhoum (n 21). Regarding Chile, Law 20.169 on Unfair Competition, and specially the modifications introduced by the Law 20.416, regarding small firms. An analysis of this reform in, M. Tapia, 'Abuso de Condiciones Contractuales y Competencia Desleal' Investigaciones CeCo (November, 2020), link.
[30] See Bakhoum (n 21).
[31] The extent to what this issue is protected by competition law depends on the scope of competition goals in each jurisdiction and, as we see above, on the specific rules to measure economic power and elements to build an anticompetitive infringement hypothesis.

a downstream distortion of competition.[32] On the other hand, in the refusal to grant access to data example, while a vertical-bilateral approach would enable a claim for damages generated on those who cannot access their data, a horizontal-collective approach allows an analysis of whether there are artificial barriers that obstruct competition in the platform market. Moreover, the imposition of exclusive distribution clauses or other formulas that increases switching costs can cause the same effect.[33]

Platforms have incentives to be the first to adopt this type of strategy, because by doing so they can take advantage in the winner-takes-all race.[34] In this context, one of the main questions is when these aggressive strategies should be regarded as anti-competitive. To this end, competition law usually resorts to the rule of dominance.[35] Dominant power is a legal fiction that —based on economic parameters— distinguishes whether a firm has sufficient market power to behave with independence from competitors[36] and/or customers[37] on a constant basis. If so, their behaviour is scrutinised to assess whether it has an economic justification or, on the contrary, whether it was carried out to exclude competitors or exploit the market.

Yet, in digital platform markets (and in the data economy in general) this rule faces several difficulties.[38] First, since platforms have multiple sides, it is complex to understand the distribution of power among them.[39] Second, in the data economy it is complex to know what the true utility or value of a company's accumulated data is and how important it is to access this data for third parties to compete.[40] On the other hand, the rule of dominance seems not able to handle all cases of economic dependence threatening competition. Indeed, according to the examples we saw, a third difficulty is that there could be a scenario of dependence distorting downstream or upstream competition (where the platform does not compete, or competes, but

[32] International Competition Network Task Force for Abuse of Superior Bargaining Position, "Report on Abuse of Superior Bargaining Position", 7th Annual Conference, Kyoto (2008), p. 15.
[33] See J. Farrell and P. Klemperer, "Coordination and Lock-in: competition with Switching Costs and Network Effects", in M. Armstrong and r. Porter, Handbook of Industrial Organization Vol. 3 (North-Holland 2008). "(…) proprietary network effects tend to make competition all-or-nothing, with risks of exclusion. Thus large firms and those who are good at steering adopters' expectations may prefer their products to be incompatible with rivals'".
[34] See L. Khan, "Amazon´s Antitrust Paradox", 126 Yale L.J. (2016), especially the chapter II; See also Farrell and Klemperer (n 33).
[35] OECD, 'Abuse of Dominance in Digital Markets' (2020).
[36] See e.g. Motta, M. Competition Policy, Theory and Practice, Cambridge University Press, 2004, p 41.
[37] See e.g. the Case 27/76 United Brands Co and United Brands Continental BV y Commission [1978] I CMLR 429.
[38] OECD (2020), Abuse of dominance in digital markets, www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf; European Commission. Cremer Report (n 5), p. 3; Furman Report, p. 89.
[39] See e.g. Franck and Peitz (n 13).
[40] See e.g. J Drexl, 'Connected Devices – An Unfair Competition Law Approach to Data Access Rights of Users' [2020] 48.

is not dominant). Finally, a fourth difficulty is that, even without dominance, a platform can make strategic use of dependence to reach a position of dominance that will later allow it to win the whole market.

While the first two difficulties are of a methodological nature (i.e. they face the challenge of proving dominance), the last two are related to the substantive elements that form part of the infringing hypothesis (i.e. they ask whether a theory of harm to competition is enforceable on the basis of vertical dependence relationships but without dominance, whether by using that relationship to tip the market or to affect competition up/downstream). The focus of the present work is on these substantive questions, which are addressed in Section Four.

3. The goals of Chilean competition law (as a developing country)

Currently there is a heated debate regarding the goals of competition law. While some argue in favor of economic efficiency and consumer welfare as the only objectives of competition law, many others argue in favor of a broader view of competition law goals, including the competitive process, the freedom to compete, and fairness/equality considerations both in terms of opportunities and outcomes.[41] In the data economy, this debate poses great importance due to the unprecedented levels of concentration of economic power in the hands of conglomerates and the theories of harm that specifically apply to data-driven markets. This issue has different angles when it comes to economic dependence relationships.

First, in the context of platform markets, a question about competition goals has direct relation with the specific role that platforms have in markets. Intermediary digital platforms are placed in a strategic position, as they *shape* the marketplaces where other players —most of them not rivals of the platform— are going to compete, i.e., they are "digital gatekeepers". As gatekeepers, they have strong incentives to take decisions in their own interest instead of acting as neutral matchmakers, which may lead to distortions in downstream markets.[42] Therefore, there is a crucial discussion about how to guarantee equal access to these marketplaces since,

[41] For a review of fairness considerations in the current competition law debate, see N. Dunne, "Fairness and the Challenge of Making Markets Work Better", 2021 84(2) The Modern Law Review 230-264.
[42] See e.g., Jorge Padilla, Joe Perkins and Salvatore Piccolo, "Self-Preferencing in Markets with Vertically-Integrated Gatekeeper Platforms", (2020) SSRN Working Paper.

from a competition perspective, the equal access to markets can be deemed a precondition for competition on the merits.[43]

Second, there is a question about how uneven economic relationships can affect the autonomy that economic agents are expected to have in a free market system. For instance, if a platform and its suppliers are deemed to be in an agency-principal relationship, then the platform/agency may decide not to disclose relevant information to some of the principals/suppliers, who would not be in a position to demand a complete disclosure due to their uneven bargaining position.[44] Accordingly, if there is no real choice —either because market players subjectively cannot exercise their freedom to choose due to information asymmetries or objectively do not have other options— it is hard to say that markets work well because there is a supposedly efficient allocation of resources.[45]

Third, an economic dependence relationship may also entail concerns regarding fairness in terms of distribution of outcomes. For example, a platform with sufficient economic power may have incentives to keep most of the profits generated through the trading channel or value chain of production. At the same time, since it is in the intermediate platform's interest to have a large number of suppliers offering through it, its incentives may not seek to drive suppliers out of the market, but simply to let them survive with a small slice of the revenue pie. This could be regarded as an unfair commercial practice, but also a form of anti-competitive behaviour, given that the platform and suppliers may be considered as vertically competing for these profits.[46]

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[43] The EU Google Shopping case clearly states a theory of harm -self-preferencing- based on the question of the responsibility of a platform in securing an equitable market access for competitors (Google Search (Shopping) (Case AT.39.740) Commission Decision of 27 June 2017). In the case of developing countries, the goal of equality may go a step further, considering part of competition goals to ensure access to basic needs, and to increase the economic opportunities of historically disadvantaged groups. Regarding the latter, see M. Bakhoum, 'A dual language in modern competition law? Efficiency approach versus development approach and implications for developing countries' (2011), World Competition, p. 495; Michal S. Gal, Eleanor Fox, 'Drafting competition law for developing jurisdictions: learning from experience' in M. Gal, M. Bakhoum, J. Drexl, E. Fox, D. Gerber (eds.), Economic characteristics of developing jurisdictions: their implications for competition law, Cheltenham and Northampton, MA, Edward Elgar, June 2015, pp. 296-356.

