IT'S ALL ABOUT EFFICIENCY: THE AIM OF COMPETITION LAW IN PERU

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«No wind is favorable to the man who doesn't know which port he's sailing to»
Lucius Annaeus Seneca

Abstract

Competition Policy is a diverse, complex field. Its scope runs from sophisticated economic techniques to detailed legal procedures, and from the psychological factors involved in a dawn raid to the sleuthing skills required in the design of a sound research strategy. However, above all the rules and topics that structure Competition Law, the aim – i.e. the main objective – is essential to understand how it is applied and, more important, why it is applied, in what context and to what extent. Accordingly, the following pages discuss the aim of Peruvian Competition Policy, for the understanding of the basis of our competition law, and so, for a deeper comprehension of the study and discussion of particular institutions of Peruvian Competition Law. This article discusses what the Competition Act and the Competition Authority in Peru have assumed as the goal of Peruvian Competition Policy, drawing some concern on its adherence to the classic – and somewhat surpassed – Chicagoan notion of efficiency. The article supports the defense of efficiency – under a liberal «consumer welfare» approach – as the only proper aim for Competition Policy. Finally, it proposes a systemic relation between Competition Policy and other public policies with harmonic or discordant goals.

Keywords: Peruvian Competition Policy, Peruvian Competition Act, Efficiency, Public Policy

I. INTRODUCTION

Competition Policy is quite a diverse, complex field. Its scope runs from sophisticated economic techniques to detailed legal procedures, and from the psychological factors involved in a dawn raid to the sleuthing skills required in the design of a sound research strategy. This is a fact for the numerous competition authorities around the world, and the

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Peruvian Competition Authority – the Free Competition Commission within INDECOPI[2] – is no exception. So how could such an abstract subject like «the aim of competition law» in any particular jurisdiction be worth dealing with? Certainly, it is worth a lot.

The answer to that question is in this paper. A few months ago, two leading specialists[3] came to INDECOPI to illustrate the competition policies in their respective jurisdictions (the United States and the European Union), the most developed competition law systems in the world. The very first session was set for the discussion of the aim of competition policy in their jurisdictions. I wondered why? The answer came naturally: because above all the rules and topics that structure Competition Law, the aim – i.e. the main objective – is essential to understand how it is applied and, more important, why it is applied, in what context and to what extent. Tools can be useful in a strong hand, but it is the mind that is responsible for putting them to successful use.

Regarding Peruvian Competition Policy, unlike other jurisdictions, in Peru most academics and practitioners had peacefully accepted the notion that economic efficiency is the only goal of our competition law. Moreover, and interestingly enough, unlike the most representative jurisdictions, it seems that the discussion around «total welfare» vs. «consumer welfare» has shifted in favor of the former.

Considering that, the following pages discuss the aim of Peruvian Competition Policy, in order to show that nothing other than efficiency is the right goal for it. However, fine-tuning is needed in favor of the «consumer welfare» standard, for only such an approach is compatible with the very essence of Competition Policy: preventing consumers from being harmed by the effects of market power arising from any impairment to the competitive process.

Additionally, applicable rules are proposed for cases where the Peruvian Competition Authority must make coherent decisions when Competition Policy addresses conduct and markets that are linked – directly or indirectly – to other social policies and there is no explicit applicable provision in the Law.

II. THE IMPORTANCE OF DEFINING POLICY GOALS

From the epigraph of this paper, it is clear that any human enterprise – given that man is a being of action – should follow a path towards a particular end, most generally,

[2] INDECOPI is the acronym for Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, which is usually translated to English as "National Institute for the Defense of Competition and the Protection of Intellectual Property".

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to fulfill a particular need. That rule is also true for public policies, as they result from public consensus about what the authorities should concern and what public needs are deemed to accomplish. In this regard, it is necessary to identify «the north» that the public authorities are pursuing and which citizen's legitimate expectations may be affected as a result of such policies. As a Peruvian scholar pointed out:

> *"A legislative or administrative authority should have a clear picture of what is the north of the public policy he is to implement or to enforce. If he fails to acknowledge its north, if he does not have a reference point to guide him in the right path the public policy should follow, he will be lost, [and] he would not even know what direction to follow. Such lost authority would enforce its policy in an arbitrary direction, spinning on itself, going backwards and forwards, «shooting» in all directions, even shooting himself. His lack of a north would result in more harm than benefits".*[4]

From our perspective, the importance of defining policy goals is threefold:

- **Guidance**: The ultimate goal of a public policy guides its entire system.
- **Firewall**: Defining a proper goal helps to control the power given to the authority.
- **Connecting point:** The defined goal serves as a communication link with other policies and allows the establishment of adequate relations between them.

As shown in the next pages, these principles are fully applicable to Competition Policy.

2.2. What is competition policy?

To start with, it is essential to clarify some fundamental concepts. Let us outline the idea of «Competition» as defined by the Merriam-Webster Dictionary:

> *"The effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms"*[5].

[4] From Spanish: «Una autoridad legislativa o administrativa debe tener claro cuál es el norte de la política pública que va a implementar o aplicar. Si no conoce su norte, si no tiene un punto de referencia que lo guíe respecto del rumbo que debe seguir la política pública, estará extraviado… [y] ni siquiera sabrá qué rumbo seguir. Esta autoridad extraviada ejecutará la política en cualquier dirección, dando vueltas sobre lo mismo, yendo y retrocediendo, disparando a todas partes, incluso a sí mismo… La falta de norte de su actuación terminará generando más perjuicios que beneficios». Hugo Gómez (2007). «El Norte de las Políticas Públicas: Orientando a las autoridades de competencia, protección al consumidor y regulación», *Revista de la Competencia y la Propiedad Intelectual*, Año 3, No 5, p. 174. Translation mine. Hereafter, all quotations from statute titles, legal provisions, papers and other documents in Spanish will be my own translation, unless otherwise noted.

[5] «Competition», Merriam-Webster, last accessed on 6 Nov. 2013: http://www.merriam-webster.com/dictionary/competition

More generally, the Royal Spanish Academy defines it as:

> *"Dispute or contest between two or more people about something"*[6].

We agree. Competition is the idea of rivalry that takes part in our daily lives. We compete for everything from children to seniors: we seem to compete for the love of our parents, for the best diploma, the best job, for a loved one, and even the best social and family status. At election time, we participate in a very important contest for our societal life, communicating our preferences for certain political leaders. Competition is therefore a process that underlies different spheres of our lives, and urges us to bring our resources and our expectations to a process of rivalry that we usually want or need, whether consciously or instinctively.

In markets, competition manifests itself when, in the search for profitability, firms strive for the preferences of consumers: the winner is the one we choose to give our money to in exchange for its goods or services. The process of competition in markets is seen as a good thing, not only because it leads to the satisfaction of consumer needs, but also because of the efficiencies that enhance social welfare along the way. In an ideal world –i.e. under perfect competition[7] – rational, perfectly-informed consumers and producers would lead society to a state of maximum welfare: a Pareto optimality state[8].

However, as we know, the world is not ideal, nor it is so from the perspective of economics. Nevertheless, having realized what a competitive market implies in terms of development and welfare, the US[9], then European countries, and now more than a hundred countries have established competition policies in their respective jurisdictions[10].

In that regard, Competition Policy is a tool for the enhancement of economic development, in a context of market freedom, through the promotion of rivalry and the prohibition of anticompetitive behavior[11]. From our perspective, the main concern of Competition Policy lies in avoiding market power concentration for reasons other than economic efficiency, in order to enhance consumer welfare. However, in the following

[6] From Spanish: «Disputa o contienda entre dos o más personas sobre algo». «Competencia», Real Academia Española, last accessed on 6 Nov. 2013:http://lema.rae.es/drae/?val=competencia

[7] Disregarding – of course – the problem of income distribution.

[8] For a simple explanation of the perfect competition model and its implications, see AREEDA, Kaplow and Edlin (2004), «*Antitrust Analysis, Problems, Text and Cases*», Sixth Edition, New York: Aspen Publishers, p. 5.

[9] Having a less famous – and unsuccessful – antecedent in the Canadian Act for the Prevention and Suppression of Combinations formed in Restraint of Trade of 1889.

[10] Of course, each country had established provisions according to their own context and could therefore be subject to a comparative study from many perspectives: from the degree of interventionism to the content of the provisions, the reliance on case law and, of course, the general goal of the competition policy.

