Distribution

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David Evans, Dan Graulich, and Thomas Griffith
Editors

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Message from the Co-Chairs

Welcome to our first edition of *Distribution* for the 2019-20 ABA year! Thanks to our editors David Evans, Dan Graulich, and Thomas Griffith for soliciting and editing the articles. **This edition** covers four very topical issues in distribution law:

- **Alberto Thomas** discusses two-sided platforms and the implications for expert witness economists.
- **Caiti Zeytoonian** discusses the International Competition Network's efforts to standardize antitrust enforcement around the globe.
- **Stephan Tribukait Vasconcelos** discusses the essential facilities doctrine as applied in a recent case involving the Mexican Competition Authority.
- **Ignacio Larraín and Álvaro Espinosa** discuss the final report issued by the Australian Competition and Consumer Commission in its Digital Platform Inquiry from a Chilean perspective.

We hope you find these articles informative and useful. We are always looking for additional topics and authors! If you would like to submit or have an idea for an article or are interested in summarizing one of our programs for a **future edition** of *Distribution*, please contact David Evans (devans@kelleydrye.com), Dan Graulich (daniel.graulich@bakermckenzie.com), or Thomas Griffith (tgriffith@lowey.com).

We hope you also find value in our monthly e-bulletin "Up the Downstream," which summarizes recent developments in distribution and franchise law in a "news roundup" format.

Please stay tuned for news of upcoming Committee programming. We are currently planning programs on restrictions on communications within an authorized dealer or franchise network or dual distribution system, the legal standards applicable to no-poach provisions in franchise agreements, and the use of experts in cases involving distribution law. We will also be presenting a program at the Spring Meeting exploring standing and the burden of proof in cases challenging two-sided platforms following *Amex* and *Apple*; we hope to see you there. If you have ideas for additional programs or would like to help organize or speak at one, please reach out to either of us (David Evans at devans@kelleydrye.com or Deena Schneider at dschneider@schnader.com) so we can put you in touch with one of our Vice Chairs Matt Adler, Anna Aryankalayil, Adam Goodman, Dan Graulich, and Frank Qi.

We thank the members of our Committee's leadership, including our Young Lawyer Representatives Olga Fleysh and Thomas Griffith, for their work developing worthwhile programs and publications on distribution and franchise law. Thanks also to all our Committee members, program attendees, and publications readers. If you aren't already a member of our Committee, please consider joining and bringing along a friend or colleague. You won't be sorry!

Best wishes,

David H. Evans
Deena Jo Schneider
Co-Chairs, Distribution & Franchising Committee

Distribution

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Submission of Materials: Distribution welcomes submissions of articles, commentary, and case summaries involving significant or interesting decisions, trials, or developments in antitrust law affecting all types of distribution arrangements.

Committee Leadership

Antitrust Enforcement in Two-Sided Markets: Lessons for American Consumers

Alberto Thomas[1]

I. Two-Sided Markets: Theory and Enforcement

In June 2018, the Supreme Court of the United States handed down a landmark judgment in a case involving American Express ("Amex").[2] The decision followed a suit by the Department of Justice ("DOJ") against Amex, that was appealed by several states, for imposing high fees and antisteering provisions on merchants using their payment gateways.

Although the court ultimately ruled in favor of Amex, the case has reignited a debate on how anticompetitive harm should be assessed in two-sided markets – industries where two, distinct groups of users (such as merchants and cardholders) attract each other to the same platform.

In this paper, we elaborate on why the Amex case is so significant for antitrust enforcement and what this means for American consumers going forward. It has particularly important implications for future antitrust litigation in the digital economy, where online platforms often involve one group of users interacting with a different set of users across the platform.

a. Risks to Competition in Two-Sided Markets

There is growing evidence that two-sided markets are characterised by high barriers to entry. Some of the reasons for this are:

- *High switching costs* – in general, it is inconvenient or costly for consumers to leave an incumbent in favour of a competitor in network industries. This issue is particularly pronounced in industries where consumers communicate with each other, such as social media or telecommunications;
- *High fixed costs* – creating a platform on which consumers can network with each other, such as a telephone network or e-commerce platform, requires extremely high initial investment in software and/or physical infrastructure;
- *Low variable costs* – conversely, the cost for the incumbent of increasing its user base is often low or negligible. In fact, as Economides points out, network industries generally exhibit *increasing returns to scale*, implying that unit costs decrease as the number of users increases.[3]

These features have led some theorists to argue that such industries are particularly prone to abuse of dominance, or other forms of market abuse.[4]

b. Antitrust Enforcement in Two-Sided Markets

Despite the clear risks to competition in two-sided markets, the DOJ does not appear to have taken as active an interest in this issue as its counterparts in Europe. This is particularly striking, given the undisupted market dominance of large American technology companies such as Uber and Amazon, which are widely viewed as two-sided platforms. Of the monopolization investigations the DOJ has conducted since 2000, only four relate to network industries, of which only three might be classified as two-sided markets:

[1] Alberto Thomas is a partner at Fideres Partners LLP.
[2] Ohio v. American Express, 138 S.Ct. 2274 (2018).
[3] Nicholas Economides, *Public Policy in Network Industries*, HANDBOOK OF ANTITRUST ECONOMICS, Bucirossi ed., Cambridge 2003, p. 471; David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20(2) YALE J. ON REG., 325, 367 (2003); Massimo Motta, COMPETITION POLICY: THEORY AND PRACTICE 82 (2004).
[4] Motta, Massimo, COMPETITION POLICY: THEORY AND PRACTICE 82 (2004).

Table 1 – Selected DOJ Investigations for Monopolisation

Year	Case Title	Affected Sectors	Two-Sided Market (Y/N)
2007	U.S. v. Daily Gazette Co., and MediaNews Group, Inc.	Newspaper Publishers	Y
2009	The Authors Guild, Inc., et al. v. Google, Inc.	Book Stores, Libraries and Archives, Other Information Services, Other Services Related to Advertising	N
2013	U.S. v. Oklahoma State Chiropractic Independent Physicians Association and Larry M. Bridges	Professional Organizations	Y
2016	U.S. v. Clear Channel Outdoor Holdings Inc. and Fairway Media Group LLC.	Display Advertising	Y

Source: US Department of Justice

It is encouraging that, as reported by Forbes, the DOJ is now initiating separate investigations against Apple, Facebook and Google, all for "unfairly blocking out smaller companies in favour of their own services."[5] Yet, as we show below, two-sided markets do not simply pose challenges for antitrust enforcement. Quantification of harm in such markets has also proven to be highly contentious. We now turn to *Amex*, a US case where this issue took center stage.

