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**THE CHILEAN UNFAIR COMPETITION ACT: A
CRITICAL ANALYSIS.**

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INTRODUCTION:

Until 2007, the Chilean legal system did not have a comprehensive body of Law in which business had the opportunity to seek remedies against competitors that were committed in acts of unfair competition. As a matter of fact, the only regulation that considered these acts was in the Chilean Antitrust Act² in cases where those practices were executed with the purpose of obtaining, maintaining or incrementing a dominant position within a relevant market and in articles 86 a 88 of the Industrial Property Act which is limited to the protection of industrial secrets³.

In order to fill that legal gap, a group of parliamentarians presented a bill in September 2003 before the National Congress which ended up to be the current Unfair Competition Act No. 20,169 of 2007 (hereinafter, the “UCA”)⁴.

Despite the hopes that such statutory regulation by itself would deter those acts, this paper contends that *is not the case*. This essay argues that UCA has a problem of *over-deterrence of desired conducts* and *under-deterrence of undesirable conducts*. The first problem (over-deterrence by stifling strong competition) is, as I will show, the consequence of the ambiguity of the causes of action provided by the UCA and the lack of institutional environment that could provide legal certainty to market agents. In turn, the problem of under-

² Decree with Force of Law No. 1 of the Ministry of Economy, Promotion and Reconstruction which sets the revised, coordinated and systematized text of the Decree Law No 211 of 1973, published at Official Gazette on March 7, 2005 (hereinafter, the “**Antitrust Act**”).

For an English version of such act see National Economic Prosecutor’s Office <<http://www.fne.cl/descargas/normativa/Competition%20Law.zip>> [visited: 1/15/2010]

³ Decree with Force of Law No. 3 of the Ministry of Economy, Promotion and Reconstruction which sets the revised, coordinated and systematized text of the Act No. 19,039 of Industrial Property, published at the Official Gazette on March 9, 2003 (hereinafter, the “**Industrial Property Act**”)

⁴ Act No. 20,169 of Unfair Competition, published at the Official Gazette on February 16, 2007.

deterrence of certain acts of unfair commercial practices is the result of the lack consistency between the objectives of the UCA and the remedies enshrined in it.

Part (I) will argue that the UCA provide a good deal of uncertainty to market agents that can stifle strong competition. Part (II) of this paper will address the inconsistency between the objectives of the UCA and the remedies provided by this legislation. Part (III) will provide some concluding remarks and some normative proposals in order to provide a more optimal way to deter these acts.

I. LEGAL UNCERTAINTY AND THE UCA.

Competition, “...necessarily contemplates the probability of harm of other participants in the market... [since] it implies a right to induce prospective customers to do business with the actor rather than with actor’s competitors”⁵. Despite the existence of such likelihood of harm, market oriented economies promote and protect this kind of behavior. This disposition towards competition is the result of a long understanding that competition is the most effective way to increase social welfare by the efficient allocation of resources.

By establishing a set of rules that control competition we can both enhance or discourage it. To a great extent this will depend upon the legal certainty that is provided to market agents in the way that they can or cannot compete.

Indeed, legal certainty matters. As it has been out by several scholars, laws that produces legal uncertainty about the rights and obligations of people can create series of serious social costs, inter alia, error in their application⁶, the

⁵ AMERICAN LAW INSTITUTE, “*Restatement (Third) Of Unfair Competition*”, §1, 1995, p. 4.

⁶ POSNER, Richard A., ‘An Economic Approach to Legal Procedure and Judicial Administration’, *The Journal Legal Studies*, Vol. 2, No. 2, 1973, p. 449.

rise of transaction costs⁷, the diminishment of “*efficiency with which society conducts its business*”⁸, the rise of litigation costs by generating larger number of (wasteful) claims and a reduced number of settlements when a dispute arises⁹ and, of course, the deterrence of certain desirable conducts¹⁰.

The UCA, unfortunately, seems to create such situation.