[11] In most developed countries competition policy includes the control of market structure as well.

pages, it can be appreciated how the most representative jurisdictions, the US and the EU, have been far from having such a unique and defined goal.[12]

2.3. Generally accepted goals of competition policy

2.3.1. Competition policy as a social policy

Before analyzing how Competition Policy has been seen in the most relevant jurisdictions, it is essential to remember that it is a social policy because its concerns have to do with the welfare of society. Not only from its monetary sense, but also regarding the degree of producers and consumers' freedom to interact in the market: freedom of choice, property and economic power are all aspects underlying Competition Policy.

Accordingly, it is necessary to notice that, despite the intent of this and other works to discuss the competition policy from a somewhat formal economic approach, some other non-economic issues have found more or less space, explicitly or implicitly, formally or informally, in many jurisdictions around the world.

Moreover, it is worth noticing that the answer to the question «what goals should competition policy pursue?» is not unambiguous in the majority of jurisdictions with competition rules. As we have seen, economic goals are social goals, but non-economic goals are still social goals. Ultimately, though most of such jurisdictions share common ideas about what competition policy is aimed at, it is first up to their legislative and executive bodies in the first place, and then to the enforcement authorities, to define what the priorities and capabilities of their respective jurisdictions are; thus, striking the appropriate balance and issuing the set of rules most likely to fulfill such purposes[13]. This is proof of how complex Competition Law could become from a wide perspective. Another proof of such complexity is what has happened in the most representative jurisdictions regarding competition policy: the US and the EU.

[12] When concerned with decisions by consumers and producers, Competition Policy strongly relies on microeconomic postulates and topics such as decision theory and game theory. New studies are analyzing the relevance of behavioral economics for antitrust issues.
From a broader point of view, competition policy could be assessed as the policy regarding how competitive a country's economy develops, thus giving an emphasis to macroeconomic issues. However, that would be properly a «competitiveness policy» and it is not within the scope of the present article.

[13] That being said, it is necessary to remember that the task of scholars is to make those public authorities aware of the risks and opportunities involved in the design and implementation of a competition policy and to help them to meet that responsibility as well as possible. The present work is aimed at doing that.

2.3.2. The US approach[14]

As is widely recognized, Antitrust Policy appeared as an attempt to control the great power of trusts in the US. The Sherman Act was not intended to promote efficiency as such, but its primary concern was to protect small, weak companies from the (not always lawful) business capabilities of the bigger, well-founded and resourceful companies.

With this principle in mind, in the first half of the 20th century, the Antitrust Policy developed as a public policy aimed at the dispersion of economic power, for it was thought that only an atomized market made up of small businesses could guarantee the basic economic liberties of citizens. Therefore, Antitrust Policy was seen as the «*magna carta of free enterprise*». As Sullivan and Hovenkamp point out:

> *"Competition was defined as the promotion of equality among businesses through the dispersion of economic power. Free access to markets was an objective. Economic power was the evil to be condemned. Freedom of individual choice, distributive justice, and pluralism were core values. The small entrepreneur was favored and protected against the encroaching economic leverage of the larger concentrated entity, even if the result was increased cost to the consumer".*[15]

Indeed, in this early stage of Antitrust Policy, the concern of enforcers and policy-makers was the existence and protection of competition by protecting competitors, disregarding the real outcome borne by society. Interestingly enough, in *Brown Shoe* the Supreme Court expressly adhered to such rationale by not (only) implicitly but explicitly recognizing and accepting the potential harm to consumers arising from it:

> *"We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision".*[16]

To some extent, this approach was reinforced by the Harvard structural, less systematic approach to competition in markets. In the second half of the century, however, the development of the Economic Analysis of Law and the several principles introduced in the

[14] The origins and evolution of antitrust in the US are finely treated in well-known works. Here we just present some facts to keep in mind in order to better understand the content of the present work. For known reasons, in this section we are using the phrase «Antitrust Policy» instead of «Competition Policy».

[15] Sullivan Thomas and Hovenkamp (1989), «*Antitrust Law, Policy and Procedure*», Second Edition, Virginia: The Michie Company Law Publishers, p. 2.

[16] Brown Shoe Co. Inc. v. United States, 370 U.S. 294, 344 (1962).

study of antitrust issues by the now well-known Chicago School[17] led to a revolution in the *status quo* of antitrust case law:

> *"From 1976 to 1978, Posner, Bork and Areeda each published seminal treatises arguing that antitrust should be dominated by a single goal (consumer welfare) and a single methodology (economic analysis). Given these developments, it is not surprising that Kowka and White (1989) contend that an «antitrust revolution» began in the mid-1970s".*[18]

Precisely, many of the most classical principles of Chicago School of Antitrust Analysis, found in works such as Judge Richard Posner's *Antitrust Law* (1976) and Judge Robert Bork's *The Antitrust Paradox* (1978), had a great impact on US Antitrust Policy. These and other scholars showed how the Antitrust Policy then in force was technically flawed, incoherent and harmed market development and consumer welfare. As Bork (1993) stated:

> *"'Competition' the courts assured us, meant the preservation or comfort of small businesses, the advancement of first amendment values, the preservation of political democracy, the preservation of local ownership, and so on infinitum. Judges could and did choose among the items they had invented and placed in this grab bag in order to legislate freely. Cornucopias have their attractions but, when it comes to finding and applying a policy to guide adjudication, horns of plenty make anything resembling a rule of law impossible."*[19]

They aimed at establishing new "non populist" principles and rules for a true Antitrust policy system based on welfare enhancement. A great early victory for the Chicago School was, for instance, the Supreme Court acknowledgment in *Sylvania* (1977)[20] that "*departure from the rule of reason standard must be based upon demonstrable economic effect, rather than… upon formalistic line drawing*" therefore shattering the practice prevailing until then.

Even more significantly, the Supreme Court, quoting Bork's work, decided in *Reiter v. Sonotone* (1979)[21], that «*Congress designed the Sherman Act as a consumer welfare prescription*»[22]. Such a declaration indicated the acknowledgement that the single – or

[17] The Chicago School of Antitrust Analysis developed, as Richard Posner acknowledges, from the seminal works of Aaron Director (founder of the Journal of Law & Economics) and further work from Bowman, Bork, McGee and Telser, among others, including George Stigler. See Richard Posner (1979), «The Chicago School of Antitrust Analysis», *University of Pennsylvania Law Review*, Vol. 127, No. 4, Apr. 1979, p. 925 - 926. Posner himself is one of the most famous members of the Chicago Antitrust School.

[18] Kirkwood, John (2004), «Consumers, Economics and Antitrust», *Research in Law and Economics*, Vol 21: Antitrust Law and Economics, Elsevier, p. 3. Internal quotations omitted.

[19] See: Bork, Robert (1993), «*The Antitrust Paradox: A Policy at War with Itself*», New York: The Free Press, p. 427.

[20] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977).

[21] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[22] This statement has been included in subsequent opinions such as NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 106 - 107 (1984), and is in the basis of Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) and Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company, Inc. 549 U.S., 05-381 (2007).

at least the most relevant – goal of Antitrust Policy was the enhancement of consumer welfare through the protection of competition, overruling a path that could have led to consumer welfare harm in the name of decentralized markets.

Although the classic principles of the Chicago School have been a matter of extensive discussion, and many of them have been relativized or enriched (by what is now known as the *post Chicago School*), the acceptance of consumer welfare as the ultimate goal of Antitrust Policy has now seen more than thirty years of general acceptance by US courts and enforcers. Indeed, Hovenkamp observed in 2005:

> *"After thirty years, the debate over antitrust's ideology has quieted. Most now agree that the protection of consumer welfare should be the only goal of antitrust laws".*[23]

That notwithstanding, it is necessary to observe that the concept of «consumer welfare» adopted by the Supreme Court differed from what Judge Bork actually wrote about. That will be explained further in this work.

