# ABUSIVE PRICING POLICY FOR EMERGING ECONOMIES: THE CASE OF EXCESSIVE PRICING AND PRICE PREDATION IN LATIN AMERICA

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# ABSTRACT

## ABUSIVE PRICING POLICY FOR EMERGING ECONOMIES: THE CASE OF EXCESSIVE PRICING AND PRICE PREDATION IN LATIN AMERICA

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For several years, the literature has discussed whether a country's particular economic circumstances should be taken into account in competition law and policy design. This thesis discusses whether economic growth should be considered as the guiding principle for Latin American Emerging Economies' competition law and policy design. It specifically explains why having economic growth as competition policy's guiding principle makes a difference in choosing superior rules and standards, among the large range of efficient rules. In order to explain how economic growth as a guiding principle has an impact on competition policy design, this thesis studies whether the analysis and application of the prohibitions and standards of abuse of dominance in emerging Latin American economies are appropriate, and why, having regard to economic growth, a different approach might be justified. To engage in the study of such questions this thesis centres on the regulation of dominance and the law governing abuse of dominance, in particular on predatory pricing and excessive pricing. After a careful analysis of such institutions, an optimal rule for the regulation of pricing abuses in these emerging economies is proposed. Similarly, having regard to economic growth as the policy's guiding principle, the mainstream standards on excessive pricing and price predation are evaluated and a different approach is found to be justified. It is concluded that economic growth should be the principle guiding Latin American emerging economies' competition law and policy design and it is demonstrated that this will grant these economies policy soundness and identity.

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## Table of Abbreviations

| | |
|---|---|
| AVC | Average Variable Cost |
| ATC | Average Total Cost |
| CADE | Brazilian Administrative Council of Economic Defence |
| CFI | Court of First Instance |
| CJEU | Court of Justice of the European Union |
| CNDC | Argentinean National Commission for the Defence of Competition |
| EU | European Union |
| FNE | Chilean National Economic Prosecutor |
| LATAM | Latin America |
| OECD | Organization for Economic Co-operation and Development |
| OFT | The Office of Fair Trading |
| PFCC | Peruvian Free Competition Commission |
| SDE | Brazilian Secretary of Economic Law |
| SIC | Colombian Superintendence of Industry and Commerce |
| TDCIP | Peruvian Tribunal for the Defence of Competition and Intellectual Property |
| TDLC | Chilean Free Competition Defence Tribunal |
| US | United States of America |

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# ABUSIVE PRICING POLICY FOR EMERGING ECONOMIES: THE CASE OF EXCESSIVE PRICING AND PRICE PREDATION IN LATIN AMERICA

## INTRODUCTION

During the last decade, part of competition law scholarship has discussed whether particular economic circumstances, economic policy goals and market structure should matter in competition policy design. This thesis generally discusses whether the achievement of a general economic goal –sustained economic growth- should matter in competition law and policy design and questions whether it is possible to determine, having regard to that goal, a particular guideline in order to grant coherence to competition law and policy design in Latin American emerging economies. This thesis, specifically explains why using economic growth as competition policy's guiding principle, in addition to other particular economic circumstances, makes a difference for structuring the rules and standards applicable to Latin American emerging economies' competition law and policy. It proposes economic growth as the guiding principle of competition law and policy design in Latin American emerging economies.

These objectives are broad for a doctoral thesis and therefore limitation of the scope is necessary. In order to provide an explanation why economic growth should matter as Latin American emerging economies' competition law and policy

design guiding principle, a set of sub-questions will particularly address whether the analysis and application of the prohibition of abuse of dominance in Latin American emerging countries is appropriate and whether the application of this guiding principle would lead to a different outcome. To engage in the study of such questions this thesis will centre on the regulation of dominance and predatory and excessive pricing in Latin American emerging economies.