[44] See Rupprecht Podszum, "Digital Ecosystems, Decision-making, Competition and Consumers – On the Value of Autonomy for Competition" (2019) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420692> accessed 16 June 2021.

[45] Peter Behrens, 'Comment: Controlling dominance or protecting competition: from individual abuses to responsibility for competition', *in*, Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?*, Cheltenham and Northampton, MA, Edward Elgar, 2006, p. 228.

[46] See Robert L. Steiner, "Vertical Competition, Horizontal Competition, and Market Power", 2008 53(2) The Antitrust Bulletin 251-270.

All these concerns —equality of access, freedom to participate in the economy, and fairness outcomes— are of special relevance in developing countries, due to the high levels of inequality and concentration of economic power.[47] This is why some scholars argue in favour of developing countries not having identical competition goals nor the same cost-benefit frameworks for enforcement policy than the ones of developed economies (and, particularly, the ones of the two main competition law reference jurisdictions across the world —the US and the EU).[48] Accordingly, as noted by Eleanor Fox,

> *"To many developing countries the deep problem of fairness cannot be avoided. Business, society, and the law have been unfair to the poor and to the left-out and unconnected majority for many years. Injustices need to be righted, for efficiency and for humanity. Competition law cannot do everything, but at least it can provide an environment in which the left-out population has a fair chance to compete and smaller producers are not exploited by exercises of market power. Developing countries are looking for ways to make their law responsive to and alleviative of poverty, inequality, and past injustices of exclusion from economic life. Whereas U.S. antitrust law leans towards protecting the dominant firms and their strategies on the assumption that intervention is inefficient, developing countries may prefer a strategy of keeping a clear path for the outsider—a route that has strong efficiency properties and is fair as well."*[49]

While some countries have incorporated broader goals in their competition laws,[50] in others, however, this is not the mainstream approach, since competition law has been transplanted from the US competition system,[51] which has been developed according to the argument that competition law is not an efficient tool for dealing with those issues. The latter is more debatable

[47] On the particularities of developing countries' socioeconomic issues vis-à-vis competition law and policy, see Michal S. Gal & Eleanor M. Fox, Drafting Competition Law for Developing Jurisdictions: Learning from Experience, in The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law 296, 304 (Michal S. Gal et al. eds., 2015). See also Julia Molestina, *Regional Competition Law Enforcement in Developing Countries*, Springer 2019.

[48] See e.g., Josef Drexl, 'Consumer Welfare and Consumer Harm: Adjusting Competition Law and Policies to the Needs of Developing Jurisdictions' in Michal Gal, Mor Bakhoum, Josef Drexl, Eleanor Fox, David Gerber (eds.), *The Economic characteristics of developing jurisdictions: their implications for competition law* (Cheltenham and Northampton, MA, Edward Elgar, 2015, pp. 265-295.

[49] Eleanor Fox, "Competition Policy: The Comparative Advantage of Developing Countries" (2017) 97:69 LCP 69-84.

[50] Notably, in the case of South Africa.

[51] Gal and Fox (n 47), See also Einer Elhauge and Damien Gerardin, *Global Competition Law and Economics* (2nd edn, Oxford and Portland, OR, Hart Publishing, 2011).

with respect to the EU competition law model, since one of its original objectives is keeping markets open to competition, whose raison d'être is not purely economic, but based on broader normative values[52], e.g., freedom to compete and ensuring equal access to markets. However, since the introduction of the more economic approach, there was a clear narrowing of the enforcement focus, which today —due to the challenges of the digital economy— seems to be broadening again to incorporate fairness-related goals, e.g., the case of Google Shopping.[53]

However, the EU competition law system clearly delimits its scope of action by virtue of the dominance rule, without which it is not possible to consider unilateral conducts as abusive, unless national laws of an EU Member State introduces special provisions concerning uneven bargaining power. In this regard, despite arguably being extended towards more fairness-oriented goals, the EU as well other jurisdictions' approaches are not prone to consider abuses of economic dependence based on relative market power as a competition infringement since —in their view— this would be harmful to efficient bargaining between contracting parties.[54] In connection with the above, it is argued that undertakings with different bargaining power do not affect competition because in order for a contractual relationship to be considered abusive it will not depend on that relationship but on other alternatives in the market.[55]

Contrary to that position, a broader perspective of competition considers that an abuse of economic dependence can have significant effects on the well-functioning of markets, despite not being committed by a dominant firm. If so, a party may not compete freely and independently when an undertaking with superior bargaining position imposes detrimental conditions that would not have been accepted in a competitive setting, which in turn may result in the appropriation of abnormal shares of the value chain revenues or a disadvantageous position to compete with regards to the affected party's competitors.[56] The latter may ultimately lead to a scenario with an uneven playing field up/downstream.

[52] See e.g. Ariel Ezrachi, "EU Competition Law Goals and The Digital Economy" Oxford Legal Studies Research Paper No. 17/2018.
[53] On Google Shopping case as a fairness-oriented case, see Dunne (n 45) 252 and note 43. On EU competition goals in the digital economy, see Ezrachi (n 53).
[54] International Competition Network (n 32), p. 17.
[55] Florian Wagner-von Papp, "Unilateral conduct by non-dominant firms: a comparative reappraisal" [2018] ELECD 1513; in Di Porto, Fabiana; Podszun, Rupprecht (eds), "Abusive Practices in Competition Law" (Edward Elgar Publishing, 2018) 225.
[56] International Competition Network (n 32), p. 15.