2.3.3. The EU approach

In contrast to the US, the development of Competition Policy in the EU is not strongly related to the adherence to one or other economic school of thought and therefore there have not been especially dramatic fast changes in its history. This characteristic is the consequence of a system that relies more on statutory rules (not only in its case law) and that have strong directions and boundaries under the framework established by its founding treaty (the Treaty of Rome of 1957[24]) and its amendments. As the Council of the European Union has stated (regarding merger regulations):

> *"The Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union [common market and other principles]".*[25]

Extending such rationale to wider Competition Policy, it is necessary to recall that some relevant goals of the Treaty (Article 3) are:

> *"(c) The abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;*

[23] Hovenkamp, Herbert (2005). «*The Antitrust Enterprise: Principle and Execution*», Harvard University Press, book jacket.
[24] Treaty establishing the European Economic Community (TEEC), signed on March 25th 1957 and effective from January 1st 1958. It was renamed by the Maastricht Treaty (1993) and succeeded by the Treaty of Lisbon (2009).
[25] Council Regulation 139/2004 on the control of concentrations between undertakings of 20 January 2004, (23).

> *(f) The institution of a system ensuring that competition in the common market is not distorted"*

Such goals, coherent with the then dominant ordoliberalism influence, are the natural consequence of the very reason for the existence of the EU, and the process of elimination of the various barriers that once divided the European countries. Accordingly, the characteristic features of the EU approach to Competition Policy are its plurality of goals and its single-market baseline.

Indeed, the protection and promotion of a single internal market was established as a main concern for EU Competition Policy in an early case regarding a vertical restriction, *Consten and Grunding v. Commission* (1966)[26] where the European Court acknowledged that:

> *"The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85(1) [TFUE 101.1] is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process".*

Though the aim of promoting the single market has been recognized to the present[27], other goals have found their way into Competition Policy as well. An interesting one is the protection of small companies by means of favorable treatment under Competition statutes, including the right to enter into special agreements and the existence of *de minimis* rules. As Rodger stresses:

> *"It is derived from the overall aim of integrating the markets of Member States to create a more united Europe. The concept of "small is beautiful" seeks to foster smaller companies' ability to compete more directly with established powerful companies. One way that it can achieve this is by responding more leniently to forms of cooperation between smaller firms, which might involve the sharing of technology. The promotion of SMEs (Small and Medium-sized Enterprises) is a particular goal of the Community authorities as it is believed that such companies may start to compete across national frontiers and hence indirectly support the market integration policy".*[28]

[26] Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community, Judgment of the Court of 13 July 1966, CELEX 61964J0056, p. 340.

[27] See Football Association Premier League Ltd and Others v. QC Leisure and Others, C-403/08, Judgment of the Court of 4 October 2011, Official Journal of the European Union of 26 November 2011, C 347/2.

[28] Rodger B.J. (2000), «Competition Policy, Liberalism and Globalization: A European Perspective», *Columbia Journal of European Law*, Vol 6 No 3, Fall 2000, p. 304.

Such a goal could be traced to the promotion granted by the Treaty (article 157.1):

> *"The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:*
>
> *— encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings".*

This concern for decentralized markets (now excluded from US Competition Policy) reveals that sophisticated economics shares its presence with other methodologies more likely to advance goals other than economic efficiency alone. As Fox points out:

> *"While economics has a role in EU analysis, it is much less center stage than in the United States. The European Union is concerned about competitive opportunities for small and medium-size firms, raising the economic level of worse-off nations, and general notions of fairness".*[29]

Nonetheless, the goal of advancing consumer welfare has gained special relevance in the last decades and has now been recognized as a cornerstone of competition enforcement. This converging point, with foreign competition policies, was explicitly acknowledged by Commissioner Neelie Kroes in her 2005 speech for the European Consumer and Competition Day:

> *"Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy. And of course our anti-cartel work is clearly focused on preventing unfair profits being creamed off markets at additional and direct cost to consumers".*[30]

In the same way, it has been stated in the OECD European Union Competition Law and Policy Peer Review (2005) that:

> *"[European] Policy statements now stress efficiency, consumer welfare and competitiveness. The mission statement of DG Competition sets out a number of possible goals, including in the same sentence both the welfare of consumers and the competitiveness of the European economy".*[31]

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[29] Fox, Eleanor (1997), «*US and EU Competition Law: A Comparison*, Global Competition Policy», Edward Graham and David Richardson (Editors), Institute for International Economics, p. 340.

[30] Kroes, Neelie (2005), «*European Competition Policy: Delivering Better Markets and Better Choices*», London, 15 September 2005. Available at: http://europa.eu/rapid/press-release_SPEECH-05-512_en.pdf

[31] OECD, *European Commission - Peer Review of Competition Law and Policy* (2005). Available at: http://www.oecd.org/daf/competition/prosecutionandlawenforcement/35908641.pdf.

As it can be seen, though it has not abridged other goals, EU Competition Policy in general does not conflict anymore with US Competition Policy because both of them seek – as a primary goal – to enhance consumer welfare through the protection of the competitive process. As we will see in the next section, this is the very aim of Peruvian Competition Policy, though an interpretation margin persists.

III. PERUVIAN COMPETITION POLICY: AN EXPLANATION

3.1. The Peruvian approach

The goal of Peruvian competition policy is to promote economic efficiency by protecting the competitive process. More than a primary goal, efficiency is 'the north' of the policy. Let us examine the applicable law.

Article 61 of the Political Constitution of Peru (1993) explicitly addresses the role of the government regarding anticompetitive behavior:

> *"The State facilitates and guards free competition. Fights all the practices that restrict competition and the abuse of dominant or monopoly position. No law or agreement shall authorize or establish monopolies".*[32]

Based on this constitutional provision, the first article of our Competition Act[33] establishes:

> *"**Article 1. The aim of the Act***
>
> *The present Act forbids and punishes anticompetitive behavior in order to promote economic efficiency in the markets for the benefit of consumers".*[34]

Breaking down such a statement, we can schematize the aim of the Act as a three-part sequence, as follows:

[32] From Spanish:
«*Artículo 61.- El Estado facilita y vigila la libre competencia. Combate toda práctica que la limite y el abuso de posiciones dominantes o monopólicas. Ninguna ley ni concertación puede autorizar ni establecer monopolios.*»

[33] Decreto Legislativo 1034, Ley de Represión de Conductas Anticompetitivas [Legislative Decree 1034, Prosecution of Anticompetitive Behavior Act]. Hereinafter, the Competition Act.

[34] From Spanish:
«*Artículo 1.- Finalidad de la presente Ley.- La presente Ley prohíbe y sanciona las conductas anticompetitivas con la finalidad de promover la eficiencia económica en los mercados para el bienestar de los consumidores.*»

FIGURE N° 1

THE AIM OF PERUVIAN COMPETITION ACT (Art.1)

Graphic by the author.

It is easy to see that the direct goal of the law – by means of punishing anticompetitive behavior – is to promote economic efficiency, and that an indirect target – by means of promoting economic efficiency – is to benefit consumers. Even when consumers are an indirect target, the statement could be interpreted in two different ways:

> *"**The Act protects economic efficiency inasmuch as it benefits consumers**" – Consumer welfare approach.*
>
> *"**The Act protects economic efficiency for it would generally benefit consumers**". – Total welfare approach.*

In the former scenario, the competition authority would challenge behavior that affects consumer surplus through lessening the competition even when the overall efficiency is improved. In the latter, the authority will focus only on whether total efficiency gains outweigh dead-weight losses. This dichotomy could lead to uncertainty: Does Peruvian competition law seek to protect «total welfare» or «consumer welfare»?

Unlike most jurisdictions, competition law in Peru has arguably been conceived by legislators and understood by the competition authority as protecting economic efficiency in its «total welfare» approach, where «consumer welfare» is the most important but not the only part of the equation[35]. It is fair to notice that consumers welfare concerns arise in some articles of the Competition Act, but primarily to benefit defendants from absence of harm to consumers and not, *au contraire*, to condemn defendants for efficient conduct with income effects.

Instead, the Statement of Intent of the Competition Act portrays that the concept of economic efficiency, which the Act is aimed at protecting, is not restricted to allocative efficiency, but it also includes productive and dynamic (innovative) efficiencies:

[35] For a comprehensive though inconclusive discussion, see: Quintana, Eduardo (2011), «*El Objetivo de la Ley de Competencia Peruana y la Interpretación de las Conductas Prohibidas*», *INDECOPI: Revista de la Competencia y de la Propiedad Intelectual*, N° 13, Lima, Spring 2011, p. 19ff. Available in Spanish at: http://aplicaciones.indecopi.gob.pe/ArchivosPortal/boletines/recompi/castellano/articulos/primavera2011/EduardoQuintanaSanchez.pdf

> *"In establishing the promotion of economic efficiency through the protection of economic process as its aim, the Act seeks for the competition dynamism to lead to an efficient outcome of markets. Economic efficiency could be defined through its three components: productive efficiency, innovative efficiency and allocative efficiency.*
>
> *The prohibition of anticompetitive practices is aimed at obtaining an efficient outcome of markets, which have an impact on consumers' welfare".*[36]

This would mean that, in finding whether an efficiency defense could justify a restriction to competition, not only the consumer benefits or harm can be part of the balance, but also other efficiencies related to producer welfare that could only indirectly benefit consumers.