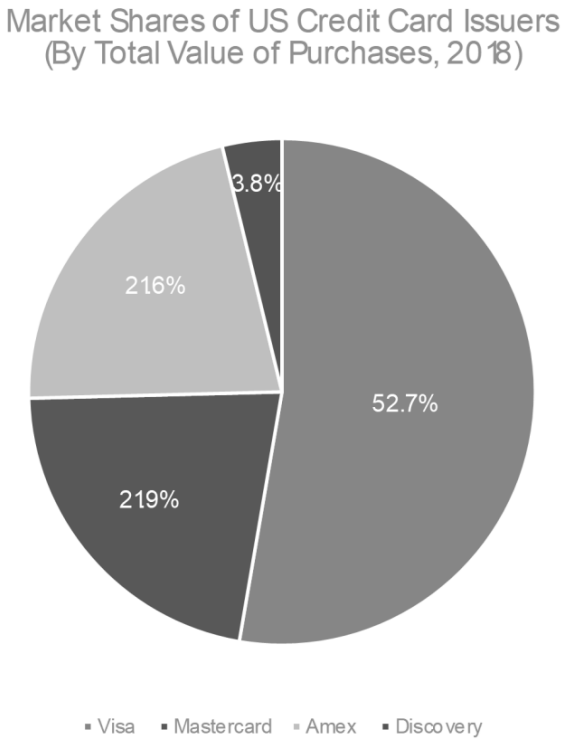
II. Ohio v. Amex: "Two-sided markets" in Litigation

Amex controls approximately 20% of the market for credit card transactions in the United States and is projected to become the second largest player in the market in 2019.[6] Together, Visa, Mastercard and Amex control more than 95% of the market for credit card transactions in the country:

[5] Rachel Sandler, *Big Tech's Reckoning: Behind the Probes of Amazon, Facebook and Google*, FORBES, (June 4, 2019, 06:31 PM), available at https://www.forbes.com/sites/rachelsandler/2019/06/04/big-techs-reckoning-behind-the-probes-of-apple-amazon-facebook-and-google/#12a2e71c1416.

[6] Trefis Team, *AmEx is Likely to Become the Second Largest US Card Processing Company This Year*, FORBES, (May 29, 2018, 02:28 PM), available at https://www.forbes.com/sites/greatspeculations/2018/05/29/amex-is-likely-to-become-the-second-largest-u-s-card-processing-company-this-year/#2f9262144fa0, last assessed 19 July 2019.

Figure 1 – Credit Card Market Shares in the United States (2018)



Source: Forbes

In October 2010, the DOJ sued Amex, Visa and Mastercard for imposing a series of contractual provisions on merchants known, collectively known as "anti-steering provisions." The contracts at issue dissuaded merchants who take Amex payments from promoting or offering different terms on other credit cards at checkout. They also imposed heavy fee penalties for contravention of these conditions.[7] Visa and Mastercard promptly settled – but Amex decided to take the issue to court.

Credit card payment gateways represent a classic case of the two-sided market, a fact recognised by the Supreme Court in its judgment.[8] Purchasers don't derive utility *directly* from other purchasers using Amex platforms, but do benefit *indirectly* as a greater user base encourages merchants to accept Amex in more shops. Conversely, merchants benefit *indirectly* from other merchants offering Amex payment gateways, as it encourages more consumers to have Amex credit cards.

Market definition proved the key consideration in the District Court's decision. Crucially, the court ruled that credit card platforms constitute "two separate markets – one for merchants and one for card-holders."[9] Given the government's concern over the high fees charged to merchants, the court reasoned

[7] Rinehart, William and Pranjal Drall, *Platform Competition and the Implications of* Amex, FEDERAL TRADE COMMISSION, available at https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0050-d-0038-155063.pdf, last assessed 19 July 2019.

[8] Ohio v. American Express, 138 S.Ct. 2274 (2018).

[9] *Id.*

that the relevant market to consider was the merchant market. It concluded that the effect of the anti-steering provisions on the merchant market were anticompetitive, as they raised merchant fees above a competitive level.

The Court of Appeals for the Second Circuit – as later affirmed by the Supreme Court – reversed this decision. Writing for the Supreme Court, Judge Clarence Thomas argued that merchants and cardholders constitute one relevant market, as both groups benefit from each other's presence when using the platform:

> "For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually."[10]

After holding that merchants and consumers were part of the same two-sided market, the court was not persuaded that Amex's actions constituted an abusive practice. They noted that "Visa and Mastercard have significant structural advantages over Amex" and accepted that Amex's contractual provisions offer it a valid defence against their market dominance. The court also accepted that the anti-steering provisions "promote interbrand competition" in the market for credit card transactions and hence improve consumer welfare.[11]

III. Lessons from Amex

a. The Importance of Market Definition

The contrasting *Amex* decisions in the district and appellate courts arose from conflicting understandings of the relevant market. The District Court explicitly ruled that consumers using a two-sided platform operate in a separate market from merchants, implying that broader consumer welfare is irrelevant in a claim on behalf of merchants. In contrast, the Supreme Court's inclusion of consumers as part of the relevant market necessitated a broader assessment of consumer welfare, which ultimately proved decisive.

b. Valuing Consumer Choice and Product Differentiation

The Supreme Court's decision did not dispute the allegation that the fees charged to merchants that accept Amex payments were high, nor did it challenge plaintiffs' claim that the anti-steering provisions were restrictive. However, Amex managed to persuade the court that the anti-steering provisions were necessary to protect its position as a competitor of Visa and Mastercard. Significantly, the court explicitly recognised that increased consumer choice has positive welfare effects, which needs to be considered in antitrust claims. Justice Thomas opined:

> "Amex competes with Visa and Mastercard by using a different business model . . . Amex's business model focuses on cardholder spending rather than cardholder lending. Due to its superior rewards, Amex tends to attract wealthier customers who spend more money . . . In sum, Amex's business model has stimulated competitive innovations in the credit card market, by increasing the volume of transactions and improving the quality of the services."[12]

This presents a challenge to plaintiffs bringing litigation in two-sided markets, who may need to present a method of quantifying gains from increased consumer choice. This remains an under-researched area in microeconomics.

c. Quantifying Antitrust Harm

In a typical claim involving cartel damages or abuse of dominance, an expert economist must first estimate a "counterfactual price" for the affected product. Methodologies for this estimation include:

[10] *Id.*
[11] *Id.*
[12] *Id.*

- The Yardstick approach: The comparison of price, rates, and/or other metrics in the market in which the cartel is operating vs. the same metrics in a highly comparable market. The
- Benchmark approach: The comparison of prices before, during, and after the alleged formation of a cartel within the same market.
- Mixed methods: such as difference-in-difference models, cost structure models, and Cournot/Bertrand price simulations.