According to the drafters of the UCA, this legislation is construed using general concepts that are intended to provide enough flexibility for adapting the legislation in time and different circumstances, encouraging the development of a case law which will set out criterions for application within the dynamics of the market¹¹. However, as we shall see, this approach creates more evils than advantages. These problems are particularly serious in the case of the causes of action enshrined in the UCA. Now we proceed to some examples.

1. THE DEFINITION OF “UNFAIR COMPETITION” UNDER THE UCA.

The best example of the use of general standards within the UCA is the definition of “unfair competition” of article 3 of the UCA. This provision states the following:

⁷ HIRSCH, Werner Z., ‘Reducing Law’s Uncertainty and Complexity’, *UCLA Law Review*, Vol. 21, 1974, p. 1234.

⁸ *Ibid.*

⁹ POSNER, Richard A., *Op. Cit.*, pp. 449-450; HIRSCH, Werner Z., *Op. Cit.*, 1236-1238.

¹⁰ EHRLICH, Isaac and POSNER, Richard A., ‘An Economic Analysis of Legal Rulemaking’, *The Journal Legal Studies*, Vol. 3, No. 1, 1974, pp. 263-264; D’AMATO, Anthony, ‘Legal Uncertainty’, *California Law Review*, Vol. 71, No. 1, 1983, p. 5.

¹¹ ‘Proyecto de ley para regular la competencia desleal’, Boletín 3356-03. Moción de los diputados Jorge Burgos Varela, Juan Bustos Ramírez, José Antonio Galilea Vidaurre, Zarko Luksic Sandoval, Fernando Meza Moncada, Eduardo Saffirio Suárez, Exequiel Silva Ortíz y Eugenio Tuma Zedan. Cuenta en Sesión 40, Legislatura 349, September 11, 2003. In: NATIONAL CONGRESS LIBRARY, “Historia de la Ley 20.169. Proyecto de Ley para regular la competencia desleal”, pp. 7-12. Available on line at <<http://www.bcn.cl/histley/ifs/hdl-20169/HL20169.pdf>>, p. 8 (hereinafter, the “**Congressional Motion**”)

“Article 3.- In general, an act of unfair competition is any act against good faith or good costumes which, by illegitimate means, is carried out with the purpose of diverting the clientele of a market agent”

In accordance to this general provision, we face of an act of unfair competition if four requirements are fulfilled: (1) There must be an “act”; (2) this “act” must be carried against “good faith” or “good costumes”; (3) this “act” must use “illegitimate means” and (4) it has to be carried out with the “purpose” of diverting the clientele of a market agent.

As we can see, these requirements open several questions: Does the word “act” include omissions? How do we assess whether a market agent is acting in “good faith”? Do we need to assess the good faith requirement from an objective perspective (what we should expect from a competitor) or from a subjective standpoint (we need to find out that there is an intention to provoke an unlawful damage to third parties)? How we define “good costumes”: in accordance to the business practices or by other means? What is an “illegitimate means”, an unethical means and/or an illegal means? If competition by definition has the purpose of diverting the clientele of another competitor, which characteristic has to have the “purpose” of this provision?

What is more, if an act of unfair competition lies upon the determination of whether certain commercial practice are carried out “in good faith”, this adds an ethical element that seems to have little to do with the economic characteristics of the competitive process, leading to a discussion that resembles more a *“theological debate on morality at the time of St. Augustine than a theory studying the law of the market and the way competitors should behave in order to promote competition”*¹².