While some of these disadvantages can have efficiency-based explanations (especially when looking only at the final-consumer side), just looking at the efficiency aspects can lead to losing sight of other elements that are prerequisites for competition to exist. Indeed, a coercion to not all but one group of undertakings may reduce their expectations of equal access to markets, without which there can be no competition on the merits. Moreover, in the context of developing countries, an additional argument for addressing such scenarios could be that small and medium-sized enterprises are the main affected group, due to their lower bargaining power. This does not mean protecting inefficient companies. On the contrary, it means that: first, there should be adequate protection to efficient and competitive firms, whose economic freedom and right to compete on the merits is being restricted by a more powerful economic player,[57] and, second, that competition law may have a relevant role in promoting the introduction of new actors to the economy vis-à-vis buyer power issues, which may be deemed an essential goal for developing economies in certain sectors of the economy.[58]

In a digital reality in which one economic agent —even without being considered dominant— has the role of defining the rules of the platform marketplace where others —many of which are much less powerful than the platform— are going to compete, attending those broader goals seems more necessary than ever.

As every country, Chile is no stranger to this debate. The terms of DL 211 regarding the goals of competition law are broad, as it only states that "[t]he purpose of the present law is to advocate and defend competition in the markets". Under this framework, despite currently having a more Chicago-oriented competition enforcement policy, years back the Comisión Resolutiva —institution in charge of sanctioning competition law breaches prior to 2004— ruled in a seminal case that "the goal of competition law, contained in the previously stated act [DL 211], is not only to protect consumers' interests, but more precisely to safeguard the liberty of undertakings, be it of manufacturers, merchants, or consumers, with the ultimate goal to benefit society as a whole, in which consumers obviously play an important role. In other words, the protected legal interest is the community´s interest in the production of more and better goods and rendering of more and better services at convenient prices, which is attained by assuring the liberty of undertakings".[59]

[57] Bakhoum (n 21) p. 22.
[58] See Thomas K. Cheng, *Competition Law in Developing Countries*, (1st edn, Oxford 2020) 391.
[59] Resolution n° 368.

In accordance with this first statement on the goals of DL 211, Chilean Courts later took a major role in delineating this broad perspective of the competition system. As such, the Supreme Court recognized the constitutional status of competition law by pointing out that "Competition law has as a fundamental role the neutralization undertakings' market power, and in that regard, it is part of the economic constitution based on the assumption that liberty is the mean through which the welfare of the nation is consolidated".[60] It has also explained that "Free competition entails rights and liberties of suppliers of goods and services, but without ignoring the collective interests of consumers and the State´s public interest in preserving a highly competitive market.[61]

Complementary, the Constitutional Court recognized that these liberties must be awarded on equal terms. In this sense, it has stated that "one of the purposes [of competition law] is to safeguard the freedom of all subjects participating in the economic activity, under equal conditions, thus benefiting the whole community, the latter being interested in the production of more and better goods and services at lower prices".[62] This idea of competing under equal conditions have as clear precedent the EU competition legal system, and particularly, the equality of opportunity approach associated with Ordoliberalism,[63] which materializes in the protection of what has been called the *effective competition structure* or, from a more dynamic perspective, the *competitive process*.[64]

Unlike a system just focused on a consumer welfare standard, the notion of competitive process admits different economic-based liability standards, which is the case of Chile. One liability standard is based on the likelihood of having foreclosure effects on the market. The goal of this benchmark is to maintain markets open and contestable. The Chilean Competition Court ("TDLC") has recognized this standard in decisions on practices regarding the deterrence or hindrance to new competitors' entry[65]. However, in most cases the theory of harm brought by

[60] Recital 6 of the Chilean Supreme Court ruling in case n° 44.266-2017.
[61] Recital 8 of the Chilean Supreme Court ruling in case n° 24.828-2018.
[62] Constitutional Court, Judgment No. 467, 2006.
[63] See Dunne (n 41) 7.
[64] This is reflected in the EU jurisprudence, which has stated that its competition law system 'aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such". C–501/06P GlaxoSmithKline EU:C:2009:610 at [63]. Regarding the terminology, as explained by Renato Nazzini, "the term "market structure" is equivalent, in all respects, to "competitive process"; the two terms can be used interchangeably". Renato Nazzini, *The Foundations of European Union Competition Law* (1st edn, Oxford, 2011) 14.
[65] See e.g., Recital 29, Judgement N°26/2004 of the TDLC.

the Chilean National Economic Prosecutor's Office (FNE) before the TDLC comprises both raising barriers to entry and consumer welfare analysis.[66]

A second liability standard is based on preserving an existing market structure. According to it, there is an aim at protecting efficient competitors against exclusion, even if final consumers are benefiting from the conduct. It can be argued that the Chilean Supreme Court has also recognized this standard, although indirectly, when analysing margin squeeze cases. In these cases the Chilean Supreme Court has accepted that one of the minimum conditions to substantiate a margin squeeze case is that vertically integrated dominant firm's prices would render the activities of an efficient rival uneconomic.[67] According to this criterion, the TDLC sanctioned —by labelling as arbitrary price discrimination— a change in downstream contractual conditions without economic justification.[68] In the decision it stated that the firm "objectively placed the plaintiffs [downstream competitors] in a situation of asymmetric competition, diminishing their ability to compete".[69]

In light of the above, it can be argued that Chilean Competition Law includes as one of its objectives the freedom to compete and the protection of the competitive process, both connected to the idea of granting equal conditions to compete in the market On the contrary, there is no explicit recognition of an abstract fairness goal in terms of distribution of outcomes, neither an explicit mandate to protect particular groups of society —e.g. small and medium enterprises.[70] The principles recognized by Chilean system should work as guidance in the interpretation of the law. Moreover, they are the normative foundations of a competition legal system which is open to different economic-oriented liability standards. Against this backdrop, and considering the negative effects of abuse of economic dependence such as impeding market access, in what follows we discuss the different possible ways of the Chilean Competition Law to address abuses of unequal bargaining power.

4. Chilean legal framework on abuse of economic dependence

[66] See e.g., cases N° C 233-11; N° C 249-13, of the TDLC.
[67] Both the TDLC and Supreme Court are following the conditions set out in R. O'Donoghue y J. Padilla, The Law and Economics of Article 102 TFEU, Hart Publishing, 2ª ed., 2013, p. 372.
[68] The test of economic sense of the conduct was used for the TDLC in assessing whether the conduct is anticompetitive, and it was confirmed by the Supreme Court.
[69] Recital 100, Judgement N° 88/2009 of the TDLC.
[70] At least through Competition Law. However, with the passing of Law 20.416, the Law on Unfair Competition does addresses the protection of small and medium enterprises.