Another example of this position could also be tracked to a decision of the Free Competition Commission from the first half of the 2000s:

> *"In terms of competition policies, the result of protection of free competition and efficiency of companies will be the total surplus maximization (welfare of society), which includes the consumers welfare maximization, the latter being a necessary but not sufficient condition. In that regard, the aim of competition law is to protect and preserve the competitive process, for it is through this [process] that social welfare, as a whole, is maximized, and consumer welfare in particular".*[37]

Similarly, while deciding a case of excessive pricing, the Peruvian Competition Tribunal observed that:

> *"The economic competition becomes valuable in itself, and so the development of markets has to be based on competitors' rivalry, who will battle to get the consumers preference. (…) Legal theory shows that the aim of competition policy is to promote efficiency in its economic sense and therefore to achieve economic welfare for society as a whole. This economic welfare comprises what economic theory refers to as the sum of the consumers and producers welfare. (…) Therefore, competition laws seek to eradicate anticompetitive behavior inasmuch as it harms and distorts the competitive process, and therefore injures economic efficiency and so the welfare of society".*[38]

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[36] From Spanish: «Al establecerse como objetivo la promoción de la eficiencia económica a través de la protección del proceso competitivo, lo que se procura es permitir que de la propia dinámica de la competencia se obtenga un desempeño eficiente de los mercados. La eficiencia económica puede ser definida a través de tres componentes: eficiencia productiva, eficiencia innovativa y eficiencia asignativa. (…) [L]a prohibición de aquellas conductas que dañan el proceso competitivo tiene como objetivo permitir un desempeño eficiente de los mercados, lo que redunda en el bienestar de los consumidores.» Peruvian Competition Act, Statement of Intent, pp.11 - 12.

[37] Resolution 054-2003-INDECOPI/CLC, voted on Dec 10th, 2003, num. 86 [internal quotes omitted].

[38] Resolution 0027-2008/SC1-INDECOPI, voted on Oct 26th, 2008, num. 33 - 35.

No recent decisions have contradicted this approach. Therefore, we can argue that the total welfare standard is still the current approach at INDECOPI.

Nevertheless, this approach has never meant to state that consumers were left unprotected. Most common cartels do not require a verification of whether efficiency gains could surpass dead-weight losses or not; and few modes of exclusionary dominant behavior have become a real concern to the competition authority in the last decade. Moreover, considering that no merger control has been implemented other than for the electricity sector, Peruvian case law has not yet had the opportunity to apply the «total welfare» approach as the ultimate tool to decide a complex challenged behavior. It is economic efficiency that the competition authority has had in mind, and thus its decisions have followed this path.

3.2. The explanation

As it can be seen, Peruvian legislators and the competition authority have been prone to accept economic efficiency – in its total welfare sense – as the only goal of competition policy.

From our perspective, this approach is the result of two facts:

- The change in economy orientation in Peru, which went from a dramatic free-fall to its good economic performance.
- Generally speaking, INDECOPI, the Peruvian Competition Authority, has ascribed the classic Chicagoan antitrust perspective.

To understand why in Peru it does not feel unnatural to have an efficiency-oriented competition law and even the acceptance of a total welfare efficiency approach, we need to take a look at our history. The two following episodes have a strong relationship, though the first one is broader and illustrates a dramatic change in all economic policies, and the second is narrower and only concerns competition law enforcement.

3.2.1. A change in economy orientation

In August 1990 Peru took a new path concerning its economic policy, heading directly towards open markets and economic liberalism. This historic detour is usually viewed as a strict adherence to what Williamson named «the Washington consensus»[39] [40].

[39] Williamson, John (1990), «*What Washington Means by Policy Reform*». In: Latin American Adjustment: How Much Has Happened? *Peterson Institute for International Economics*, April 1990. Available at: http://www.iie.com/publications/papers/print.cfm?ResearchId=486&doc=pub

[40] For a critical review of the process of implementation of the Consensus: Noejovich, Héctor (2010), «*El Consenso de Washington: antes y después. El caso de Argentina y Perú en el período 1990 – 2008*», PUCP: Contabilidad y Negocios (5) 9. Available at: http://revistas.pucp.edu.pe/index.php/contabilidadyNegocios/article/download/211/205

Unlike many other countries – not only in Latin America but other parts of the world as well – the shift from a centralized and highly controlled economy to a free and modestly supervised one was not a slow paced transition. Instead, it was a rather fast and somehow reckless process. Hence such dramatic economic measures adopted by the Peruvian Government are widely known as «el shock».

The most important reason for our confidence in efficiency-driven open markets is the disastrous experience we had under the planned economic venture under our governments in the 70s through the 80s. No paper will ever show the real dimension of scarcity and poverty resulting from the economic policies of such governments. However, we have prepared the following chart to summarize their most important «achievements»:

TABLE N° 1

PERU: ECONOMIC INDICATORS 1988-1991[41][42]

Indicator	Value	Remarks
GDP per capita (USD)	595 (1988) 969 (1989) 1 213 (1990) 1 562 (1991)	The worst indicators in 30 years. In 2012 GDP per capita was estimated in USD 6 796, representing a growth of 1142% from its lowest point at 1988.
Inflation	1 722,3% (1987-1988) 2 775,3% (1988-1989) 7 649,7% (1989-1990) 139,2% (1990-1991)	The highest monthly inflation rate was 397% (Aug. 1990), when prices doubled in 13,1 days, being the worst reported hyperinflation episode in the history of Latin America and the fifth in the world for the second half of the twentieth century[81]. Interestingly, in 2012 Peru was among the best ranked nations in inflation rate control with a 1, 5% rate[82].
Unemployment / Underemployment (% of labor force)	No data (1988) 7,9 / 73,5 (1989) 8,3 / 72,8 (1990) 5,9 / 78,5 (1991)	In 2012, the unemployment rate was 6,8% while the underemployment rate was around 38% (BCRP).
External debt (% of GDP)	86,3 (1988) 66,9 (1989) 62,6 (1990) 60,7 (1991)	In 2012, external debt was just 9,5 % of GDP (BCRP).

Sources: The World Bank, Data[43] / Banco Central de Reserva del Perú - BCRP[44], Institutional Memories[45].

[41] Hanke, Steve and Nicholas Krus (2012), «World Hyperinflations», Institute for Applied Economics, Global Health, and the Study of Business Enterprise, Johns Hopkins University: August 2012. Available at: http://www.cato.org/sites/cato.org/files/pubs/pdf/WorkingPaper-8.pdf .

[42] World Economic Forum, Global Competitiveness Report 2011-2012, p. 293 and 424. Available at: http://reports.weforum.org/global-competitiveness-2011-2012/

[43] The World Bank Data. Available at: http://data.worldbank.org/indicator/NY.GDP.PCAP.CD

[44] Peruvian equivalent to European Central Bank and US Federal Reserve System.

[45] Banco Central de Reserva del Perú, Institutional Memories. Available at: http://www.bcrp.gob.pe/publicaciones/memoria-anual.html (in Spanish).

Just to illustrate how our currency lost its value, the «inti» started in 1985 with a value of 1 000 «old soles» or 10/65 of one US dollar and by mid-1990 its value was about 10/500 000 of one US dollar. During those years, there were people carrying millions of «intis» just to buy dairy products and bread. By means of law[46] the «new sol» was introduced with a value of 1 million «intis» or 1 billion of «old soles» per «new sol».

After «el shock» arrived, Peruvians suffered a dramatic 3 year period of economic changes, as well as the «el niño» climatic phenomenon and the war against terrorism, not to mention the political disorder arising from the «auto coup d'etat»[47]. Such critical measures led to the stabilization of our economic arena, the first relief being the reinsertion of Peru into the international credit system, though no significant economic growth would seem to appear for several more years.