¹² KAUFFMANN, Peter J., *“Passing Off and Misappropriation. An Economic and Legal Analysis of the Law of Unfair Competition in The United States and Continental Europe”*, IIC Studies in Industrial Property and Copyright Law, Vol. 9, Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, Munich, 1986, p. 15 (citing Lehmann, M, “Schutz des Leistungswettbewerbs und Verkauf unter Einstads-preis”, GRUR (1979), pp. 368 *et seq.*)

Similar problems face the concept of “good costumes”. As HÖPPERGER and SENFTLEBEN notes:

“Traditionally, a line is drawn between the concept of honest practices and ethical standards referring to behavioral norms of fairness and decency in a given community. This ethical approach is criticized by some as being imprecise. It is argued that the determination of relevant behavioral standards strongly depends on how the trade circle is defined whose customs and habits are taken as a basis for the analysis. Moreover, it is asserted that trade circles whose business practices serve as a reference point for determining honest practices de facto shape the legal standards, in the light of which their behavior is to be judged. Therefore, some commentators align the concept of honest practices with the objective of ensuring the efficient operation of competition as a core instrument of market economies.”¹³ (footnotes omitted)

Although the legislator had some reason when he decided to use general standards to provide enough flexibility of this norm, such an approach comes at a cost that is rather undesirable: uncertainty that discourages strong competition between businesses for fear of lawsuits¹⁴.

This unintended tradeoff has its root in the assumption of the legislator that the UCA will develop a jurisprudence that will be able set out coherent criteria of interpretation of the UCA. However, the hope put in case law seemed to be overoptimistic. Indeed, in Chile, judicial rulings are not binding

¹³ HÖPPERGER, Marcus and SENFTLEBEN, Martin, ‘Protection Against Unfair Competition at the International Level – The Paris Convention, the 1996 Model Provisions and the Current Work of the World Intellectual Property Organisation’. In: HILTY, Reto M. and HENNING-BODEWIG, Fruke (eds.), *“Law Against Unfair Competition. Towards a New Paradigm in Europe?”*, MPI Studies on Intellectual Property, Competition and Tax Law, Vol. 1, Springer, Berlin, Heidelberg & New York, 2007, at pp. 64 - 65.

¹⁴ This opinion seems to be shared amongst prestigious practitioners. For instance, Mr. Juan Cristóbal Gumucio (partner from, Sargent & Krahn, one of the most important IP Law firms in Chile) have complained about the fact that the UCA is ambiguous. What is more, according to the same practitioner, *“...it seems to be very difficult for the judiciary to define what is ‘unfair competition’, leaving too much room for presenting lawsuits which can end up in negative effects upon competition since it can be stifled through lawsuits.”* ‘Competencia Desleal es Segunda Causal Más Juzgada por TDLC’, *Diario Estrategia*, January 19, 2010. Available on line at: <http://www.estrategia.cl/detalle_noticia.php?cod=26525> [visited: 1/12/2011]

precedent that could produce compulsory standards of interpretation of the UCA¹⁵. Furthermore, it is rather unlikely that a de facto jurisprudence could be created since several Civil Courts and Courts of Appeals¹⁶ spread within the national territory are likely to create different interpretations of the UCA, creating inconsistent case law and more legal uncertainty rather than a dynamic instrument of adjustment of said law. To make things worse, Civil Courts face the handicap of having no experience in dealing either with unfair competition laws or with other related areas of law, such as Trademark Law or Antitrust Law.

On top of that, apart from the system created by the UCA, there is a parallel system of unfair competition law embedded within Chilean Antitrust Act. As a matter of fact, article 3, letter c) of the Antitrust Act penalizes acts of unfair competition carried out with the purpose of attaining, maintaining or increasing a dominant position. Since a different tribunal hears such cases there is a further danger of the creation of inconsistent definitions of what “unfair competition” means, leading to contradictory rulings between the Competition Court and Civil Courts¹⁷.

All this provides little predictability of a system that is based in ambiguous standards, creating a chilling effect that is rather undesirable as a whole.

The problem of legal uncertainty generated by the UCA is, to some extent, attenuated by the establishment of a non-exhaustive set of examples of what the UCA will understand as an act of unfair competition. Yet, as we shall see,

¹⁵ The Chilean Civil Code states, in article 3, paragraph 2, that “*judicial rulings will only have legal validity in the cases that they are currently pronounced*”.

¹⁶ According to article 8 of the UCA, Civil Courts shall have the exclusive jurisdiction to hear these type cases. In turn, Court of Appeals will hear the case on appeal.