Article 3 of DL 211, as well as Law 20.169 on Unfair Competition (as amended by Law 20.416), define the legal framework to address illegal abuse of economic dependence, either by private (civil law oriented) or administrative (competition law oriented) enforcement. This framework contains the two formulas —competition and civil— that have traditionally been used at a comparative level to address cases of abuse of economic dependence.[71] We categorize the scenarios identified above according to three legal categories that can serve to address a case of abuse of economic dependence:

	Unfair competition without attaining dominant power	(a) Abuse of dominance; (b) Unfair competition to *maintain* or *strengthen* dominance	(a) Abuse without dominance; (b) Unfair competition to *attain* dominant power
Applicable Law	Law 20.169	Art. 3 b) DL 211 Art. 3 c) DL 211	Art. 3 para. 1 DL 211 Art. 3 c) DL 211
Nature of power	Uneven bargaining power	Dominant power	Uneven bargaining power
Legal interest protected	Good faith and fairness	Competition	Competition
Court jurisdiction	Private enforcement – Civil Courts	Adm. enforcement – Competition Court	Adm. enforcement – Competition Court
Sanctions	Damages and obligations	Fines, structural and behavioural remedies	Fines, structural and behavioural remedies

In what follows, we address each of these categories in general terms, focusing on the type of power that abuse in contexts of economic dependence entail. This work will not dive into the technical-legal debate about how to measure dominance. Nor do we explore in depth specific categories of unilateral conducts, except to highlight those whose basis is a relationship of dependence.

i. Unfair competition without attaining dominant power (Law 20.169 as amended by Law 20.416)

Law 20.416 included the vertical dimension of unfair competition practices to the Law on Unfair Competition (Law 20.169). This amendment addresses cases of upstream or downstream abuses based on a dependence relationship. Specifically, letters h) and i) of Art. 4 of the Law on Unfair Competition establishes as unfair commercial practices:

[71] Bakhoum (n 21).

> Art. 4 h) "the imposition by an undertaking to a supplier, of contracting conditions for itself, based on those offered by the same supplier to competing undertakings of the former, in order to obtain better conditions than those offered to the latter; or, the imposition on a supplier of contracting conditions with undertakings competing with the undertaking in question, based on those offered to the latter. By way of example, this would include verbal or written pressure exerted by an undertaking on a smaller supplier whose income depends significantly on its purchases, in order to obtain a discount calculated on the basis of the price agreed by the same supplier with a competitor of the first undertaking".
>
> Art 4 i) "the establishment of contractual clauses or abusive conduct to the detriment of suppliers or the systematic non-fulfilment of contractual duties contracted with them […]".

Both provisions contemplate hypotheses of unfair competition conducts against suppliers, without it being necessary for these conducts to be carried out by an actor with a dominant position or with the aim at reaching it. These infringements have two common elements. First, the presence of economic dependence between client and supplier. Second, the execution of an abusive behaviour that goes to the detriment of the weaker party.[72]

Although there is few case law developed in Chile, in comparative law a relationship of economic dependence is usually considered to take place if there are no "reasonable and sufficient" possibilities to switch from one business partner to another.[73] It is normally "understood that the sufficiency of existing alternatives can be evaluated on an objective basis, while the reasonableness of resorting to such alternatives necessarily involves a more subjective evaluation that depends to a greater extent on the possibilities available to the claimant".[74]

As an example, different types of economic dependence have been considered: **(i)** dependence based on product assortment (the counterpart's product is fundamental -must have- given its popularity or notoriety); **(ii)** dependence based on scarcity (the counterpart is one of the few

[72] M. Tapia, 'Abuso de Condiciones Contractuales y Competencia Desleal' (UAI 2020).
[73] T. Tombal, 'Economic Dependence and Data Access' (2019) p. 5.
[74] L. Feteira, "The Interplay between European and National Competition Law after Regulation 1/2003", [2016] Alphen aan den Rijn, Kluwer.

suppliers of a certain good); **(iii)** dependence based on long-lasting or long-term commercial relationships; and **(iv)** dependence based on demand (due to the importance of the counterpart in the company's turnover).[75]

With respect to the second requirement, international cases shed light on what abusive conducts may be incurred upon by platforms which, in any event, must be proven to exceed the reasonable exercise of economic freedom by one of the parties and which could not have been adopted without the existence of a situation of dependence, for example:

- Improper use of suppliers' data obtained in a marketplace in order to favour the commercialization of its own branded goods;[76]
- Establishing wide parity price clauses or other contractual conditions under the threat of downgrading their visibility on the platforms or simply refusing to post their offers in the platform;[77] [78]
- Grant more visibility to suppliers conditional to contracting unwarranted services.[79]
- Removing a supplier from a platform for the sole purpose of favouring its own service or business.[80]

Under this framework, any type of abusive conduct of economic dependence whose basis is lack of good faith in contracts or fairness in the commercial context can be sanctioned, regardless of whether or not it has dominant power.

In this regard, if an undertaking feels it has been put at a disadvantage position regarding its competitors, such as if the platform charged it with higher commission than other suppliers, under Chilean Law such undertaking may seek relief from courts. According to Law 20.169, the plaintiff may file the following legal actions:

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[75] Tombal (n 61) p. 5.
[76] See note 27 above about Amazon case.
[77] See, for example, cases against the firm Booking driven by the competition authorities from France, Italy and Sweden, which ended up with commitment decisions. More details on this type of clauses in accommodation and hotel platforms, see "Report on the monitoring exercised carried out in the online hotel booking sector by EU competition authorities in 2016", <https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.> accessed 29 January 2021.
[78] Bougette et al. (2018).
[79] For example, the Italian case about Amazon's marketplace and logistic services. See https://en.agcm.it/en/media/press-releases/2019/4/A528.
[80] See, for example, the complaints against Apple that were presented by developers of apps (for parents to be able to control what their children do with the smartphones), because the platform would have done a self- preferencing strategy. See https://www.engadget.com/2019-04-27-apple-clamp-down-on-screen-time-apps.html.

- Cease and desist action or, if the conduct has not been executed yet, prohibition to implement it.
- Declaratory judgment action in order to declare the conduct as unfair competition, in case the disturbance caused by such conduct persist.
- Action to remove the effects of the conduct, through the publication of the guilty verdict, or a rectification at the defendants cost or other adequate mean.
- Action seeking damages, according to tort regulations in the Chilean Civil Code.

It is worth mentioning that the Chilean civil procedure may be lengthy, the decision maker is not technical, does not consider fines, and the decision is not enforceable or binding on third parties. In a context where competition is to be protected, this procedure would undoubtedly be ineffective. However, to the extent that the problem of dependence is limited to a bilateral issue, the civil procedure allows a relatively flexible way for the affected party to pursue the corresponding compensatory action.

ii. Abuse of dominance & Unfair competition to *maintain* or *increase* a dominant position (DL 211, Arts. 3 b), and Art. 3 c) in part)

Economic dependence can be addressed under different manners according to competition law. In what follows, we discuss three possible ways in which the TDLC could approach economic dependence in cases in which there is dominant power.