Direct purchaser damages are then estimated as follows:

Damages = (Actual – But-for Price) * Units Sold – Pass-through

where "pass-through" refers to the proportion of the cost increase passed down the supply chain.[13]

The findings in *Amex* highlight the importance of applying this approach to *both sides* of a two-sided market in order to assess the overall effect on consumer welfare. Evans made this point in his 2003 paper, presciently using American Express as an illustrative example:

> "Consider the American Express corporate card charge. The cardholder pays nothing for a transaction and often receives various inducements that make the price of the transaction negative. The merchant pays about 2.7 percent of the transaction to American Express. The fact that cardholders pay a negative price is not relevant; it is consequence, and quite possible a socially efficient one, of pricing in a multi-sided market."[14]

While we agree broadly with Evans's assessment, it is also worth pointing out that two-sided markets pose some challenge to the standard methodologies above, particularly regarding counterfactual price estimation. In the case of a dominant company in a two-sided market, applying standard yardstick approaches may be challenging, if that company dominates the global market as well as the local one. This is likely to be the case, particularly if large, American tech companies are involved in future competition enforcement actions.

When there is more than one major player in a two-sided market, standard models are also limited in addressing some of the secondary consequences of indirect network effects, such as high switching costs. However, all three approaches above can be extended with other quantitative evidence to mitigate this issue. For example, in a two-sided market where one, smaller platform charges merchants less than the dominant platform, a regulator might survey merchants to determine what cost reduction would entice them to forego the advantage of network effects and switch providers. This information could be incorporated into standard damages models, to get a more accurate estimate of the overall welfare effects of the dominant firm's pricing strategy.

d. A New Defense for Tech Defendants

Antitrust scrutiny on the tech sector is clearly on the rise. Facebook, Amazon, Google and Apple are all facing antitrust scrutiny, either from the DOJ or FTC.[15] It is likely that private monopolisation claims against these putatitve defendants will emerge in the near future. Significantly, all four of these putative defendants operate in two-sided markets:

[13] *See* Raphael Chaskalson, *Passing the Buck: Estimating Pass-on Damages*, FIDERES, available at https://fideres.com/publications/passing-the-buck, last assessed 19 July 2019.

[14] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20(2) YALE J. ON REG., 325, 371 (2003).

[15] https://www.scotusblog.com/2018/06/opinion-analysis-divided-court-defines-credit-card-networks-as-single-two-sided-market-rejecting-antitrust-challenge-to-anti-steering-provision/.

Table 2: Two-Sided Markets in the Digital Eeconomy

Company	Sector(s)	Market Capitalisation (USD Billions)	Two-Sided Market?	Explanation
Amazon	E-Commerce, Cloud Computing	995	Yes	An increase in consumers on Amazon attracts more sellers to platform, which in turn increases product variety available to consumers and stimulates price competition
Apple	Telecommunications, IT, Music	939	Yes	An increase in consumers to App Store attracts more App developers, which in turn increases product variety available to consumers
Google	Search Engines, Online Advertising	793	Yes	An increase in users attracts more advertisers, which in turn increases product variety available to consumers
Facebook	Social Media	580	Yes	An increase in users attracts more advertisers and news outlets to use the platform, which in turn increases product variety and information available to consumers

Prospective plaintiffs, particularly merchants or app developers on one side of the platforms listed above, should be mindful of encountering the defense of increased consumer welfare (through increased choice, lower prices or both) in future litigation.

e. Promoting data availability

More generally, our past experience in international litigation (most notably in financial markets) strongly suggests that there is a need for decisive action from regulators and legislators to promote data availability. This is particularly true of cases involving digital markets, in which economic analysis is typically very data intensive. In 2018, the high cost of accessing financial and economic data has become an increasingly contested public issue abroad, precisely for this reason.[16] Regulatory action promoting the availability of proprietary data (and reducing its cost) would aid efforts to hold large companies accountable for their actions, and make prospective private damages claims more viable.

[16] *See* John McCrank, *Exchange fee fight moves from NYSE floor to data center rooftop*, REUTERS, (Aug. 6, 2019, 3:24 PM) https://uk.reuters.com/article/us-usa-exchanges-virtu/exchange-fee-fight-moves-from-nyse-floor-to-data-center-rooftop-idUKKCN1UW24U, last assessed 7 August 2019.

Procedural Fairness in Competition Investigations and Enforcement: The International Competition Network Introduces New Framework for Competition Agency Procedures and Recommended Practices on Investigative Process

Caiti Zeytoonian[17]
Noah Kaufman[18]

I. Introduction

On May 15, 2019, the International Competition Network ("ICN") kicked off its 18th annual conference in Cartagena, Colombia.[19] The two-day conference, hosted by Colombia's Superintendencia de Industria y Comercio, covered a broad spectrum of antitrust topics including unilateral conduct, competition agency design, and enforcement cooperation.[20] In addition to the presentation of new reports on cartel enforcement and vertical merger analysis, the ICN introduced two new initiatives to promote procedural fairness in competition law investigations and enforcement: the Framework for Competition Agency Procedures ("Framework") and Recommended Practices for Investigative Process ("Recommended Practices").

II. Background: What is the ICN?

The ICN, which consists of over 100 national and multinational competition agencies across jurisdictions, is dedicated exclusively to competition law enforcement and policy.[21] The organization brings together competition agencies from around the world to formulate effective and practical investigative techniques, frameworks, and best practices that simultaneously respond to and shape the increasingly transnational nature of competition investigations. Throughout the year, ICN members participate in working groups that seek to develop procompetitive and efficiency-enhancing policies across the global antitrust community. In addition to the involvement of its member agencies, the ICN also draws upon the expertise and input of its non-governmental advisors, including consumer groups, academics, and specialists from the legal and economic professions.[22]

III. The Framework and Recommended Practices: Two New Tools to Promote Universal Procedural Fairness

The topic of procedural fairness in competition investigations and enforcement has been a key focus of the ICN since its inception in October 2001.[23] The

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[17] Caiti Zeytoonian is an associate at Morgan, Lewis & Bockius LLP.
[18] Noah Kaufman is an associate at Morgan, Lewis & Bockius LLP.
[19] *See* Press Release, US Dep't of Justice, Antitrust Div., *International Competition Network Adopts Framework for Competition Agency Procedures and Recommended Practices on Investigative Process, Announces U.S. Agencies Will Host 2020 ICN Annual Conference* (May 17, 2019) [hereinafter DOJ Press Release].
[20] *See* News Release, International Competition Network, *2019 ICN Annual Conference Press Release* (May 17, 2019), available at https://www.internationalcompetitionnetwork.org/featured/2019-annual-conference-press-release/ [hereinafter ICN News Release].
[21] *See* Fact Sheet, International Competition Network, *ICN Fact Sheet and Key Messages* (April 2009), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf.
[22] *Id.*
[23] International Competition Network, *What is the ICN?* (2018), available at https://www.internationalcompetitionnetwork.org/about/.