In 1991, the Government issued Legislative Decrees that changed the field of the Peruvian economy by destroying most legal provisions that supported the economy of the previous regime[48].

The most important economic principles of such decrees were also adopted in the Political Constitution of Peru (1993), basically to guarantee the protection of certain principles, rights and policies:

- *The open market economy (Article 63): free imports and exports with low tariffs.*
- *Private property (Article 70): as an axis of economy.*
- *Contractual freedom (Article 62): as the other axis of economy.*
- *Freedom of enterprise (Articles 58 and 59): to promote allocative, productive and innovative efficiencies.*
- *The subsidiary and guiding role of the State in the economy (Article 60): in order to prevent the deterrence of private initiatives and to keep public spending low.*
- *The defense and promotion of free competition (Article 61): to promote competitive markets and enhance consumer welfare.*
- *Freedom of pricing: as a result of free interaction of supply and demand. (Implicit under property and contractual freedoms)*

[46] Ley 25295, Nuevo Sol Monetary Currency Act, Jan 3rd, 1991.
[47] The coup, carried out by the then President Alberto Fujimori (hence the «auto coup» denomination), led to one of the biggest political crises in Peruvian history and a regime based on open economy policies along with rampant corruption, ended in 2000 with the return to democracy.
[48] Legislative Decree 668 (International commerce freedom), Legislative Decree 701 (First Peruvian Competition Act) and Legislative Decree 757 (Promotion of private investment) are worth mentioning.

These guiding principles were developed with the aid of several agencies, particularly the regulatory bodies and the then newly created INDECOPI as the Competition Authority.

Finally, around the mid-2000s, it became evident that the measures adopted under the «shock», plus the implementation of new policies regarding austerity in public spending and controlling high levels of embezzlement, have successfully resulted in Peru being a country with a strong economy in the region and a land of opportunities to investors in a globalized world.

Almost twenty three years later, Peruvian institutions have strong confidence in this economic model. It is true that some sectors have grown worried about many social demands and institutional issues that still require clear solutions, but generally speaking, this model has massive support.

Moreover, it appears that each administration is more confident than the last about economic policy. That can be shown in: the unilateral reduction or elimination of tariffs, the signing of free trade agreements, the warranties for foreign capital to invest in Peru and, regarding competition policies, the efficiency-oriented approach and the lack of support for introducing a merger control system.

3.2.2. The enforcement of Peruvian competition law

INDECOPI, a 20 year-old institution, is a relatively young agency. However, it has managed, by enforcing the law, to build a doctrine or, at least, to formulate many criteria regarding competition law policy. These criteria have deeply influenced the general perception of competition law by scholars and practitioners, many of whom have worked at some point there. The formulation of such criteria has not been without fierce debate.

In the end, however, several ideas have prevailed and modeled our contemporary competition policy arena. The current criteria of the Peruvian mainstream approach to competition law are:

– Acknowledgement of efficiency as the ultimate goal of antitrust policy[49].

– Acknowledgement of the per se rule and the rule of reason[50].

– Acknowledgement of ancillary restraints[51].

– The good approximation assumption[52].

[49] Resolution 0027-2008/SC1-INDECOPI, voted on Oct 26th, 2008.
[50] Resolution 276-1997-TDC, voted on Nov 19th, 1997.
[51] Resolution 206-1997-TDC, voted on Aug 13th, 1997.
[52] This has not been expressly adopted. However, it could arguably be derived from the content of decisions.

– The lack of concern for excessive pricing and other exploitative behavior[53].

– The lack of special concern for vertical restraints[54].

– The lack of special concern about unilateral exclusionary behavior like exclusive dealing and bundling[55].

– The lack of special concern about mergers[56].

Indeed, as it can be seen, many of the principles of the «Chicago School of Antitrust Analysis» have had an impact on Peruvian competition law, to the extent that all of those made their way into the 2008 Competition Act[57].

As shown before, the change of economic orientation that made possible the existence of INDECOPI was simultaneously the reason why the efficiency-oriented decisions of INDECOPI have received very good support from scholarship and practitioners in the competition arena.

That being said, it is not clear why the Peruvian Competition Authority has adopted the «total welfare standard» over the «consumer welfare standard», without taking into account the large debate on which standard is appropriate for Competition Policy in the last few decades, which has already ended in favor of the «consumer welfare standard». In that regard, we will now discuss the case for updating the standard of «efficiency» that the Peruvian Competition Authority is required to pursue. We will show the reasons why efficiency in its «consumer welfare» approach should be the genuine goal of Peruvian Competition Policy.

IV. TOTAL WELFARE VS. CONSUMER WELFARE

As we have mentioned previously, efficiency is a complex concept describing a situation where resources are allocated to their most valuable ends (allocative efficiency), production cost is minimal (productive efficiency) and long-run society surplus is enhanced (dynamic efficiency). This Pareto optimal situation is an attribute of competitive

[53] Resolution 005-2010/ST-CLC-INDECOPI, signed on Apr 15th, 2010.
[54] Resolution 045-2009/CLC-INDECOPI, voted on Jun 25th, 2009.
[55] Resolution 1348-2010/SC1-INDECOPI, voted on Mar 18th, 2010.
[56] It is important to mention that INDECOPI has supported a recent legislative proposal that seeks to introduce a general merger control system in Peru (in contrast with the sector specific current merger control system only for the electricity sector).
[57] It is not the purpose of this paper to deepen the identification of the large number individuals that made this possible. However, it is worth noting that, at an early stage, the Free Competition Commission and the Competition Tribunal of INDECOPI – under the leadership of Alfredo Bullard (an influential academic) – introduced some of the mentioned principles for the first time, establishing a base on which to discuss and develop the ideas that nourish our Competition Law.

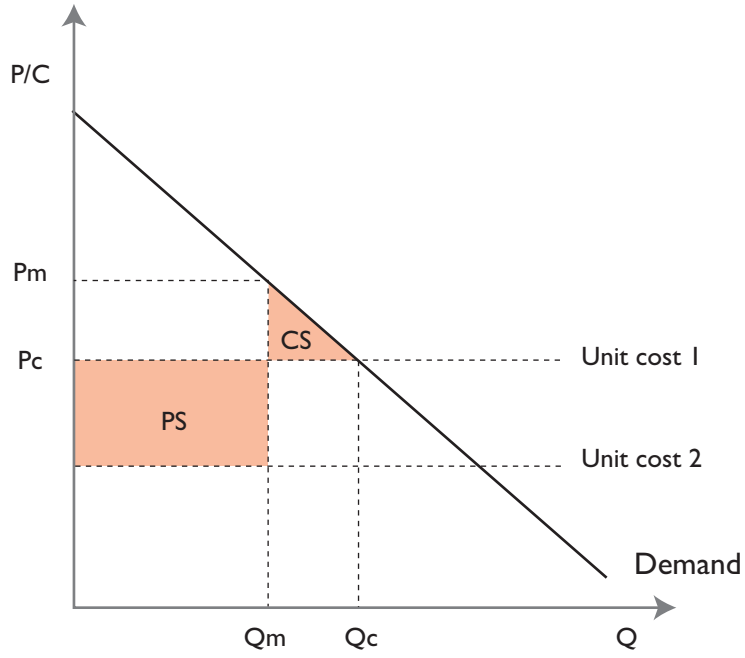
markets, and therefore enhancing competitive process in markets is a value worthy of promotion and protection[58].

Though it is impossible to achieve an optimal situation, it is possible to enhance efficiency by increasing the degree of competition through the elimination of identifiable market failures at the minimum cost to society. Competition Policy is precisely aimed at doing that, therefore enhancing the aggregate welfare (sum of consumers and producers surplus) in real markets (what is known as «workable competition»).

The debate around total and consumer welfare arose after Professor Williamson's *trade-off* economic partial equilibrium model (describing a merger to monopoly) illustrated by a simple diagram that, under some conditions, aggregate «total» welfare could be enhanced at the expense of «consumer» welfare. This happens when the merger produces a degree of savings to firms so as to offset the elevation in prices borne by consumers:

FIGURE N° 2

WILLIAMSON TRADE OFF MODEL



Graphic by the author

[58] See Areeda, Kaplow and Edlin (2004), *Antitrust Analysis*…, pp. 5ff.