- Dependence as the conduct itself

A first manner in which Chilean competition law could address a commercial practice based on economic dependence is to consider it as the conduct constituting the abuse. This has been tried on past cases before the TDLC[81] and currently there are numerous pending cases that follow this line of arguing.[82] For this purpose, one can resort to the hypothesis of Art. 3 paragraph one of DL 211 (the generic infringement hypothesis) or to Art. 3 c) of DL 211, which explicitly refers to *unfair competition conducts*, which include abuses of economic dependence (as

[81] For example, in Judgment N° 21/2005, particularly in its third and eighth recitals, of the TDLC.
[82] For example, in cases C 363-2018, C 399-2020 and C 413-2020.

discussed above).[83] In this sense, a dependence-based unfair competition practice may be a useful way to address the platform-related competition concerns explored in the present work.

However, as noted above, while dependence is directly connected to the presence of uneven bargaining power, it would be conceptually inconsistent —and disproportionate— to pretend an identity between dependence and dominance. This interpretation is consistent with the complete reading of Art. 3 c), which states that unfair competitive conduct (which itself may involve dependence) is unlawful to the extent it has a relation to dominant power —either to maintain or increase it (the law also talks about *attaining* a dominant position, which is analysed in the next section). Therefore, this hypothesis is suitable only in cases with evidence of dominance. Horizontally, this means a risk of late enforcement, i.e., when the tipping effect is already unstoppable. Vertically, it means that cases with strong economic dependence relationships may configure a proper case of exploitative abuse of dominance in which the abusive conduct is the economic dependence-based unfair practice.

- Dependence in light of the anticompetitive effect

A second way to address economic dependence is from the point of view of the effects on competition. The TDLC has, although occasionally, established dominance by first looking at the effects.[84] If these are anticompetitive, then the firm is considered dominant. Likewise, if the existence of an economic dependence relationship and a negative effect in the market's functioning is proved —either a horizontal foreclosure or vertical distortion—, then it could be directly concluded that the defendant had dominant power. In a way, it entails skipping the traditional dominance test by directly addressing the conduct.

However, the effectiveness of this analysis in a platform context is questionable. First, because once the negative effect on competition takes place, it will not only be irreversible, but unstoppable, if the tipping point has been reached. Second, because this approach may face substantial difficulties meeting the elements of the infringement hypothesis. In this regard, one of those difficulties could relate to the market in which the harm occurs. For example, this would be the case of a platform that is not dominant or even active in the downstream/upstream market, which refuses to grant access to data, thereby limiting users and providers' portability

[83] Chilean DL 211 translation is taken from an unofficial translation made by the FNE.
[84] See Recital 134, Judgement N° 63/2008 of the TDLC.

options. Therefore, if the infringement hypothesis requires the firm to be dominant in the market where the effect takes place, an effect-based approach to determine dominance seems inconsistent. In refusal to deal cases, the TDLC has taken this position stating that "[t]he injured parties must be competitors in the downstream market and the conduct must have the purpose of maintaining or increasing a dominant position in such market"[85]. If this line of argument is applied to a refusal to grant access case, it would leave out of the enforceability scope cases such as the example of differentiated commissions with a downstream distorting effect.

- Dependence as a structural element of the market

Economic dependence can also be considered a structural element of the market that, together with other indicators, allows to determine whether a company is dominant.[86] This is consistent with the two hypotheses discussed in this section (Art. 3(b) DL 211; Art 3(c) DL 211). Both require dominance —not dependence— at the time of the conduct to satisfy all the elements of the infringement.

In effect, while Art. 3(b) literally requires *dominant* position at the moment of the conduct, Art. 3(c) in the part here analysed recognizes that an unfair practice may be carried out with the purpose of *maintaining* or *reinforcing* a dominant position, i.e., the hypothesis assumes that there was already dominance at the time the conduct was carried out.

In that sense, in a scenario of economic dependence in which a platform does have dominant power, the problem that could arise is not of a substantive order, but rather methodological, i.e. how to determine the existence of such dominant power. In the context of digital platforms, the competition authority can be expected to make a thorough analysis of eventual dependence relationships on the multiple sides of the platform.

However, this was not the approach of the National Economic Prosecutor's Office ("FNE") in the first case regarding abuses in platforms. In 2020, the FNE addressed for the first time an investigation related to vertical restrictions against the Latin American leading e-commerce

[85] See Recital 8, Judgement N° 19/2006 of the TDLC.
[86] See, e.g. Recital 6, Judgement N° 9/2004; Recital 41, Judgement N° 51/2007, in the part it establishes that, according to the purchasing volume of some pharmacies, “they constitute distribution channels hardly to be substitutable. Therefore, they have market power when they face negotiations with providers”; Recital 27, Judgement N°153/2016, all of the TDLC.

platform, Mercado Libre.[87] The origin of the investigation was a complaint of a group of small suppliers who use the platform's marketplace to sell their own products. The complaint was dismissed at the admission stage, according to a Dismissing Report of September 2020.[88] In this administrative decision, the FNE did not analyse whether there are relations of economic dependence between suppliers and the platform. Nor did it analyse the business model related to monetization via data extraction for the provision of personalized services, which is a key element in evaluating whether situations of economic dependence exist (which, in turn, serves as a basis for establishing dominance). Finally, the authority did not analyse possible tipping scenarios. The report concluded that it is not possible "to argue that [Mercado Libre] currently has a dominant position from which it can abuse".[89] Whether or not this was the correct conclusion, one would have expected a more comprehensive analysis of the data-related business model, the possible dependence relationships, and likelihood of tipping scenarios.

This is surprising since the FNE did a more progressive statement in a recent merger case relating to car sharing application and a last mile delivery platform.[90] In this decision —the only other one related to digital platforms— the FNE stated that "in dynamic markets it is preferable, in general, to focus the analysis on theories of harm, being the definition of a relevant market just a reference framework or first approach to assess the effects of the theory analysed".[91]

In any case, as stated in section 2 above, although the analysis of dependency relationships can help to establish dominance, in platform markets (and in the data economy in general) proving dominance can be fraught with a number of difficulties. In the face of all these difficulties, an imputability rule that does not depend on dominance could be more effective in protecting free competition.

iii. Abuse without dominance & unfair competition to attain a dominant position (DL 211, Arts. 3 paragraph 1, and Art. 3 c) in part)

From the economic freedom of undertakings' perspective, achieving a dominant position is in principle not only lawful, but also the legitimate expectation of many actors competing in the

[87] FNE, 'Informe de Archivo Sobre Denuncia Contra Mercado Libre' (2020).
[88] Ibid.
[89] Ibid.
[90] FNE, "Informe de Aprobación Cornershop / Uber Technologies, Rol F-217-2019.
[91] Ibid. p 33.

market.[92] On the other hand, a conduct carried out by a dominant player declared unlawful, when carried out by a non-dominant player, might be considered pro-competitive.[93]

However, Chilean competition rules do not require that all unilateral conduct be incurred by an undertaking with dominant power in order to be declared unlawful. This is clear from the wording of Art. 3 c) DL 211, which typifies an infringement hypothesis based on a conduct that is carried out in order to *attain* dominant power. Moreover, Art. 3, paragraph 1 (also referred as Art. 3 generic), establishes a generic infringement hypothesis without any reference to dominance, that applies to "any action, act or convention that impedes, restricts or hinders competition, or sets out to produce said effects".