organization's Agency Effectiveness Working Group ("AEWG") focuses specifically on increasing the efficacy of competition agencies around the world by identifying best practices for agency operations, enforcement, and procedures.[24] In connection with these efforts, the AEWG is responsible for articulating and maintaining the ICN's "Guiding Principles for Procedural Fairness in Competition Agency Enforcement," which consists of nine key principles designed to inform and guide universal enforcement processes.[25] The new Framework allows participants to come together to achieve global implementation of established procedural fairness principles in accordance with the ICN's preexisting standards.[26] Similarly, the Recommended Practices, which were developed by the AEWG in conjunction with the U.S. Federal Trade Commission, seek to formalize preexisting investigative processes and norms and to facilitate worldwide adoption of those processes.[27]

a. The Framework for Competition Agency Procedures

The Framework is an opt-in initiative open to any national or multinational competition agency that is willing to adhere to the ICN's fundamental procedural fairness principles.[28] As of August 2019, there are 72 Framework participants.[29] By signing on to the Framework, participants agree to cooperate with implementation efforts, participate in the discussion and formation of procedural fairness principles, and abide by the Framework to the fullest extent possible.[30] Additionally, each participant agrees to provide documentation of its competition law investigative and enforcement processes and protocols to the Framework's Co-Chairs within six months of joining the Framework.[31] The global antitrust community has recognized the Framework as a historic multilateral initiative.[32]

b. Recommended Practices for Investigative Process

The Recommended Practices is a compilation of the ICN's consensus statements on procedural fairness in the context of investigations.[33] The ten-page guidance, which is divided into six sections, provides competition agencies with a detailed and comprehensive overview of universal investigative practices.[34] Section I provides guidance on key investigative tools that competition agencies should use when

[24] *Id.*
[25] International Competition Network, *ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement* (2018), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf.
[26] *See* International Competition Network, *ICN Framework on Competition Agency Procedures* (May 2019), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf [hereinafter Framework on Competition Agency Procedures].
[27] *See* DOJ Press Release.
[28] *See* Press Release, International Competition Network, *ICN Framework for Competition Agency Procedures Update* (June 7, 2019).
[29] *See* International Competition Network, *ICN Cap Participants* (Aug. 2019), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/08/CAPparticipants.pdf.
[30] *See* Framework on Competition Agency Procedures.
[31] *Id.*
[32] *See* DOJ Press Release.
[33] *See* ICN News Release.
[34] International Competition Network, *ICN Recommended Practices for Investigative Process* (May 2019), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf.

conducting competition investigations, such as written requests for information, on-site inspections, witness interviews, and information submissions from third parties.[35] Sections II and III focus on transparency of agency enforcement policies, both as a general matter and in the context of investigations.[36] Section IV addresses the issue of agency engagement during an investigation, including interactions with parties that are the subject of an investigation as well as agency engagement with third parties.[37] Sections V and VI provide recommendations for the establishment of internal agency safeguards and protections for confidential and privileged information respectively.

IV. Conclusion and Outlook

The emergence of an increasingly global market economy has given rise to a growing number of cross-border competition investigations, multi-jurisdictional merger reviews, and international trade compliance issues. Now more than ever, the work of competition agencies across jurisdictions is inextricably intertwined; thus, the need for worldwide cooperation and consensus among competition agencies is paramount. As the most collaborative and inclusive agency-led organization, the ICN is at the forefront of creating universal competition policies and frameworks that will shape and affect the trajectory of competition law.[38] The Framework for Competition Agency Procedures and Recommended Practices for Investigative Process are significant steps towards achieving worldwide norms for procedural fairness in competition investigations and enforcement. As the globalization of our economy continues, the issue of global procedural fairness will remain a salient and crucial aspect of competition investigations and enforcement.

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *See* ICN News Release.

Essential Facilities in Mexico: The International Airport of Mexico City

Stephan Tribukait Vasconcelos[39]

I. Abstract

The doctrine of 'essential facilities' is an apparently novel theory of anticompetitive behavior under economic competition law in Mexico. This article analyzes the leading case, issued from a Court of Appeal in April 2019, involving the International Airport of Mexico City.[40] In light of case law[41] on essential facilities in the European Union, the ruling of the Court of Appeal may clarify the scope of such doctrine under applicable law in Mexico. A better understanding of essential facilities, as laid down by the Court of Appeal, may lead to its effective enforcement by the Federal Commission of Economic Competition ("Federal Commission").

II. Concept: The Apparently Novel Kind of Anticompetitive Behavior

The development of case law on essential facilities in the European Union is not surprising considering it clearly falls within the category of abusive conduct, characterized by a combination of the 'refusal to deal' and 'discriminatory dealing.'[42] This combination is explained as the refusal to allow access, or allowing access to a certain facility or infrastructure only on unfavorable and discriminatory terms, placing new or existing competitors at a competitive disadvantage. The facility or infrastructure at issue itself is characterized by competitors' need to access the same to provide services or goods to their customers. Thus, the facility or infrastructure may vary, as much as an airport differs from a banking system that enables electronic transfers of funds.

The economics[43] behind essential facilities have been largely discussed. But from a legal perspective, the concept is a variety of abusive conduct already prohibited by Community law, rather than a novel kind of anticompetitive conduct.

The precise definition of the essential facilities doctrine varies among jurisdictions, as law itself does. But a notion based on the underlying conduct may prove to be useful in practice to determine its scope. By contrast, a use-oriented concept, *e.g.* the one suggested by the OECD,[44] may serve information and/or awareness purposes.

III. Origin in Europe

[39] Stephen Tribukait Vasconcelos is the sole founder of *Tribukait Vasconcelos, S.C.* The author acknowledges the invaluable insight of Mr. Álvaro R. Sánchez and the contributions of Mr. Thomas Griffith for the preparation of this article.

[40] First Federal Tribunal Specialized in Competition Law, Broadcasting and Telecommunications, *Amparo en revisión:* R.A. 142/2018.

[41] Case law on essential facilities in the European Union is discussed by way of example only based on its relevance and analogy for the leading case analyzed in this article.

[42] *See, e.g.*, D.G. Goyder, EC COMPETITION LAW (OXFORD EC LAW LIBRARY), 346 et. seq. (3d ed. 1998).

[43] *See, e.g.*, John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, FORDHAM INT'L L.J. 437, 441 n.3 (1994).

[44] *See* OECD Policy Roundtables. The Essential Facilities Concept 1996, p. 7: "An "essential facilities doctrine" (EFD) specifies when the owner(s) of an "essential" or "bottleneck" facility is mandated to provide access to that facility at a "reasonable" price."

Telemarketing (CBEM v. CLT & IPB) is an early and illustrative example from the European Court of Justice. Defendant CLT ran the RTL television station. IPB was the exclusive agent of RTL for television advertising aimed at the Benelux countries. IPB refused to sell its television time, including to plaintiff, on the RTL station for telephone marketing operations using a telephone number other than its own. The television station and its exclusive agent belonged to the same group. The European Court answered the question of whether such refusal should be considered an abuse of a dominant position within the meaning of Article 86.