As it is shown, the merger of two firms leading to a monopoly would result in (a) cost savings to the merging firms, and (b) monopoly power resulting in a higher price [Pm > Pc] and less quantity [Qm < Qc]. In the new equilibrium, however, the increase in producer surplus [PS] offsets the loss in consumer surplus [CS]. This means that, in spite of the worse situation of consumers, the overall aggregate welfare is higher than the previous competitive equilibrium.

The controversy arose after Robert Bork identified total welfare as the unique goal of competition policy[59]. With such a rule, the cases where conduct (especially mergers) improved overall welfare had to be approved under Antitrust Policy, even when consumer welfare could have been reduced according to the Williamson model.

However, the real problem was, famously, terminological: instead of identifying his approach as «pro total welfare» he explicitly identified it as «pro consumer welfare», using the term «consumer» to include producers as well, thus causing a sort of confusing adherence to his principle. Indeed, in «The Goals of Antitrust» section of its epilogue for the 1993 edition of The Antitrust Paradox, Bork would write that:

> *"The argument of this book, of course, is that competition must be understood as the maximization of consumer welfare or, if you prefer, economic efficiency. That requires economic reasoning because courts must balance, when they conflict, possible losses of efficiency in the allocation of resources with possible gains in the productive use of those resources. In a word, the goal is maximum economic efficiency to make us as wealthy as possible. The distribution of that wealth or the accomplishment of non economic goals are the proper subjects of other laws and not within the competence of judges deciding antitrust cases".*[60]

As has been explained, in *Reiter v. Sonotone* (1979) the Supreme Court quoted Bork's work to adhere to its «consumer welfare prescription» for Antitrust Policy. But the Court would have in mind not the principle that Bork was trying to advance, but a principle that would put strict «consumer welfare» over aggregate «total welfare», thus giving Antitrust Policy a different approach, specifically relevant in special cases where aggregate welfare is enhanced at the expense of consumer welfare[61].

[59] See: Bork, Robert (1993), *The Antitrust Paradox…*, pp. 90 - 91: *The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer* [total] *welfare*.

[60] See: Bork, Robert (1993), *The Antitrust Paradox…*, p. 427.

[61] For a recent recapitulation on the subject, See Barak ORBACH (2013), «*How Antitrust Lost Its Goal*», *81 Fordham L. Rev.*, pp. 2253ff.

The Court would consolidate its consumer-over-total-welfare tendency in subsequent opinions. In *Brooke v. Brown & Williamson Tobacco* (1993)[62] and *Weyerhaeuser v. Ross-Simmons* (2007)[63], both cases involving predatory pricing, the Court stated that although such practice could result in an inefficient allocation of resources (therefore lessening aggregate welfare), consumer welfare could be enhanced and so it should not be forbidden under antitrust standards:

> *"Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers."*[64]

This divergence leads to a basic question: Should competition policy be aimed at enhancing total welfare even when it could harm consumers or should it advance competition policy to the extent it provides for consumer welfare?

4.1. Pro-Total welfare arguments

Let us summarize the basic classic arguments supporting the pro-total welfare approach.

- **It is not biased by distributional aspects, it relies on impartial economic analysis.-** Sound economics should not be stained by indeterminate «fairness» considerations like placing consumer welfare over producer welfare. The enforcer should not take the side of one of the parties involved (consumers). His analysis should be impartial. It should follow the rule of indifference[65].
- **It fosters long-term welfare.-** The earnings of the monopoly should stimulate the entrance of competitors, thus enhancing consumer welfare in the long term.
- **Prevents opportunistic / individualist conduct from officials**.- The ever-present risk of misconduct by public officials could be reduced if «fairness» considerations are left out of its scope.

[62] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[63] Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company, Inc. 549 U.S., 05-381 (2007).
[64] Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 224 (1993).
[65] Ahdar, Rex (2002), «*"Consumers" Redistribution of Income and the Purpose of Competition Law*», *European Competition Law Review*, Vol. 23, No 7, July 2002, p. 346: «In conventional neoclassical welfare economics the redistribution of income is, as Williamson puts it, 'a matter of indifference' and is 'treated as a wash'. Scherer affirms: '[i]n the standard analysis of efficiency, the redistribution is of no concern. It merely reflects a robbing of Peter (the consumer) to pay Paul (the producer), and since Paul may be more deserving than Peter, who knows whether society is worse off as a consequence?' This stance is sometimes reinforced by invoking Hume's law that 'a dollar is a dollar'».

- **Provides greater predictability and less interventionism**.- Being a clearer rule, protecting total welfare brings predictability to undertakings and prevents the government from changing the rules at the expense of individual liberty.

Although these arguments are aimed at giving the pro total welfare approach a «clean and crisp» position in the statutes and case law, further analysis has shown that the basic ideas that support their main arguments are not entirely true.

4.2. Pro-total welfare fallacies

In the following we summarize the main concerns with the total welfare approach.

- **It relies on unlikely assumptions.-** The main conditions of the total welfare approach that were advanced under classical Chicagoan principles (costless entry, full information, non-strategic behavior) could not be transferred to real markets. Markets are imperfect, barriers exist and long-term predictions are hardly reliable. Those are the reasons why the post-Chicago principles have rejected the total welfare approach. The trade-off partial equilibrium model does not provide enough convincing arguments to choose for a total welfare standard.
- **Value-free impartial approach is questionable**.- Non economic school is value-free. Studies have shown that economic transfer from consumers to producers could have a negative impact even in the long-run, for it gives a better incentive and opportunity to monopolies to block or delay the entrance of competition. With that in mind, it is not accurate to present the total welfare approach as impartial and value-free.
- **It does not provide higher predictability**.- The total welfare approach could even diminish predictability because it introduces economic defenses which are hard to assess, to weigh and to rely on and therefore it gives the authority a greater discretional power.
- **The law does not make bad officials good.-** The degree of opportunistic behavior by public officials could not be attributed to the consumer welfare standard more than it could be attributed to the total welfare approach. On the contrary, the total welfare approach could be used as a method of advancing illegitimate interests of such officials and undertakings.

Considering these significant flaws in the rationale behind the total welfare approach, we present the reasons why the competition authorities should adhere to the consumer welfare approach.

4.3. Pro- consumer welfare arguments

- **Competition policy is concerned with the wrongs to consumers arising from market power.-** The basic reason for the existence of competition policy is to prevent consumers from being harmed by the effects of market power arising from the lessening of the competitive process. Such an approach is coherent with the constitutional and legislative roles given to enforcers[66].

  Competition Policy should not be used as a tool to endorse market power against consumer welfare. It would be contradictory to have a Competition Policy that validates the acquisition of market power opting against consumer welfare.

- **The approach retains the level of predictability**.- A sound economic assessment of markets and potential outcome arising from anticompetitive behavior could establish a good approximation about the danger to consumers, especially in the short and medium terms. It could also increase such predictability, given the less hard-to-measure economic assessment and interpretations of efficiencies introduced to markets.

- **The most influential jurisdictions have opted for a Consumer Welfare standard.-** Though it is somewhat an *ad autoritatem* argument, there is background that supports the election of consumer welfare as the standard in US and EU Competition Policies and, moreover, a very good reason should be required to choose a standard that has been hardly criticized and overcome in those and other jurisdictions.

That being said, it is necessary to remember that most anticompetitive behavior (especially cartels) will have the same outcome under either standard. However, a good policy requires the exemption to confirm the rule. No social policy could be construed at the expense of the group it is aimed at protecting.

Nevertheless, it is also necessary to remember that the protection granted to consumers under the rationale presented here is always indirect but feasible. It is indirect in the sense that it results from the protection of competition and it is not the consequence of direct intervention of the enforcement agency. It should be feasible, at least in a potential manner, for it is the ultimate goal of competition policy to enhance consumer welfare.

[66] Ross, Stephen (1993), «*Principles of Antitrust Law*», University Textbook Series, The Foundation Press, p. 10: «[I] f forced to choose between an antitrust law that permits various arrangements that raise prices but allocate resources more efficiently, or a law that makes products cheaper for more Americans (even if in strictly economic terms the result is inefficient), Congress would again vote for a law designed primarily to protect the millions of Americans who are consumers (…) Moreover, a judicial interpretation of federal antitrust law contrary to the interests of the consumer majority simply invites a panoply of less coherent state and federal laws to redress similar or more specific problems».