Both provisions thus allow exploring whether there is room in Chilean competition law to address dependency-based theories of harm that, as seen above, fall outside the scope of offences that require dominance at the execution of the conduct. Firstly, we discuss whether Art. 3) generic and Art. 3 c) on unfair competition attaining dominant power are suitable hypotheses for addressing tipping scenarios. Secondly, we discuss Art. 3) generic as a possible way to tackle exploitative-distortionary cases with strong dependency relationships but without dominance.

a. Risk of tipping the market as unfair competition attaining dominant power.

To understand which scenarios —of those carried out by a non-dominant actor and aiming at achieving dominance— could fall under the infringement hypothesis of Art. 3 generic and/or Art. 3 c) in the part referring to attaining dominant power, we first discuss the elements or requirements of this anticompetitive offense:

[92] Recall the famous quote by Judge Learned Hand in United States v. Aluminum Company of America148 F.2d 416 (2d. Cir. 1945): “The successful competitor, having been urged to compete, must be turned upon when he wins”.

[93] In the context of digital platforms, the FNE has stated that "Regarding the first point, it proceeded to assess whether Mercado Libre would hold market power for one or both sides of the platform, since this condition is necessary to configure any conduct that has the potential to distort the competitive process in such markets". Fiscalía Nacional Económica, 'Resolución de Archivo Sobre Denuncia Contra Mercado Libre' (2020), paragraph 32. In general terms, the TDLC has stated that "potentially abusive unilateral conducts are numerous and very diverse. The main characteristic common to all of them is that they are generally normal business practices that, prima facie, do not deserve reproach from the perspective of free competition. On the contrary, their questioning is exceptional and depends essentially on the presence of the structural element (having a dominant position), to which they are intrinsically linked. In other words, without the presence of a firm with a dominant position, unilateral conducts maintain their quality of normal market practices without being, from the outset, subject to reproach for competition law" (Recital 89, Judgment N° 174/2020 of the TDLC).

- Risk-based infringement

Following the literal wording of the analysed rules, both hypotheses cover risk-based rather than result-based offenses. On the one hand, Art. 3 generic —while also covering result-based offenses given its broad wording— recognizes as unlawful conducts ***set out to produce*** effects that prevent, restrict or hinder competition. The TDLC has recognized the risk-based nature of this provision specially when analysing if a collusion has to have caused effects in the market[94] and when adopting preventative remedies that determine how future biddings must take place.[95] In other words, there is clear room for sanctioning conducts that put competition at risk. Yet, there is no clear criteria defined by the case law on how to measure the likelihood of occurrence of a risk-based anticompetitive infringement (which undoubtedly has a casuistic dimension in relation to the type of conduct and industry). The same can be concluded from the wording of Art. 3 c), which sanctions conducts carried out ***with the purpose*** *of attaining* a dominant position.

- Exclusionary risk of market foreclosure

There is a main difference between the hypothesis of Art. 3 c) and Art. 3 generic. The former considers dominance an essential element of the infringement, in the sense that the conduct —despite being carried out without dominance— at least has to be aimed at attaining dominant power. Given the importance of the dominance factor, the purpose of this provision seems to be maintaining market contestability. Since to attain dominance it is necessary to exclude direct competitors, it can be argued that it refers to an exclusionary theory of harm. This interpretation is coherent with competition goals recognized by Chilean authorities referring to the freedom to compete and the protection of the competitive process, both connected to the idea of avoiding the risks of market foreclosure.

Art. 3 generic's broad scope also comprises exclusionary cases, thus in principle it also serves to test the theory of harm related to the risk of tipping. However, in our understanding and the TDLC's[96], this provision has a supplementary role in the absence of a specific infringement

[94] Recital 3, Judgment N° 74/2008 of the TDLC.
[95] Recital 57, Judgment N° 121/2012 of the TDLC.
[96] As it will be discussed in the following section. Please refer to Note 108.

hypothesis contained in the law. Therefore, it corresponds first to assess whether an economic dependence relationship allowing a platform to attain the tipping point falls within Art. 3 c) specific hypothesis of unfair competition. In what follows, we therefore focus on the latter.

- How to measure the attainment of dominance?

In relation to a theory of harm that does aim at attaining dominant power, i.e., it has an exclusionary purpose, it is relevant to determine what type of analysis the case law has carried out to determine whether a conduct —and specifically an unfair commercial practice— is carried out to "attain" a dominant position. In this order of ideas, two tendencies can be observed from the Chilean case law on unfair competition, one that analyses the market position of the defendant and the feasibility that the conduct allows it to attain the dominant position, and another that analyses the objective aptitude of the conduct to attain it.

Under the first trend, the TDLC follows the traditional analysis of relevant market definition and has analysed the evolution of market share before, during and after the conduct alleged as unfair in order to determine its suitability to achieve a dominant position.[97] On this point, it is worth noting that the TDLC has implied that a high market share, although not constituting a dominant position, would give "at least the possibility of "attaining" such a position through acts of unfair competition.[98]

On the other hand, under the second trend, it follows from the act of unfair competition itself that it is aimed at attaining a dominant position.[99] In these cases, the TDLC has normally made a quick review of the relevant market, but then it departs from this analysis and focuses on revising the scope of the conduct, in order to conclude whether or not it has the ability to affect competition. Thus, the TDLC has stated that certain acts "constitute acts of unfair competition that in themselves amount to strategic behaviour that has had the aptitude to divert customers away from the plaintiff and that may even constitute an impediment or difficulty for new players to enter the market".[100] Accordingly, the TDLC found that the "advertising carried out by Epson Chile has sufficient characteristics to consider that it could have had the purpose of achieving,

[97] For example, Judgments N° 17/2005, 40/2006, 60/2007 of the TDLC.
[98] Recital 39, Judgment N° 164/2018 of the TDLC.
[99] For example, Judgments N° 30/2005, 58/2007, 130/2013 of the TDLC.
[100] Recital 72, Judgment N° 130/2013 of the TDLC.

maintaining or increasing a dominant position in the market, and would be suitable for that purpose".[101]

In the context of platforms, a key element that competition authorities should consider when analysing the conduct of non-dominant players will be to correctly weigh the risk whose materialisation is to be avoided, namely the possibility of quickly reaching the tipping point. Yet, as already mentioned, the Chilean case law does not offer clear criteria on how to measure the likelihood of occurrence of a risk-based anticompetitive infringement. We will see if future case law shed some lights on this matter.