The European Court's approach was legalistic at first. But, the European Court promptly directed its attention to the conduct's outcome and confirmed that a dominant position is a factual situation. The European Court ruled that, in practice, the conduct of the television station amounted to a refusal to supply the services of that station to any other telemarketing undertaking. The refusal lacked any technical or commercial justification relating to the nature of television, *i.e.*, there was no objective necessity pursuant to Article 86. Other conditions of that article, including the possibility of eliminating all competition from another undertaking, were also met and an abuse under Article 86 was deemed to be committed.[45]

The European Court thus ruled that Article 86 also applied to the case of ". . . an undertaking holding a dominant position on the [television advertising] market in a service which is indispensable for the activities of another undertaking on another market,"[46] that is, the telemarketing activities. The term essential facility was not even used by European Court.

IV. Development in Port Cases

The doctrine of essential facilities was further developed in cases involving the use of ports by passenger ferries in Wales, Denmark and France.[47] The application of competition law to maritime transport required not only analysis of general provisions at a treaty[48] level, but also of detailed rules for the application of Articles 85 and 86 laid down by a Council Regulation.

In the first case, *Sealink/B&I – Holyhead*, B&I was a shipping line incorporated in Ireland. Sealink was an operator of ferry services between Great Britain, Ireland and France. A subsidiary of Sealink was the owner and operator of the Holyhead port in Great Britain, which provided the direct link to the capital city of Ireland. As part of a group of companies, Sealink was considered a single economic entity. The port had a narrow passage opposite to the pier berth and the channel had depth limitations. These navigational factors led to increased turbulence at the pier berth caused by the passing of vessels, which restricted the port's efficiency. When Sealink announced its proposed schedule for 1991, B&I protested, arguing that the new schedule would disrupt B&I's scheduled service. One of B&I's vessels would have to disconnect the linkspan twice each time it was berthed at the pier to allow for two movements by Sealink vessels. The disconnection prevented

[45] Case 311/84 [1985] [15], [26], and ruling (2).
[46] Case 311/84 [1985] [26].
[47] *See* D.G. Goyder, EC COMPETITION LAW (OXFORD EC LAW LIBRARY), 347 (3d ed. 1998).
[48] *I.e.*, the Treaty establishing the European Economic Community.

B&I from loading or discharging passengers and vehicles.

The discussions among the parties included written communications to transport authorities[49] and arguments about each party's intentions. Sealink maintained that B&I had decided to be berthed at the pier at the same times of Sealink's existing vessel movements. B&I replied that its decision was made against the background of Sealink's refusal to make any changes to its traditional schedule. By contrast, the European Commission ("Commission") emphasized the requirement of non-discrimination regardless of intentions. The Commission wrote to Sealink, upon the approach of B&I, that:

> "a company or group which is in a dominant position and which owns or operates a facility or a part of an infrastructure which its competitors must use to carry on their business is obliged by Article 86 to grant access on a non-discriminatory basis to its competitors. Whether the dominance results from the ownership of a facility, or from other factors, is irrelevant. "Non-discrimination" means that the dominant company is obliged to treat its competitors as users of the facility on equal terms with its own operations."[50]

In the end, the Commission granted interim measures in favor of one party, B&I, after balancing the interests of both parties. Interests included the urgency and likelihood of irreparable damage to the commercial reputation and business activities of B&I, and the prospect of one-off additional costs and inconvenience to Sealink. The Commission forbade Sealink from implementing the proposed schedule, writing that:

> "[Sealink] is hereby ordered to return to its published ship schedules for 1991 … or to any other schedule … for these two operations which does not cause two ships to pass the Admirality berth during B&I's loading and unloading operations …"[51]

The interim measures granted by the Commission ended the dispute without providing a solution for the port's equitable use. However, the key to this solution were matters beyond competition law that had been discussed and even agreed on by the parties before the dispute. These matters had been based on technical criteria on the passing of vessels and the duration of the linkspan not to be disengaged and not to be disconnected. The corresponding agreement between the parties had been recorded in a series of plans annexed to a memorandum in relation to the Holyhead port operations. But, difficulties in negotiations on a new schedule announced by Sealink led to the dispute.

V. Scope and Extrapolation

More recently, litigants have arguably attempted to expand the scope of the essential facilities doctrine, as seen in the case *AstraZeneca v Commission*.[52] Generics Ltd. and Scandinavian

[49] *I.e.*, the Department of Tourism and Transport in Dublin.
[50] IV/34.174 *Sealink/B&I – Holyhead* [1992] [15].
[51] IV/34.174 *Sealink/B&I – Holyhead* [1992] [Article 1].
[52] Case T-321/05 *AstraZeneca v Commission* [2010].

Pharmaceuticals Generics AB had complained that the AstraZeneca group of companies ("AstraZeneca") prevented them from introducing generic versions of anti-ulcer medicines in a number of European Economic Area markets. The Commission found, *inter alia*, an abuse of a dominant position in breach of Article 82 EC. The conduct at issue was AstraZeneca's selective deregistrations of marketing authorizations for medicine capsules combined with the launch on the market of medicine tablets by AstraZeneca. The Commission imposed a fine of EUR 60 million on AstraZeneca for having abused the patent system and the procedures for marketing pharmaceutical products.

AstraZeneca claimed that the compatibility of its conduct with Article 82 EC should be assessed according to the criteria set out in case law on 'essential facilities.' In rejecting AstraZeneca's argument, the General Court reasoned that such case law ". . . relates, in essence, to circumstances in which a refusal to supply by an undertaking in a dominant position, by virtue, in particular, of the exercise of a property right, may constitute an abuse of a dominant position."[53]

AstraZeneca appealed to set aside the judgment of the General Court, which largely dismissed its action for annulment of the Commission's decision. Advocate General Mazák went further in arguing for a narrow scope of the essential facilities doctrine. In his assessment of the conduct tending to restrict competition, he considered that the duty to deal or essential facility case law[54] was completely inapplicable. He argued that the case did not concern a refusal by a dominant undertaking to provide access to or to license information indispensable to allow a potential competitor to have access to a certain market. The Advocate General concluded that essential facility cases are exceptional in nature and should not be extrapolated to the unrelated circumstances and facts.

The Court of Justice agreed, holding that AstraZeneca's abusive conduct was not in any way related to the case law on essential facilities. The Court held that the case did not involve a refusal by an undertaking in a dominant position, owning an intellectual property right in a structure, to grant its competitors a license for the use of that structure. The Court of Justice also ruled that deregistering a marketing authorization is not equivalent to the exercise of a property right.[55] Thus, essential facilities remains a narrow category of a refusal to deal on a non-discriminatory basis.