The exemption to these rules could only be the result of a normative process at the legislative level and not the result of a discretional decision of the competition authority. In that regard, the legislator is entitled to choose to benefit producer surplus, in those very rare cases where it would be socially acceptable and economically sustainable [e.g. labor unions and sector protection regulations] passing appropriate legislation.

V. A CONVINCING GOAL FOR PERUVIAN COMPETITION POLICY

Peru is a developing country. Some of its main features are young, modern institutions, great informality, widespread poverty, low confidence in the government or judiciary, and few reliable long-term policies.

Some of the characteristics that limit the Free Competition Commission within INDECOPI from adequately enforcing the Competition Policy are: a) the incipient competition culture, b) the lack of information regarding an important portion of Peruvian territory, and c) its limited human and material resources. Though INDECOPI is fairly autonomous, it would be advantageous to its goals to increase the level of independence from the Executive branch.

Some of the strongest characteristics that permit the Free Competition Commission within INDECOPI to enforce Peruvian Competition Policy are that INDECOPI is among the best-respected institutions in Peru and that the statutory law implies that main rules and provisions could not be changed opportunistically. Also, coherent regulations address different market failures (barriers to entry, advertising and information) with different but interconnecting authorities within INDECOPI. Moreover, not yet having a merger control system – other than for the electricity sector – permits the Free Competition Commission to focus its resources on anticompetitive behavior and cartels in particular.

In this context, efficiency is a good thing, for it (a) enhances predictability, (b) improves confidence in the institution and markets, (c) fits better in the current economic environment, (d) promotes consumer welfare protection and (e) restrains short-term, self-interested counterproductive goals.

It is necessary to mention that efficiency could have a sort of «dark side» if not properly used, for it could cause danger of biased or unrealistic economics and therefore overlook consumer welfare. If not seen within a case-by-case rule, the efficiency approach could overlook the danger of concentrated markets and other relevant interests addressed in the law.

However, as it can be seen, (a) the risks of adopting other goals into consideration by the Competition Authority could worsen the situation and (b) the risks of adopting the

efficiency goal could be minimized with adequate mechanisms to improve the quality and objectivity in the decisions of the Competition Authority. Therefore, it is not only understandable but a great thing that efficiency guides the Peruvian Competition Policy. Our Competition Policy relies on the premise that other social policies are better addressed by specialized authorities.

That being said, it is necessary to recognize that the impact of the election on the total welfare–consumer welfare standard has not been adequately measured. Being ascribed to a dubious interpretation of what «efficiency» implies for competition policy purposes, it is not only contradictory with the «state of the art» at a comparative level but also inconsistent with the very essence of what Competition Policy is all about, i.e. the advancement of consumer welfare through the protection of competition from the wrongs of market power.

Accordingly, considering everything explained so far, we believe that the only convincing goal for Peruvian Competition Policy is to protect competition process in order to achieve efficiencies that actually or potentially enhance consumer welfare and not efficiency irrespective of its impact on consumers.

It is necessary to emphasize once more that under this principle, consumer welfare is still an indirect goal of competition policy, for it is the consequence of protection of efficient competition and not the result of direct intervention in market outcomes. This approach implies that, according to the current Peruvian Competition Act, INDECOPI should not address conduct like excessive pricing and non-exclusionary unilateral behavior, for such policy has to do more with substituting economic agents' decisions than with the enhancement of a healthy competition system in a free market economy.

VI. TOWARDS A SYSTEMIC APPROACH TO COMPETITION POLICY

6.1. What about other important goals?

Once defined that the only goal of Peruvian Competition Policy is to promote efficiency and that this aim should be met from a consumer welfare approach, one question remains: What about the other goals that the government is trying to advance and are arguably as important as efficiency?

In order to answer that question, first we need to recognize that a wide range of policies could affect the behavior of economic agents: price regulation, intellectual property, employment, small business protection, sectorial protection, among others.

The next step to follow is realizing that each policy has its own goals. Here, some examples are presented:

- Price Regulation: productive/allocative efficiencies, universal access.
- Intellectual property: dynamic efficiency, investment promotion.
- Employment / unions: minimal protection, negotiation, power compensation.
- Small companies' protection: access to markets, power compensation.
- Sectorial protection: sectorial defense, national welfare, long-term sustainability.

As a principle, it is not for the Peruvian competition authority to enforce other policies or to fulfill other aims than those expressly established in the Competition Act. Indeed, as explained, Peruvian institutions are still young and to some extent weak, and society is just starting to internalize the goal of competition law. Accordingly, the best option for lawmakers and governments has been the establishment of a clear and distinct aim for the Free Competition Commission at INDECOPI. This objective can be summarized as the promotion of efficiency by means of the protection of competitive process.

There are several policies that could eventually conflict with the aim of the Competition Act: intellectual property rights, protection of small enterprises, corporate rescue, sectorial exemptions and so on. The Free Competition Commission of INDECOPI has recently dealt with one in particular: labor union policy.

6.2. The experience of INDECOPI

In 2012 the Free Competition Commission within INDECOPI faced an unprecedented challenge: It had to decide a complaint issued against two stevedores unions for an alleged infraction of competition law. While in other jurisdictions competition law does not apply to labor unions or workers and the restrictions to competition caused by them, in Peru there is no statutory exemption.

By mid-July 2008, the stevedores of Salaverry port, grouped into two unions, were pushing for a rise in their services fee. Even when they provided services not to a specific shipping agent but to all of them, by means of law they were deemed as employees of all of such shipping agents, who were to pay social benefits proportional to the services provided monthly by each worker.

Under an alleged customary practice, unions were imposing several conditions for the provision of their services. Most relevant practices consisted in (1) the allocation of each stevedore to provide services to a respective shipping agent, under a pre-established order, and (2) the imposition of a defined number of stevedores for each operation,

irrespective of the real needs or the will of the shipping agent. In response to these impositions, some shipping agents tried to help new stevedores (potential competitors) to enter the market. In retaliation to these intentions to bring competition, stevedores struck back by (3) boycotting the operations in the port.

In regular markets, all the restrictions would have been deemed illegal under the Peruvian Competition Act. However, the Free Competition Commission realized that relations among employees and among employers and employees had a particular nature. Looking for answers in foreign case law, the Commission found: (a) that several jurisdictions had statutory provisions exempting employees and unions from competition law (under certain conditions)[67] and (b) American and European statutes where interpreted applicable in cases of agreements between employers and employees against other companies in the «product market» (in contrast with the «labor market» where employees participate) [68].

None of the mentioned rules could have been replicated in Peru to solve the case. First, in Peru there is no statutory exemption for workers or unions from the applicability of the Competition Act. Second, the restrictions under evaluation did not affect the «product market» but allocated the «labor market» between stevedores and blocked entrance of competitors also to the «labor market». Lacking examples in other jurisdictions, the Technical Secretariat and the Free Competition Commission outlined an approach as a result of a balance between competition and labor policies.

First, the Commission considered that, as both competition and labor policy had express recognition in the Constitution, they both had to be part of a more comprehensive principle that harmonizes both policies in a single development path. Therefore, it was necessary to consider the core of each policy and the central scope of the policy. In following such a path, INDECOPI reached the following conclusions:

[67] US Code, Title 15, Sec. 17, «Antitrust laws not applicable to labor organizations»; Federal Competition Act of Mexico, Sec. 5; Competition Act of Canada, Sec. 4.1.

[68] For an approximation to possible antirust liability of labor unions, see: Daralyn Durie and Lemey (1992), «*The Antitrust Liability of Labor Unions for Anticompetitive Litigation*», *California Law Review* 80, p. 757; also Robert Lande and Zerbe (2006), «*Anticonsumer effects of Union Mergers: An Antitrust Solution*», *Duke Law Journal 47*, November 2006, 197.

TABLE 2

COMPETITION LAW vs. LABOR UNION LAW

Competition Law	Labor Union Law
Aim : Economic efficiency in all the markets for the enhancement of consumer welfare.	**Aim :** To benefit employees by compensating asymmetric negotiation power between them and employers.
Means : Punishment of anticompetitive behavior.	**Means:** Unions, collective agreements, strikes.
Types of horizontal agreements: 1. Those that restrict competition to benefit **the parties (businesses) without injuring competitors outside the agreement**: e.g. Price fixing, market sharing, output restriction, bid rigging. 2. Those that restrict competition **by injuring competitors outside the agreement**: e.g. Group boycotts, blocking the entrance to trade associations.	**Types of agreements:** Those that restrict competition **between the parties (workers) without injuring competitors outside the agreement** in order to become stronger for negotiation.