- Conduct (as a differentiating criterion)

The dominance rule is ineffective as a criterion to differentiate between lawful and unlawful practices in the hypothesis discussed in this section, since a dominant position is not required to constitute the offence. The criterion of proving anti-competitive effects should also be ruled out as a differentiating criterion, since the hypothesis discussed is one of risk. On the other hand, a criterion that could be consistent is to take into account the type of conduct carried out by the platform, distinguishing whether or not it is unfair competition conduct. An effective defining criterion to distinguish between a permitted and a prohibited risky conduct should be offered by the analysis of whether the conduct is in accordance with good faith and morality (is the conduct fair or unfair?).

This is consistent with Art. 3 c), which expressly refers to unfair competitive conduct. Moreover, it is consistent with the TDLC's case law, which refers to acts of unfair competition as those that 'in themselves amount to strategic behaviour that has had the capacity to divert customers from the plaintiff'. A consistent interpretation of this paragraph is that conduct considered unfair (fairness element) is presumed to have been undertaken for the strategic purpose of increasing market power (economic element). On the contrary, if a conduct carried out in the framework of an economic dependency relationship allows attaining dominance, but is not considered unfair, then it should not be prohibited.

This is also consistent with Chilean competition goals. Despite not having an explicit recognition of fairness as a competition goal as such, the law establishes an unfair practice as

[101] Recital 37, Judgment N° 58/2007 of the TDLC.

potentially anticompetitive if it is carried out in a specific context: with the aim of attaining, maintaining or reinforcing dominant power. In other words, the law establishes a specific infringement hypothesis without dominance with a fairness-based element —unfair practice— and economic-based element —the aim at attaining dominance—. Insofar as an abuse of economic dependence is deemed one type of unfair competition practices (which is the case according to the Law 20.169 on Unfair Competition, as seen above), then the theory of harm discussed in this section is recognized by Art. 3 c) as a competition infringement.

This means, at the same time, that Art. 3 generic is not applicable to this case. Otherwise, it would make no sense for the legislator to have described an infringement hypothesis with specific requirements.

- Efficiency defence?

Under this scheme, a defence based on the benefits end consumers could obtain from the unfair conduct should be disregarded. Not only because the conduct is unfair, but also because the economic effect sought to be avoided is market foreclosure. It is of no use that in the short term end consumers are better off thanks to abusive conduct to the detriment of suppliers, if in the medium or long term this will lead to a platform gaining the whole market and consequently being able to exploit it at its mercy. The Federal Trade Commission's recent complaint against Facebook is one of the most obvious examples of the consequences of failing to monitor a platform's conduct in a timely manner.

- Any remedies for a case attaining dominance?

In the same Epson Chile advertising case, the TDLC stated that although its conduct was suitable to achieve a dominant position, “given the fact that there is insufficient information in the file to establish the defendant's market power and the possible effects of its conduct, this Court will only warn the defendant to refrain from carrying out advertising campaigns such as the one complained of, without applying a fine".[102]

[102] Ibid.

This reasoning is consistent with enforcing a risk-based infringement. In fact, in the context of abusive conducts with dominance, the justification for a fine is the breach of the special responsibility dominant firms have in the market. On the other hand, in a case without dominant power, whose enforcement's aim is to limit conducts that may result in anticompetitive effects, it seems appropriate not to impose fines, but focuses on behavioural remedies. Otherwise, there could be a disincentive to compete intensively.

b. Dependency-based market distortion without dominance

Platforms are placed in a strategic position, as they *shape* the marketplaces where other players —most of them not rivals of the platform— are going to compete. Therefore, their behaviour might be able to distort competition with respect to those participating in the upstream or downstream market, e.g. by differentiating between groups of customers. This distortionary effect can be deemed a case of exploitative abuse. This leaves out for the sake of this analysis the infringement hypothesis of Art 3 c), as it requires attaining —i.e. excluding— dominance. Chilean competition law on unilateral conducts is not limited to exclusionary case though. Moreover, Art. 3) generic would, at least theoretically, allows testing a risk-based exploitative abuse even without the firm being dominant. However, there is few case law on this generic hypothesis. We therefore briefly discuss this hypothesis in relation to Chilean competition goals discussed above, and the few parameters stated by the TDLC regarding dominance's requirement in these cases.

- Competition goals and non-dominant distortionary behaviour

As discussed in Section 3, the goals of Chilean Competition Law include the freedom to compete under equal conditions. Thus, if an undertaking is discriminated by a non-dominant firm but with whom is in an economic dependence relationship, and as a result it cannot compete effectively in the market, that undertaking may seek relief from the TDLC. In other words, from a normative perspective, there is room for testing a theory of harm which considering the lack of dominance affects the broader goals of competition law.

However, in most cases there are also good arguments to sustain that intervention can have a negative impact on efficiency. Faced with this analytical difficulty, there are several arguments for not intervening. Among them is that a firm generally has no economic interest in generating

downstream distortions. On the contrary, as argued, it would be interested in strong downstream competition, as this benefits end consumers, which ultimately allows the firm to obtain higher profits.[103]

Despite arguments about efficiencies and economic incentives, perhaps the ultimate question is how to balance the economic freedom of the firm and downstream customers' freedom to compete on equal terms. For approaching this issue, other jurisdictions have created special rules for these scenarios, which are grounded on fairness rather than efficiency-based concerns.[104] In Chile, it can be argued that DL 211 contemplates a fairness-oriented rule in Art. 3 c). However, as we already discussed, this rule is explicitly narrowed to exclusionary cases (i.e., horizontal effects on competition).

Moreover, it can be argued that Chilean legal system has a special rule to protect fairness-based exploitations in vertical relationships without dominance, namely the Law 20.169 already discussed above. This can be a good way to address issues specifically related to vertical competition, i.e., related to the allocation the value chain revenues among the platforms and suppliers. Yet, this route does not solve the issue of possible downstream distortions that uneven the playing field, which can be deemed as part of the Chilean competition goal related to equal access to markets. In the light of this goal, still one alternative is possible: refer to Art. 3 generic.

- A non-dominance infringement hypothesis?