Before starting, it is important to highlight that determining the goal of competition law has been one of the most recurrent and difficult debates in competition policy. Despite the availability of several competing or at least different perspectives to the matter, economic efficiency has taken the lead in recent years and most literature -though by no means all- has disregarded or at least opposed the role of competition law as a means to achieve non-economic goals. Thus, focused on economic goals of competition law, these fluctuate between efficiency standards such as social welfare, producers' welfare, consumers' welfare, and, most recently, dynamic efficiency. In fact, a large set of jurisdictions have found consumer welfare as the most important competition policy goal, and in several cases jurisdictions have advocated for institutional design based on such a welfare standard. However, case law and the literature on the topic show that there is not a single welfare proposal above other, and in several cases, some economies have decided to follow different welfare standards for the same institutions of competition law.[1]

[1] See Kaplow L, 'On the Choice of Welfare Standards in Competition Law' in ASCOLA (ed), The Goals of Competition Law, Fifth ASCOLA Conference (Edward Elgar 2012), p. 4;

Latin American emerging economies' have recently faced the dilemma regarding what type of policy to follow. This is mostly because following an unclear rule or standard coming from a mainstream proposal could lead to inappropriate or unjustified rules or standards that will have as outcome an unclear policy path.[2] This is enhanced when it is considered that Latin American emerging economies' general economic goals and their industrial structure differ widely from those economies where mainstream proposals have been developed. These differences and challenges justify a different approach for the design of competition law rules and standards. This thesis proposes that economic growth, as the most common economic goal of emerging economies, should be the 'lighthouse' that indicates the route for competition law and policy design in Latin American emerging economies. Using economic growth as the guiding principle of emerging Latin American economies policy design, will grant such policy a path to determine which standards to choose, among the large range of standards developed by the mainstream literature.

This introduction will proceed as follows: First, in order to provide an explanation why it is justified to study Latin American emerging economies' competition law and policy, first, a short introduction to the origins and current state of competition policy in Latin America will be presented. After such introduction, the questions regarding what is an emerging economy, what are its economic policy goals, and which Latin American economies are considered emerging economies will be studied. Then, the general question regarding the

[2] De León I, Latin American Competition Law and Policy: a Policy in Search of Identity (Kluwer Law International 2001).

problem of tailoring competition law and policy rules for emerging economies will be addressed and the thesis plan will be briefly presented.

## 1. The Development of Competition Law and Policy in Latin America

The dynamics of competition law in Latin America are much more intense and vivid than the few students of the topic have acknowledged. The literature on the topic has stated that legal origins[3] and trade policy[4] have a significant weight on competition policy design. This section, however, will not provide information on the origins of competition law in Latin America, and therefore the questions regarding the weight of legal origins on competition policies will not be addressed.[5] Then, the aim of this section is to describe such dynamics, and the backgrounds and the origins of competition law in Latin America.

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3 See Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Economic Consequences of Legal Origins' (2008) 46 Journal of Economic Literature 285; Cassey Lee, *Legal Traditions and Competition Policy* (Institute for Development Policy and Management, University of Manchester 2004); Simeon Djankov and others, 'The New Comparative Economics' (2003) 31 Journal of Comparative Economics 595.

4 See Sébastien Miroudot, Enrico Pinali and Nicolas Sauter, *The Impact of Pro-Competitive Reforms on Trade in Developing Countries* (OECD 2007); Harry First, 'Theories of Harmonization: a Cautionary Tale' in Hanns Ullrich, Wolfgang Fikentscher and Ulrich Immenga (eds), *Comparative Competition Law: Approaching an International System of Antitrust Law* (1. Aufl. edn, Nomos 1998); Doern and Wilks (eds), *Comparative Competition Policy : National Institutions in a Global Market.*

5 Several authors have addressed this issue. See Kate AT and Niels G, 'Mexico's Competition Law: North American Origins, European Practice' in Marsden P (ed), Handbook of Research in Trans-Atlantic Antitrust (Edward Elgar 2006); Hylton KN and Deng F, 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Law and their Effects' (2007) 74 Antitrust Law Journal 271; Rodriguez AE, 'Does Legal Tradition Affect Competition Policy Performance?' (2007) XXI The International Trade Journal 417; Peña J, 'Competition Policies in Latin America post Washington consensus' in Marsden P (ed), Handbook of Research in Trans-Atlantic Antitrust (Edward Elgar 2006); Hylton KN and Deng F, 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Law and their Effects' (2007) 74 Antitrust Law Journal 271; Shahein H, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow' in ASCOLA (ed), *New Competition Jurisdictions: Shaping Policies and Building Institutions, Sixth ASCOLA Conference* (2011).