¹⁷ This is particularly likely to occur since cases involving claims related to acts of unfair competition are the second most litigated issue at the Antitrust Court. See ‘Competencia Desleal Es la Segunda Conducta Más Vista por el TDLC,’ *Diario Estrategia*, September 6, 2010. Available on line at: <http://www.estrategia.cl/detalle_noticia.php?cod=32889> [visited: 1/15/2011]

they also leave open questions that increase the problem of uncertainty. Let's examine the examples provided by article 4 of the UCA and the underlying tensions within each of them.

The first example is provided by the UCA consider passing off conducts. According to letter a) of article 4 of the UCA consider an unfair commercial practice “*every conduct which takes advantage of other's goodwill, which induces to confuse third party's goods, services, activities, distinctive signs or establishment with those of the infringer*”. At the first glance the provision seems to be straightforward. However, the UCA provides little guidance in order to know whether we need the existence of actual confusion within the consuming public or just a likely chance that this can happen. Furthermore, this provision does not consider any standard of appreciation of this confusion: what kind of consumer is the benchmark, all consumers (even the inattentive ones), sophisticated consumers or an “average” consumer¹⁸?

The same seems to happen with the other examples provided by the UCA. For instance, letter b) of article 5 of the UCA deals with misrepresentative activities such as “*the use of signs or the diffusion of incorrect or false facts or assertions, which induce to mislead people about the nature, origin, components, features, price, way of production, mark, suitability for the ends that are expected to satisfy, quality or quantity and, in general, about the real advantages provided by the goods or services offered by the infringer or a third party*”. Similarly to the prior example, this provision generates further doubts of interpretation: for

¹⁸ That is for instance, the “average consumer” standard is benchmark chosen by Unfair Commercial Practices Directive at European level (“this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factor”) Recital 18, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), Official Journal of the European Union, L 149/26, June 11, 2005 (hereinafter, the “**Unfair Commercial Practices Directive**”).

instance, is the mere “inducement” sufficient to have a claim under this provision or do we need actual evidence that consumers are indeed being misled? Again, what type of consumer is the benchmark? Furthermore, do we have to prove that the infringer has the actual intention to mislead or is a certain level of negligence sufficient?

In its turn, letter c) of article 4 of the UCA considers disparaging activities as acts of unfair competition. Indeed, letter c) penalizes “*any incorrect or false information or assertion about the goods, services, activities, distinctive signs, establishment or commercial relations of a third party that is capable to harm his goodwill*” or “*any expression directed to discredit or ridicule such person without any objective basis*”. This also generates further doubts. For instance, which kind of harm are we dealing with here: pecuniary damages, non-pecuniary injuries or both? When the act says that the information or assertion has to be “capable” of producing such harm, what does that actually mean: an actual damage or does the mere likelihood of the occurrence of such harm is sufficient?

In turn, letter d) of article 4 of the UCA punishes “[a]ny offensive statement against a third party related to the nationality, beliefs, ideology, private life or any other personal circumstance that has no direct relation with the quality of the good or service offered by this person”. In this case we again face ambiguities that require further clarification. When is the statement “offensive”? Do we need a willful intention to “offend” in order to punish this type of statement? From which standpoint do we assess the “offensive” character of the statement: the plaintiff, the infringer, the judge and/or consumers? Furthermore, when does the offensive statement have a “direct” relation to the quality of the good or service offered by this person? Putting aside the competitors as potential infringers, are consumers prohibited from making these kinds of statements as well?

I could continue with the remaining examples provided by article 4 of the UCA¹⁹ and prove that all of these examples raise similar problems as those discussed above. What is clear is that depending upon the answer to these questions we will have different scopes of application of the UCA. Yet, the institutional design on which the interpretation of these provisions relies is incapable to provide consistent and predictable answers to these questions, thereby leading to a good deal of legal uncertainty that might be a good business for lawyers, but not for society as a whole which is deprived of the ability to benefit from strong competition among business.