VI. Purpose

In the end, *AstraZeneca v. Commission* transcended the application of the essential facilities doctrine to the specific facts at issue and relied upon the purpose of competition law. AstraZeneca argued that "the role of competition rules is not to police patent applications, and the rules applicable to patent applications . . . are normally sufficient to preclude any anticompetitive effect."[56]

Coincidentally with renewed debates in the United States[57] about essential facilities arising from the

[53] Case T-321/05 *AstraZeneca v Commission* [2010] [678], [679].
[54] *I.e.*, the *IMS Health* case law.
[55] Case C-457/10 P *AstraZeneca v Commission* [2012] [148], [149].
[56] Case T-321/05 *AstraZeneca v Commission* [2010] [315].
[57] *See, e.g.*, Stephen M. Maurer and Suzanne Scotchmer, *The Essential Facilities Doctrine: The Lost Message of Terminal Railroad*, UC Berkeley Public Law Research Paper No. 2407071.

increasing importance of shared networks, AstraZeneca cited United States law in support of its argument. AstraZeneca stated that an antitrust action would require proof of fraud, that is, the patent being procured by knowingly and willfully misrepresenting facts to the patent office.

The Court of Justice not only confirmed that AstraZeneca deliberately attempted to mislead patent offices and judicial authorities to keep its monopoly on the market of one category of medicinal products as long as possible. The Court of Justice also noted that an 'abuse' is an objective concept that refers to a specific set of conduct by a dominant undertaking. The characteristics of such conduct were laid down by the Court of Justice based on "settled case law" going back to *Hoffman-La Roche v Commission*.[58]

VII. The International Airport of Mexico City

In 2017 Delta Air Lines, Inc. ("Delta") challenged the legal provisions on essential facilities, as applied by the Federal Commission, including the corresponding investigation and decision of the Federal Commission, on constitutional grounds. These grounds related to the violation of the federal constitution ("Constitution") and federal laws by the measures adopted by the Federal Commission.[59]

a. Measures taken by the Federal Commission

Upon finalizing its investigation into the market of air transport services in 2016, the Federal Commission issued a preliminary opinion (*dictamen preliminar*) resolving that certain infrastructure of the airport amounted to an essential facility controlled by the airport. The findings of the Federal Commission included an inefficient use of the airport with anticompetitive effects derived from the assignment process of landing and departure schedules. As a result of its findings, the Federal Commission issued guidelines for the airport and made suggestions to other authorities[60] on the access to that infrastructure in accordance with the Federal Law of Economic Competition ("Federal Law").[61] These guidelines or measures regulated landing and departure schedules during times of airspace saturation.

One of the measures, M11, restricted the participation of certain airlines in the auction process provided in the Regulations of the Airports Law ("Regulations") that the airport held for operation schedules during saturation conditions. Under M11, airlines holding more than 35% of the aggregate landing and departure schedules within a single timeframe could no longer participate in such auctions.

b. Ruling of the Federal Judge

The constitutional proceeding (*amparo*) brought by Delta to challenge M11[62] was dismissed by a federal judge. After this proceeding began, the Regulations were amended to suppress

[58] Case C-457/10 P *AstraZeneca v Commission* [2012] [74].
[59] *See* the Federal Commission's file IEBC-001-2015.
[60] *I.e.*, the Secretariat of Communications and Transportation, Congress and the President of the Mexican Republic.
[61] Federal Law of Competition Law, articles 60 and 94.
[62] Among others.

the schedule auctions. As M11 had restricted the participation of certain airlines in these auctions, the judge considered that M11 could no longer be enforced against Delta.

Additionally, the judge deemed that the annulment of M11 in favor of third-party airlines would exceed the scope of the constitutional proceeding initiated by Delta. Upon its dismissal, Delta and the Federal Commission appealed.

c. Ruling of the Court of Appeal

The Court of Appeal overturned the ruling of the federal judge. In the first place, the Court of Appeal confirmed the authority of the Federal Commission, granted by the Constitution, to regulate access to essential facilities. However, the Court of Appeal relied on a judgment of the Supreme Court of Justice[63] to limit the regulatory authority of the Federal Commission to matters not already regulated by another public entity under federal law. The Airports Law, as stated by the Court of Appeal, specifically empowered the Secretariat of Communications and Transport ("Secretariat") to issue guidelines controlling landing and departure schedules.

Absent clear boundaries of the Federal Commission's regulatory authority laid out in the Constitution, the Court of Appeal relied upon discussions in Congress on the constitutional amendment that introduced said authority for specific matters. The Court of Appeal concluded that the Federal Commission is limited to the performance of its regulatory function within competition law. In the area of air transport, the Federal Commission may act on a supplementary basis issuing non-mandatory recommendations or opinions to the authority *ad hoc*, that is, the Secretariat.[64]

As the Federal Commission exceeded its authority, M11 and other measures by the Federal Commission challenged by Delta were held to be unconstitutional. The Court of Appeal, thus, prohibited the Federal Commission from applying the measures to Delta both presently and in the future. The Federal Commission unsuccessfully emphasized the undue advantage for Delta that would result from the measures' annulment. Nonetheless, the Court of Appeal held that Delta and third-party airlines may validly benefit from its ruling, as the constitutional proceeding initiated by Delta challenged measures, *i.e.*, rules of general applicability.[65]

VIII. Conclusion

a. Focus on Abusive Conduct

The enforcement of the essential facilities theory by the Federal Commission should focus on the underlying abusive conduct rather than issuing rules on access to certain infrastructure. Otherwise, the Federal Commission will have to rely on non-binding regulatory recommendations, as ruled by the Court of Appeal. Additionally, regulatory solutions for access to essential facilities may entail

[63] *See* Constitutional Dispute (*controversia constitucional*) 117/2014, whereby the scope of authority of the Federal Telecommunications Institute was fixed.

[64] *Amparo en revisión: R.A. 142/2018* [250] [252] [255].

[65] These effects of the constitutional proceeding had been determined by the Supreme Court of Justice in a proceeding brought against laws, *i.e.*, in the ruling with mandatory effects for lower courts (*jurisprudencia*) identified as P./J. 112/99.

technical matters, that is, non-legal matters beyond competition law.

b. Effects of Resolutions against Abusive Conducts

To effectively address the competition concerns implicated by the essential facilities doctrine, the Federal Commission may issue mandatory resolutions impeding an abusive conduct, as opposed to a non-binding recommendation. The definition of such conduct may be as straightforward as the "refusal, restriction of access or access on discriminatory terms and conditions to an essential facility by one or more Economic Agents"[66] already set out in the Federal Law.

A mandatory resolution of the Federal Commission may be appropriate, if it balances interests and incentives of the parties involved in the abusive conduct.

c. Clarity and Predictability

The requisites of an abusive conduct relating to an essential facility under Federal Law[67] have not yet been construed by courts. To date, judicial resolutions have dealt only with abusive conduct in general.[68] Either courts or the Federal Commission itself may construe the contours of (1) an absence of justification for the refusal to deal on non-discriminatory terms, (2) the types of 'essential' infrastructure[69], (3) consumer harm, and (4) digital markets to enhance the clarity and predictability[70] of the Federal Commission's analysis.