It can be argued that since Art. 3 generic does not make any reference to dominance or any other type of economic power such requirement is not necessary to determine if a competition infringement has occurred. In addition, given that the goals of Chilean Competition Law include the freedom to compete under equal conditions, the concept of anticompetitive effects must take them into account.

However, the TDLC has stated that this article "protects consumers in a generic manner from any action, act or convention that impedes, restricts or hinders competition".[105] However vague this reference is, the reference to "consumers" sheds light on the reluctance of Chilean

[103] See e.g. Judgment of the Court (Second Chamber) of 19 April 2018, C-525/16 - Meo - Serviços de Comunicações e Multimédia.
[104] See Note 21 above.
[105] Recital 5, Judgment N° 140/2014 of the TDLC.

Competition Authorities to take a more fairness-based approach to solve competition law cases. This is confirmed by another ruling of the TDLC[106], were it states that Art. 3 generic "contains a generic description of a breach to DL 211 […], but that does not entail that the Competition Court can disregard the conditions and elements that letters a), b) and c) of the second paragraph of article 3 are pointed out as example, hence both paragraphs must be interpreted harmonically". Hence, if Art. 3 b) and c) regulates abuses placing at the centre the dominant position (either by having or seeking to attain), and even if considering a broad approach to competition goals, it is unlikely that the TDLC would consider a theory of harm of an exploitative-distortionary abuse of economic dependence without dominance.

5. Conclusion

Given the different economic realities (and problems) developing countries face vis-a-vis developed economies, law regimes should not be transplanted from one jurisdiction to another, without careful consideration of those differences. In the case of competition law, the different realities may drive competition law regimes to consider goals that escape the orthodoxy of the consumer welfare standard, for instance, non-welfare ones. Considering that the goals of a competition law regime shape their interpretation and enforcement, it is important to clarify what would these non-welfare goals entail.

The challenges that digital markets pose to competition law offers an opportunity to address this issue, due to the emergence of new theories of harm in which traditional rules and tests may be outdated. Specifically, it raises the question of whether a non-dominant undertaking could incur in an anticompetitive infringement and how different jurisdictions are prepared to deal with those issues. Moreover, as discussed along this paper, the scope of competition goals defined by each jurisdiction according to its own socioeconomic reality —in the case of Chile, a middle-income developing country— may be crucial to answer whether this jurisdiction is well equipped to face the referred challenges.

In our opinion, in the Chilean jurisdiction it is feasible to open up digital markets in the context of free competition in order to study possible anti-competitive effects of abuses of economic dependence in which dominance is not yet possible to prove. On the one hand, the TDLC's own jurisprudence has ruled in this sense in cases where the risks of anticompetitive effects are not

[106] Recital 26, Judgment N° 57/2007 of the TDLC

as marked as in digital markets. On the other hand, this interpretation is consistent with the non-economic competition goals recognized by Chilean Courts in terms of safeguarding the freedom to compete and the competitive process. Naturally, this entails difficulties in balancing the risks of an anticompetitive effect. The most obvious one is that the dominance rule cannot be used as a differentiating element. On the other hand, it is not a hypothesis built on the basis of an effect that can be proven, but only on a probability of occurrence. This brings up the question about which benchmark to use in these cases.

Regarding intermediary digital platforms, their own economic rationality leads their behaviour to be aimed at achieving dominant power and, therefore, foreclosing the market to competition. In other words, many of their commercial relationships with suppliers and users contribute to this end, as they tend to increase network externalities and switching costs. However, the mere fact that the platform economy favours the monopolisation of markets would not be sufficient evidence to justify a sanction for infringement of free competition, according to current evidentiary standards (it is merely a structural element). In this context, it is essential to distinguish which conducts —from those with objective aptitude to foreclose the market— are objectionable to competition.

One criterion for differentiating between lawful and unlawful scenarios could be based on the type of conduct. This would require, however, a methodological refocusing when analysing unilateral conducts with anticompetitive potential. First, it should be determined whether economic dependence relationships exist. If so, secondly, it should be analysed the objective aptitude for the platform to reach a dominant position and, therefore, to foreclose the market. If such aptitude exists, thirdly, it should be determined whether the conduct is unfair. If it is considered unfair, it would be appropriate to declare the conduct as anticompetitive. By not relying on the dominance rule, such an analysis would not only be useful for cases of platforms that are not yet dominant, but also for those cases where they are dominant, but it is complex to prove it.

In the second scenario we explored —dependency-based exploitative conduct— things are less clear though. While the broad wording of Art. 3 generic and the recognition of equal access to markets as a goal of Chilean Competition Law grant an opening to try this theory of harm, the Chilean Competition Authorities are still far from considering this approach. In addition, given that currently Chilean Unfair Competition Law (Law 20.169) includes as unfair commercial

practices the abusive conduct to the detriment of suppliers, it is unlikely that a potential plaintiff will use the TDLC to obtain relief. Moreover, Law 20.169 expressly states that in case of a guilty verdict, all backgrounds and documents of the case must be sent to the FNE in order to assess if it is necessary (in light of the gravity of the conduct) to initiate a proceeding before the TDLC. Therefore, the dominant litigation strategy regarding dependency-based exploitative conducts is the civil action contained in Law 20.169.

In the years to come it will be necessary to see to what extent the competition authorities —both the FNE and the TDLC— will adapt to the new challenges that the digital world brings for the well-functioning of markets. It is important to recognise that such challenges are of not only a technical nature, but ultimately opens up the question of competition goals. Globally, there is pressure to establish market rules that effectively limit the excessive economic power that a few players in the digital economy have achieved. In the case of Chile —as in Latin America— it should borne in mind that it is still a developing country with high levels of inequality. A pure efficiency-oriented approach normally does not provide solutions to these socio-economic issues. Therefore, a broader perspective is needed.

Introducing more explicit fairness-oriented elements in the competition assessment —e.g. due to an explicit protection of small and medium enterprises in the digital platforms context, as well as proposing new rules allowing to address anticompetitive conducts irrespective of the dominance rule seems a good way to update competition law to make it a system that promotes social welfare and not just the welfare of a privileged few. In this regard, new lines of investigations that —considering the economic reality and needs of developing countries— are aimed at reviewing the normative goals of competition law may shed light on the properness and readiness of those jurisdictions to address the challenges that the digital era brings for competition, especially in relation to increasing economic inequalities. Considering the above, perhaps developing countries' competition law regimes can even be better equipped to face these new challenges than the developed country legal regime, at least from a normative perspective, for two reasons: first, in these countries there may be a trend toward recognizing broader fairness-oriented competition goals; second, as Professor Fox argues[107], developing countries do not have the path dependence that makes it harder for traditional competition jurisdictions —the US and the EU— to take new legislative routes.

[107] Fox (n 50).