II. INCONSISTENCIES BETWEEN THE OBJECTIVES OF THE UCA AND ITS REMEDIES.

Another serious failure of the UCA is that there is a good deal of inconsistency between its aims and the remedies that sets out in order to safeguard these objectives. As a result of such circumstance, the UCA creates a problem of under-deterrence of undesirable conducts.

Article 1 of the UCA sets out its objectives. This provision, states, the following:

“Article 1º.- This act has the object of protecting competitors, consumers and, in general, any person affected in his legitimate interests by an unfair competition act”

As the reader can realize, the UCA has multiple objectives by protecting competitors, consumers and any third parties affected by an unfair competition act. Now we move on to analyze each of them:

1. THE PROTECTION OF COMPETITORS.

¹⁹ Other examples considered in this provision are comparative advertisement without using “truthful and verifiable information”, “inducement” of breach of contract, “abusive use” of litigation to hinder competitor’s ability to compete, the “imposition” of “disadvantageous conditions” to other businesses and imposition of “abusive clauses or conditions” to suppliers.

A standard objective of unfair competition laws is mainly focused in the private interest of competitors. In this regard, the creation of unfair competition laws is aimed to "...[protect] *individual competitors by ensuring that all market participants should fight and compete in a fair and decent manner in accordance with the rules of the 'game' in the field of competition.*"²⁰. As a result of this approach, unfair competition laws which focus only on protecting such interests require that plaintiff(s) must be a competitor in order to have standing to seek remedies (such as injunctive relief and compensation for damages) under this kind of laws²¹.

2. THE PROTECTION OF CONSUMERS.

A second objective of the UCA is to protect the public interest of consumers. Despite the fact that this approach has taken an increasing importance thanks

²⁰ DE VREY, Rogier W., *"Towards a European Unfair Competition Law. A Clash between Legal Families"*, Martinus Nijhoff Publishers, Leiden and Boston, 2006, p. 230.

²¹ The U.S. Federal Law seems to follow similar orientation. Indeed, The Lanham Act, which in §43(a) regulates unfair competition at federal level, states in §45 that "...[t]he intent of this [Act] is to [...] **to protect persons engaged in such commerce against unfair competition**" (emphasis added) 15 U.S.C. §1127, final paragraph.

As a result of this approach, most of U.S. case law had held that consumers lack standing for claims based on §43(a) of the Lanham Act. See for instance *Serbin v. Ziebart International Corp.*, 11 F.3d 1163 (3d Cir. 1992); *Colligan v. Activities Club, Ltd.*, 442 F.2d 686 (2d Cir. 1971); *Dovenmuhele v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697 (7th Cir. 1989).

to recent developments within other jurisdictions²², it comes from a long-standing tradition. As U.S. Supreme Court recognizes:

*“The law of unfair competition has its roots in the common-law tort of deceit: its general concern is with **protecting consumers** from confusion as to source. While that concern may result in the creation of “quasi-property rights” in communicative symbols, **the focus is on the protection of consumers...**”*²³ (emphasis added)

The underlying idea behind this approach is that unfair commercial practices, if successful, may influence consumers’ transactional decisions by means that unduly distort their capacity for making an informed and free choice between competing products or services²⁴. This approach seems to justify the intervention of public agencies in order to monitor markets and the imposition of penalties²⁵. Furthermore, this approach explains why other people than competitors could bring an unfair competition claim against a market agent (e.g., consumer associations²⁶)

²² That seems to be the case of, for instance, the Unfair Commercial Practices Directive. Recital 8 of the states explicitly that the Unfair Commercial Practices Directive “...*directly protects consumer economic interests from unfair business-to-consumer commercial practices*. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers.” (emphasis added). Recital 8, Unfair Commercial Practices Directive.