[66] Federal Law of Economic Competition, Article 56, XII, that is, the refusal to supply in addition to 'margin squeeze' set out in Article 56, XIII.
[67] *See* Federal Law of Economic Competition, article 60.
[68] *See, e.g.*, ruling (*tesis*) I.1o.A.E.36 A (10a.) conerning invoicing and collecting services by a provider of telecommuncation services that were not considered as an essential facility.
[69] *See, e.g.*, the discussion on the application of the essential facilities doctrine to data cases in Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, Competition Policy for the Digital Era.
[70] *See* Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

Lessons from the ACCC Digital Platform Inquiry

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I. Background

For antitrust, 2019 has been, in our opinion, a year marked by important developments for digital markets. The year has featured: investigations against big tech companies; general studies on digital economy and markets; studies[72] and discussions[73] on whether current tools at the disposal of antitrust authorities are fit-for-purpose; retrospective analysis of merger control decisions; proposals for new regulations for platform business models; and debates over new theories of harm linking competition to privacy and even algorithmic coordination between competitors.

Amongst the many new resources of case law, academic publications and public policy proposals to emerge this past year, there are a few that stand out as groundbreaking for their insight, depth, and conclusions. One of them is the final report ("the Report") of the Australian Competition and Consumer Commission ("ACCC") in its Digital Platform Inquiry.

The Report has several chapters that build upon and summarize other reports and studies on the subject, but which provide a centralized source of knowledge for stakeholders all over the globe (for instance, The Stigler report quotes from the preliminary report by the ACCC). It should be noted that the Report does not stand completely on its own, a preliminary version of the Report was issued by the ACCC in December 2018 for public consultation and comments and, even though the Report is the final version, one would be remiss not to mention that the preliminary report had already caused a similarly groundbreaking impact when it first came out.

From our Chilean perspective, coming from a small jurisdiction that, nevertheless, was able to build a solid antitrust framework with diligent and serious antitrust authorities, the new theories of harm for antitrust in the digital economies have yet to be tested. However, our two antitrust authorities, our academy, and our antitrust practitioners are paying close attention to international developments and would generally agree that our institutional framework can and should deal with anticompetitive behavior in the digital economy. How we go about doing this, and the extent and sufficiency of the current powers to be efficient in this work, is an altogether different thing.

Concordantly, from this perspective, we find that the Report provides a holistic approach to tackling a subject of a massive importance and little certainty, with unclear borders and with ever increasing branches.

To this respect, the Report is another one in a long series of works that

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[71] Ignacio is a partner of the Antitrust Team at Philippi Prietocarrizosa Ferrero DU & Uría and Álvaro is a main associate of said team.

[72] *See* "Unlocking Digital Competition", Report of the Digital Competition Expert Panel, March 2019. Also known as the Furman report, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [last time reviewed: 22-10-2019].

[73] *See* Philip Marsden, *Leave, Remain & Common Ground: Pragmatism in Dealing with Tech Giants*, COMPETITION POLICY INTERNATIONAL, April 2019, available at: https://www.competitionpolicyinternational.com/leave-remain-common-ground-pragmatism-in-dealing-with-tech-giants/ [last time reviewed: 22-10-2019].

asserts that the digital economy landscape, and specific relevant markets thereof, can be and currently is dominated by a few economic agents. By doing so, the ACCC discards the "*competition is one click away*" argument that is the go-to argument of Big Tech.

II. The Economic Premises

In broad terms, the Report recognizes the economic premises that act as cornerstones of the competition analysis of "*digital markets, specifically, digital search engines, social media platforms and other digital content aggregation platforms*." Among these premises, it is always worth mentioning:

(i) the special relationship between same-side and cross-side effects of multisided platforms. This relationship always needs to be considered when defining the relevant market and the potential existence of market power;

(ii) the formidable network effects and mostly positive, but also negative, impact of the feedback loop that characterizes these effects;

(iii) similarly, the existence of extreme economies of scale and scope with large sunk costs;

(iv) the existence of so called *killer acquisitions* whereby large incumbents target the acquisition of emerging companies, whether competing in the same relevant market; whether present in related, adjacent or not even close markets but of which some relevant input, more often than not: data, is considered important; and companies that are young enough not even to be considered within any particularly defined market but have a technology or provide a service or product that could, prospectively, be considered strategic. Typically, as it has been observed[74], these acquisitions fall outside most merger control regulations because of their relatively lower revenue thresholds, courtesy of the emerging company's limited or inexistent revenue and lack of other tools, i.e., transaction value thresholds and/or mandatory merger control under some other criteria; and

(v) notably, the Report assess at length (at least, in relative terms when compared to other similar reports on digital markets) the importance of consumer inertia or consumer biases, and how incumbents have learned to use their technological abilities to exploit these biases. The

[74] See "Competition policy for the digital era", for the European Commission, prepared as special advisors by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf [last time reviewed: 22-10-2019].

Report provides examples of how these strategies work.

III. Theories of Harm of the Digital Antitrust Landscape

Importantly, the Report found that there are significant non-price effects being imposed on consumers (and to some respect foreclosure of competitors) that do reflect an abuse of dominance of a character unlike what antitrust authorities are typically accustomed to review.

Indeed, the Report provides, in our view, a thorough analysis of what has now become textbook anticompetitive risks within the digital markets, such as theories of harm linked to: (i) a decrease on quality by reducing privacy related safeguards of the services provided (e.g., increased data collection, tracking, and sales); (ii) the potential for self-preferencing and, generally, lack of transparency in rankings and display; and (iii) risks related to the seemingly inescapable nature of the services whereby the consumer, due to an exploited level of his/her own inertia, does not reach out to other suppliers or is not even aware that it is being intentionally led to a single supplier of the particular product or service involved.

Overall, the Report provides for—what we are hearing more and more as the appropriate course of action—a holistic approach to addressing these potential harms. It provides for a broader analysis, beyond mere antitrust, and into to other areas of regulation, in order to face the complexity of conduct and effects.

IV. Relevant Recommendations

From our particular Chilean perspective, the Report provides for recommendations that we find can, *mutatis mutandis,* be implemented into our institutional landscape, such as the creation of a specialist digital platform branch—in our opinion preferably within the competition authority itself—with sufficient powers to enable the authority to act even when no specific breach of antitrust law can be yet asserted.

This latter possibility would be justified with what is likely to be a worldwide common circumstance whereby antitrust cases can last years before an actual breach can be asserted and fines and remedies imposed, but where consequences the violation are felt early on in the affected relevant markets and, ultimately, on consumers. Thus, we understand this prerogative as being similar to, and in line with, the recent use by the European Commission of *interim measures* (for instance, in its investigation of Broadcom case[75]) by the reappointed Competition Commissioner and newly appointed Executive Vice President of the European Commission, charged with responsibility for a "Europe fit for the digital age", Margrethe Vestager[76].