### i) Trade policy and the Implementation of Competition Law in Latin America

The story of competition law in Latin America started with two independent events: first, the adoption of the Mexican Constitution of 1857 in which monopolies where prohibited and; second, when the Colombian Congress passed Act 27 of 1888, the new Commerce Code for the country in which Corporations where prohibited to undertake any act that may lead to the monopolisation of the supply of goods or the monopolisation of any branch of industry.[6] These were not isolated facts, but the start of a conundrum of different influences in domestic legislations.

The literature has said, however, that it is international trade reforms that opened the path for competition law in Latin America. In fact, international trade reforms came to Latin America as a response to market liberalisation, which constituted the theoretical paradigm in economic policy and international trade of the late eighties and nineties.[7]

The end of most of the authoritarian regimes in the south cone, extensive financial debt, weak currencies and changes in market structure of most Latin

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6 Ley 27, 1888, (Diario Oficial, Colombia), Article 6. In Hugo Palacios, *Derecho de los Servicios Públicos* (Derecho Vigente 1999), p. 51.

7 Rudiger Dornbusch, 'The Case for Trade Liberalization in Developing Countries' [1992] 6 The Journal of Economic Perspectives 69, p. 83.

American countries triggered the move from populism –now back in the scene in Argentina, Bolivia, Ecuador, Peru and Venezuela– to trade policy liberalisation.[8] The new liberalisation policies[9] came as a set of structural changes to the law, aimed to ease the transformation of the legal system from a protectionist model, with a large participation of the State, to an open economy, prone to the international exchange of goods, with stricter rules for public finance and the administration of the State.[10]

This new environment open to international trade, named *apertura*, pushed for the consolidation of regional trade agreements that were signed in the region during the late 60s. Treaties such as Cartagena,[11] Managua[12] and Asuncion[13] imposed on member States sets of rules and regulations to be passed by member countries in order to uniform legal institutions and smooth intra-regional trade and

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8 See Douglas A. Chalmers and Craig H. Robinson, 'Why Power Contenders Choose Liberalization: Perspectives from South America' (1982) 26 International Studies Quarterly 3 and Emilio Pantojas-Garcia, 'Trade Liberalization and Peripheral Postindustrialization in the Caribbean' (2001) 43 Latin American Politics and Society 57, pp. 60-63.

9 See Julián Peña, 'Competition Policies in Latin America post Washington consensus' in Philip Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar 2006), p. 738, pp. 752-3.

10 Ignacio De León, *Latin American Competition Law and Policy: a Policy in Search of Identity* (Kluwer Law International 2001), pp. 21-24. See D Yergin and J Stanislaw, *Commanding Heights* (Touchstone ed, Touchstone 1999), p. 240 and De León, *Latin American Competition Law and Policy: a Policy in Search of Identity*, p. 22. De Leon also cites the Washington Consensus as one of the drivers of the new trade policies in Latin America. See De León, *Latin American Competition Law and Policy: a Policy in Search of Identity*, pp. 24-26.

11 *Acuerdo de Cartagena* (26 May, 1969).

12 *Tratado de Managua* (13 December, 1960).

13 *Tratado de Asunción* (26 March, 1991).

policy.[14] The re-launched regional communities, which encompassed almost all the countries in the region,[15] helped to implement the pillars of free trade alongside a supranational legal and institutional organisation that complemented the structure of the legal systems in each of the jurisdictions involved.[16] This fact, not recognised as a determinant by mainstream literature[17] characterises Latin America's trade policy, since, in addition to changes in individual jurisdictional regulation of trade, the treaties aimed to establish a set of institutional principles to be followed by the States and to achieve harmonisation of their legal regimes.[18]