Similarly, even the U.S. legislation that seem to be, at the first glance, more focused on the private interests of competitors empower public agencies (such as the Federal Trade Commission) to tackle unfair and deceptive commercial practices. See KITCH, Edmund W. and PERLMAN, Harvey S., *“Intellectual Property and Unfair Competition”*, 5th edition, Foundation Press, New York, 1998, pp. 155 – 164.

²³ *Bonito Boats Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), p. 157.

²⁴ See recitals (7) and (14) of the Unfair Commercial Practices Directive.

²⁵ See for instance, article 19 of the Unfair Commercial Practices Directive.

²⁶ That is, for instance, the case of the Spanish Unfair Competition Act. See article 19, letter a) Act No. Act 3/1991, of January 10, of Unfair Competition. Official State’s Bulletin No. 1, January 11, 1991, pp. 959 - 961.

3. THE PROTECTION OF ANY OTHER PERSON WHICH WHOSE LEGITIMATE INTEREST ARE AFFECTED.

Finally, this act protects the interests of any third party (different from the infringer's consumers and competitors) whose legitimate interests are affected.

The Legislative History of the UCA provides little information about the inclusion of this objective.

However, the inclusion of this third objective can provide efficient and effective remedies to people that otherwise would have to seek recourse in the general legal system. An example of such case is the unauthorized use of the so called "image rights" of people: imagine a case in which a famous person appears in an advertisement endorsing a product despite that the person did not consent about the use of his/her image in such a manner. Some courts in the United Kingdom have opined that this could be considered an unfair commercial practice which allows the affected person to enjoin the use of his image and to seek damages²⁷. To be sure, under this example the affected person could seek remedies under the general rules of the Chilean Legislation by the constitutional "Action of Protection" (Recurso de Protección) to enjoin the use of his/her image in a product²⁸ and seek damages through the general tort rules set out within the Civil Code. However, the remedies set out within the UCA provide the advantage of a shorter procedure and more flexible evidence rules to the affected person in order to claim damages, something that would deter market agents in pursuing this kind of behavior.

4. THE CONSEQUENCES OF THE APPROACH TAKEN BY THE UCA: RULES IN STANDING AND REMEDIES.

²⁷ See *Edmund Irvine v. Talksport*, [2002] E.M.L.R. 32 ; [2002] 2 All E.R. 414.

²⁸ Indeed this has been the remedy seek by people affected by this kind of acts in Chile. See SUPREME COURT OF JUSTICE, *Christian Antonio Caroca Rodríguez con Electrónica Sudamericana Limitada*, docket No. 2506-2009, issued on June 9, 2009.

The mixed approach undertaken by the UCA has major consequences regarding the standing to sue and the available remedies under the CPA. Indeed, according to the UCA, any person whose legitimate interest are directly threatened or damaged by an act of unfair competition have standing to sue the infringing party²⁹ and seek the remedies set out in article 5 of the UCA, *i.e.*, (1) The enjoyment of the unfair competition act or its prohibition, in case that the act has not been put into practice; (2) The declaration of the existence of an unfair competition act, if the disruptive effect produced by the act remains; (3) The removal of the effects produced by the unfair commercial practice (for instance, by the publication of the condemning ruling or a rectification on any disparaging statement) and; (4) The indemnification of damages produced by the unfair competition act.

Furthermore, the multiple objective approach of the act explains two additional rules regarding standing and remedies:

(1) The first is that business associations are empowered to seek remedies (except damages) on behalf of its associates provided that such entity proves two things (a) that within its functions it has the duty of protecting their associates and (b) that their associates' legitimate interests are directly and personally threatened or affected by the alleged unfair commercial practice³⁰.

(2) The second rule is enshrined in article 10 of the UCA. According to this norm, after the existence of an unfair competition act has been declared, the Civil Court that heard the case is required to submit the record to the National Economic Prosecutor's Office who has the faculty (not the obligation) to decide, in accordance with the seriousness of the infringement and the extension of the damages, whether or not to bring a case against the infringer before the Chilean Competition Tribunal to sanction the infringer's action

²⁹ Article 6, paragraph 1, UCA.