These powers and positions do not currently exist in Chile and would need an actual change of law to include them. Yet, our administrative authority does have an *ad hoc* power whereby its antitrust investigations can be "*closed*

[75] European Commission, DG Comp, AT 40608 Broadcom, 2019. Public case file available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40608 [Last time reviewed: 18-11-2019].

[76] This was the general instruction given to her by Ursual von der Leyen. Its lei motive can general y be observed from her brief to the Hearings of European Commissioners-designate: "Margrethe Vestager, Vice Presidente: A Europe fit for the digital age", October, 2019. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640171/EPRS_BRI(2019)640171_EN.pdf [Last time reviewed: 18-11-2019].

without prejudice" when companies formally agree to modify their behavior. These agreements are common enough and are, also, the preferred course of action used by the authority. Indeed, antitrust cases brought by the administrative authority before the Chilean Antitrust Tribunal are few and far between[77], as they can generally be solved though this *de facto* mechanism[78].

Furthermore, the Report does not shy away from dealing with controversial and key aspects of the antitrust analysis of digital markets, such as whether or not divestment and structural remedies are needed, or whether competition authorities should break up Big Tech.

This topic that has been at the forefront, not only of academia, but, also of politics. Particularly, the antitrust approach of some presidential candidates in US politics has surprisingly become a significant point of debate. Notably, however, the Report does not recommend this course of action as it finds the potential overall effects on the underlying specific anticompetitive risks to be unclear or likely to be ineffective.

V. Digital Media and Journalism Considerations

One of the most globally resonant aspects of the Report is its analysis of the relationship it finds between digital media platforms and aggregators and the traditional media. The Report concludes that certain perils can be seen, particularly, due to the fact that: (i) media aggregators are able to impose commercial terms and conditions upon actual media and press, significantly impacting their business model; and (ii) because media platforms and aggregators are not themselves journalists, they are not subject to typical regulations for journalism and can and have promoted content that prioritizes viewer attention above content accuracy.

In this respect, the digital business model has been and continues to have an impact on journalism, pluralism, media literacy and overall quality. In this respect, we note that, in Chile, our Freedom of Press law, once specifically included a provision for a review of pluralism considerations by an antitrust authority (in the context of merger control and other relevant changes in media ownership). This explicit provision was removed, on 2009[79], from the law and antitrust authorities since then explicitly understand that they are to review

[77] In 2019, the National Economic Prosecutor's Office ("FNE" by its Spanish name), which is the Chilean administrative persecutorial agency for antitrust, only filed one claim for abuse of dominance, before the Chilean Antitrust Tribunal, against a single Chilean bank, for an alleged abuse in tender procedures for mortgage insurance, case docket number: C-379-2019. In 2018, once again, a single case of general abuse of dominance was filed by the FNE against the National Association of Professional Soccer for an alleged charge of abusive fees. Before 2018, there was a single case filed on 2016 and then only another one on 2014. Concordantly, in the last 5 years there have only been 4 abuse of dominance cases filed by the FNE. To provide a comparison, note that, in 2018, there were 4 cartel cases alone that were filed by the FNE which is its yearly average for cartels.

[78] For instance, the FNE closed its investigation due to an agreed change in conduct by the investigated entity in: FNE-2408-16, over exclusionary conducts by Compañía Cervecerías Unida S.A.; and the investigation over the alleged arbitrary requirements to open a bank account imposed by Chilean banks over currency exchanges, FNE 2355-15. For the sake of transparency, we note that we represented one of the banks involved in the second investigation.

[79] Through Law N° 20.361 of July 2009. At the time, this law was one of the major reforms to Chilean Antitrust Law, at the time and it included a revision of the powers of antitrust authorities pertaining to the Freedom of Press Law, among others.

competition concerns only and not considerations such as pluralism and integrity of the press or at least not directly[80].

In this context, the implications of the Report would, ultimately, lead us to conclude that competition considerations should include characteristics such as pluralism, content quality and even media literacy. Whether or not this is indeed the case and, ultimately, whether these implications will be considered in merger control and antitrust cases in Chile—even though pluralism was intentionally removed from its scope—remains to be seen.

To this respect, from a Chilean law perspective, we find it interesting that the explicit control on pluralism and the integrity of press by the antitrust authorities was removed from the Freedom of Press Law. At the time, this was considered to be a technical decision because Congress believed antitrust authorities should not be the ones in charge of directly reviewing the impact of mergers on pluralism and integrity of the press, as they were considered to be elements that were not directly related to competition.

Now, it would seem from the Report, these considerations have found their way back to a more direct competition background. However, though this seems intuitive in the context of digital media and the Report certainly does a good job in arguing in favor of it, the pervasiveness of the implications, at least for Chile, could very well need either the incorporation of an explicit provision to the law—to amend the previous deletion— or the incorporation of an actual agency or regulatory body with specific powers to address these topics. Indeed, in light of the historical context mentioned, Chilean antitrust authorities may be especially reluctant to directly defend considerations such as pluralism and integrity of the press without an explicit mandate, even if they could be considered as part non-price effects on competition, i.e., quality.

VI. Conclusion

The Report by the ACCC is certainly a critical piece of work in the competition analysis of digital markets, generally, due to pervasive considerations and characteristics that are similar across the board in the platform economy and, specifically, for digital media, in advertising and search engines.

In this context, though the Report certainly makes assertions that are being heavily debated still, we find that it is an altogether reasonable, in-depth look. It was certainly the result of long and hard work, and it considered different views from a broad catalogue of stakeholders and was produced by an antitrust authority that has gained international respect.

From a Chilean perspective, although the size of our digital economy will likely render us more policy-followers than policy-innovators, it is certainly a work that will have an impact. Both of our antitrust authorities will likely pay attention to the Report and

[80] The Chilean Antitrust Tribunal has decided that because of the mentioned legal reforms: "(…) *it would be possible to conclude that the mandate for antitrust authorities to directly protect pluralism as a guarantee of freedom of opinion and information that is safeguarded by the Freedom of Press Law has been removed; though this change would not prohibit this Tribunal to do so indirectly, by protecting competition in the market*". Decision N° 44/2013, case NC 413-13. To date, the Chilean Antitrust Tribunal has not made pluralism or integrity of press considerations in its subsequent decisions when analyzing mergers in the media industry.

extract that which can be reasonably adapted to our reality.

In a more international context, the Report is a groundbreaking work for competition analysis and, together with similar works (e.g., the Furman report in the UK, the Stigler report in the US and the special report on competition policy for the digital era from the European Commission, among others), present the first building blocks of what is likely to be the future of competition analysis for the fourth industrial revolution.