Source: Resolution 052-2012-CLC/INDECOPI.
Table by the author.

Using this approach, the Free Competition Commission issued a rule stating that, when facing the activities of a labor union, it will analyze whether the restriction on competition is of the type that restricts competition between the parties without injuring competitors outside of the agreement. If the answer is yes, then the agreement is exempted from the application of the Competition Act, for there is an implicit and necessary immunity for such agreements in order to fulfill the goals of labor union policy. Conversely, whenever the imposed restriction was of the type that injures a third party in order to block its entrance to or driving him out of the market, then the Competition Act is fully applicable.

As it can be seen, INDECOPI has taken the challenge to harmonize the application of the Competition Act in a case where competition policy was in direct conflict with another equally important public policy. In doing so, it has issued an original rule that fits well with both policies and could lead to a better understanding of the aims and the scope of Peruvian Competition Policy.

6.3. A systemic approach to competition policy

Considering the case above explained, we could advance a rule applicable to all cases where Competition Policy needs to address conduct and markets that are linked – directly or indirectly – to other social policy.

First of all, it is necessary to state that the goals of other policies are defined by the democratic institution entitled to do so. As social policies, each of those has underlying values and, at least formally, represents the desires of most citizens. However, it is not always clear how Competition Policy should interact with such policies.

As Competition Policy is inserted into a spectrum of social policies, the way to communicate with other such policies is addressing its respective goals and content. Here, there is an explanation of how to do it.

The Peruvian Competition Act provides economic «consumer welfare» efficiency (and no other) as its goal. Policies like utilities regulation and intellectual property also have efficiency as their primary goals. We can call them «compatible policies». When this happens, Competition Policy is applicable under the «subsidiarity principle», i.e., that competition rules are applicable to all situations not subjected to specific and explicit provisions from the compatible policy[69].

On the other hand, policies such as labor and national markets protection are aimed at other goals that usually are at odds with efficiency. We can call them «incompatible policies». When such policies have an equal statutory rank, Competition Policy is not to prevent or hinder its goals to be fulfilled. Even when there is not an explicit exemption, there could be situations where some conducts are subject to an implicit but necessary exemption, so the goals of the incompatible policy could be achieved. This implicit exemption is a rule derived from Article 3 of the Peruvian Competition Act:

> *"**Article 3.- Scope***
>
> *The conduct derived from a legal provision is beyond the scope of the present Act. Questioning such legal provision should be addressed through the proper mechanism and not before the competition authority".*

[69] For a critical revision on the application of the subsidiarity of competition rules regarding public utilities regulation, see: Olaechea, Joselyn (2007), «*Libre Competencia versus Regulación: Sobre la aplicación del principio de supletoriedad en la nueva Ley de Represión de las Conductas Anticompetitivas – LRCA*», *Revista de la Competencia y la Propiedad Intelectual*, Año 3, No 5 (2007), p. 61ff.

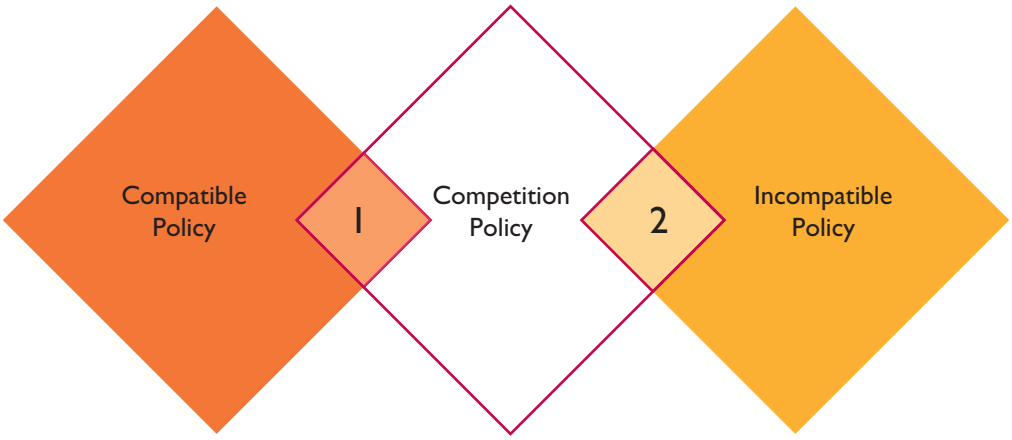
Usually, «compatible policy» legislation includes provisions explicitly establishing the subsidiarity relation with competition policy and «incompatible policy» legislation will explicitly establish exemptions to competition regulations. However, this is not always the case and therefore the Authority needs to address very carefully the relation between policies or its specific provisions. In finding an exemption, of course, the Competition Agency would need a very careful approach to the incompatible policy, in order to give the proper treatment to the conduct under evaluation.

Both the rules for compatible and incompatible policies are the consequence of the *lex specialis* doctrine: the general law (competition rules) is overridden by the special law (e.g. labor union rules) to the extent that such special law applies to the conduct and situations otherwise within the scope of competition rules. The only relevance of the methodology here presented is that it helps to find areas that could be implicitly exempted from the scope of competition rules because they are subject to an incompatible policy.

The following figure could help to illustrate what rule the Competition Authority should follow:

FIGURE N° 3

COMPETITION AND OTHER POLICIES



Graphic by the author

Competition Policy applies to which 

represents the area of a compatible policy that is not subject to specific provisions. Subsidiarity applies.

Competition Policy does not apply to 

which represents the area of an incompatible policy that is not subject to an explicit exemption, but an implicit exemption is necessary for such policy to fulfill its goals. Exemption applies.

According to this methodology, competition authorities need to view competition policy as a piece of the puzzle driving the development of society and, therefore, they have to provide rules that could adequately fit into such a context. The analysis of the goals of competition policy and other policies could lead to a systemic approach, therefore helping to harmonize the government's response to the many social problems that enrich and give meaning to the application of the science of Law.

VII. CONCLUSIONS AND REMARKS

In Peru, the sole aim of competition policy is efficiency. Peruvian lawmakers and enforcers are prone to understand the Competition Act as protecting consumers in an indirect manner, as the result of efficiency gains derived from the promotion and protection of the competitive process. Moreover, the «total welfare» standard of efficiency has arguably displaced the «consumer welfare» approach.

Two circumstances explain this situation. First, the success of the economic model that has made Peru an efficiency-driven economy in contrast to the economic disaster carried out by restrictive and protectionist policies. Second, the fact that many widely accepted institutions of competition law in Peru are the result of the influence of scholars and officials oriented towards several classic Chicago School of Antitrust Analysis principles.

This approach has developed well in Peru inasmuch it has given to the Free Competition Commission within INDECOPI a clear 'north', thus helping to comply with the aim of the Competition Act. Indeed, the Competition Commission has not had to pursue other goals, which could prove difficult to assess and could lead to discretionarily and authority loss. Considering the newness of INDECOPI, its legal boundaries and the need to send a clear and predictable message to Peruvian society, the efficiency-oriented approach has soundly fit into our current competitiveness path.

However, the interpretation of the concept of "efficiency" that the Peruvian Competition Policy should seek needs fine-tuning. The «total welfare» standard is obsolete in most significant jurisdictions and the only acceptable efficiency standard for the Peruvian Competition Policy should be the "consumer welfare" approach, for it is only compatible with the very essence of Competition Policy: to prevent consumers from being harmed by the effects of market power arising from lessening in competitive process.

The Peruvian competition authority is not entitled to enforce other policies or to fulfill other aims than those expressly established in the Competition Act. However, it will have to issue coherent decisions in all the cases where Competition Policy addresses conducts and markets that are linked – directly or indirectly – to other social policies and there is no explicit applicable provision in the Law.

In such cases, the following simple rules could be applicable after a careful evaluation of the conduct and institutions under analysis:

- Subsidiarity: Competition Policy will apply to the area of a «compatible» policy that is not subject to specific provisions.
- Exemption: Competition Policy does not apply to an area of an «incompatible» policy that is not subject to an explicit exemption, but where an implicit exemption is necessary for such policy to fulfill its goals.

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