³⁰ Article 6, para. 3, UCA.

with the imposition of fines that can range between 2 to 1,000 Monthly Tax Units³¹ (*i.e.*, between USD 156 to USD 77,965 approximately³²)

Both rules can be explained as a result of the concern of protecting the private and public interests in case of rule (1) and (2) respectively. Furthermore, both rules can be understood as a way to deter unfair commercial practices: Rule (1) by increasing infringer's costs of committing an offense by raising the level of policing and Rule (2) by penalizing with fines unfair commercial practices.

However, the rules of standing and remedies set out in these provisions are somewhat inconsistent with the objectives claimed by the deterring objective of this law and the interests that protect.

For instance, as we were able to point out before, business associations are empowered to sue on behalf of its associates that compete with the infringer. Nevertheless, this does not happen in the case of consumers: neither the Consumer Protection Agency nor the consumer associations have standing to sue on behalf of the consumer's interests. This greatly diminishes the capacity of the UCA to deter the existence of unfair commercial practices that affects consumers since the costs involved in litigation stand as an important disincentive for individual consumers to bring actions under this act. This leads to the problem of under-policing which lowers infringer's costs (*i.e.*, the likelihood of being sued and sanctioned) for committing this tortious act.

Furthermore, it seems rather inconsistent with the aim of deterring unfair competition practices that victims of the unfair competition act are not allowed to ask for the imposition of fines against the infringer or recover punitive damages.

³¹ In order to determine the amount of the fine, the Competition Court has to take into account the economic benefit obtained by the infringer by the conduct, the seriousness of the infringement and whether the infringer is a recidivist. Article 10, para. 3, UCA.

³² These numbers are the result of the multiplication of the Monthly Tax Unit of the month of June 2011 (CLP\$39,138) and the exchange rate of the U.S. dollar vs. the Chilean peso of January 14, 2012 (USD\$1 = CLP\$501.99)

This leads to an asymmetric set of rules about standing and remedies that do little to provide a coherent framework to deter conducts that provide no social utility. Indeed, it seems that this framework of rules lower infringers' costs of committing an unfair competition act by (1) decreasing the policing of those acts (and therefore decreasing the likelihood of being punished) and (2) decreasing the expected costs of punishment by providing neither punitive damages nor effective penalties.

III. CONCLUDING REMARKS.

This brief essay underscores a series of failures of the UCA. First, it shows there exists a good deal of uncertainty about the practices that are punished under this law which stifle strong competition. This problem is only increased by the lack of a proper institutional design to fill the gaps that the UCA leaves. Secondly, the UCA's asymmetric set of rules about standing and remedies do little to provide a coherent framework that could be able to deter real acts of unfair competition.

For the reasons underlined above, there is a need to review the UCA and produce some modifications of the Act:

First, it seems desirable to provide further detail about the definition of "unfair competition" stated in article 3 of the UCA. In this regard, it would seem useful to have further explanation of the requirements considered in it.

Additionally, the examples of unfair competition acts provided in article 4 of the UCA should be subject to review, adding some standards of interpretation in regard to the "average consumer" benchmark, clarifying whether any confusion is needed to be in front of a passing off offense, answering whether proof of some harm is needed in a case of disparagement, etc.

Furthermore, it seems clear that there is a need to discuss the possibility to give exclusive jurisdiction to the Competition Tribunal to hear unfair

competition cases. At least, the latter tribunal has experience with unfair competition claims and it would be better suited to balance the interest of promoting strong competition and the deterrence of unfair practices. Furthermore, since it is just one tribunal, it is more likely to create a consistent body of case law that could increase legal certainty.

Finally, there is a good case for discussing the existing remedies and rules of standing in order to create a framework that could effectively deter unfair competition practices. In this regard, it would be relevant to discuss the establishment of fines or punitive damages. Furthermore, since consumers' interests are a central objective of the UCA, it seems reasonable to provide standing to the Consumer Protection Agency and consumer association in order to act on behalf of consumer's interests.

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