Concomitantly with the aforementioned structural transformations of Latin America's trade policy, competition policy arose as one of the pillars of the legal structures about to be implemented in the region. The multilateral competition policy had as its aim the introduction and enhancement of competition in a region lacking it,[19] and to implement competition law as an enforcement mechanism to discipline market participants. The introduction of local competition policy and its

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14 José Manuel Salazar-Xirinachs and Maryse Robert, *Toward Free Trade in the Americas* (José Manuel Salazar X and Maryse Robert eds, Organization of American States; Brookings Institution Press 2001) and Miguel Rodríguez Mendoza, 'Dealing with Latin America's New Regionalism' in Miguel Rodríguez Mendoza, Patrick Low and Barbara Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilaterial Negotiations* (Organization of American States: Brookings Institution Press 1999).

15 The regional agreements are: the Caribbean Community (hereinafter Caricom), the Andean Community (hereinafter AC), the Central American Common Market (hereinafter CACM) and the Mercado Común del Sur (hereinafter Mercosur).

16 To date some countries, such as the Dominican Republic and Chile, have not agreed to join these regional communities, and have opted to develop bilateral free trade agreements.

17 See De León, 'A Proposal for a New Competition Policy in Latin America'; Peña, 'Competition Policies in Latin America post Washington consensus' in Pittman and Tineo, 'Abuse of Dominance...'

18 First, 'Theories of Harmonization: a Cautionary Tale', p. 36-37.

19 Peña, 'Competition Policies in Latin America post Washington consensus', p. 741.

enforcement had as ends, among others, the deregulation of industries and the enhancement of competition in the local markets.[20]

Regional competition policy, however, was considered a tool to stimulate regional trade and prevent the benefits of trade from being lessened by undertakings' behaviour, but not an end in itself. Regional trade agreements such as Mercosur constituted the best performing vehicle to harmonise the cross-jurisdictional legislation of competition and to facilitate coordination in regional policies and define minimum rules applicable in every country.[21] For example, Mercosur opted for a minimum standardisation approach[22] whereas the Andean Community used supranational legislation.[23]

Notwithstanding the enormous effect of liberalisation on the enactment of competition laws in Latin America, as was said before, the study of the evolution of Latin America's competition law cannot be limited to this late stage. In addition to the first legislative reactions in the late XIX century, early in the XX century Argentina's Congress passed the first Act in Latin America solely dedicated to competition. This Act, however, shows a reality of the region that is pervasive in the subsequent passing of competition acts as it was just a translation of the United

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20 The Agreement of Cartagena in the Andean Community, for example, had clear goals regarding deregulation and gradual implementation of competition in regulated industries. See José Tavares de Araujo Jr., 'Competition Policy' in José Manuel Salazar X and Maryse Robert (eds), *Toward Free Trade in the Americas* (OAS, Brookings Institution Press 2001) and De León, 'A Proposal for a New Competition Policy in Latin America'.

21 For example Mercosur's *Decisión* 21-1994 set the minimum principles for Competition legislation to Mercosur's member States.

22 Mercosur members, for example, decided in the Fortaleza Protocol, *Decisión* 18-1996, to define convergent competition principles to stabilise the conditions of competition in their countries. See Tavares de Araujo Jr., 'Competition Policy', p. 235.

23 Ibid., p. 233.

States' Sherman Act.[24] Other countries such as Mexico in 1934,[25] Colombia[26] and Chile in 1959,[27] and Brazil in 1962,[28] also enacted different rules to restrain anticompetitive behaviour to control monopolies and dominant enterprises, and to restrain excessive prices, based mostly on U.S. law.

These previous facts make the structure of Latin America's competition law particular among other competition law structures. Latin America has two regional competition regulations and each of these has had a strong influence on the domestic structure of the member States' competition laws. In addition, legal transplants, more than legal origins, and other forces, such as case law implants, have also influenced Latin America's competition regimes and their current framework.

### ii) Trade Agreements and Competition Law in Latin America

The enactment of rules of competition in the Andean Community and Mercosur has been quite different from the process achieved in other jurisdictions. The Community of Andean States (hereinafter CAS) is one of two free trade communities in South America that has as its aim the economic integration of its

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24 Germán Coloma, 'The Argentine Competition Law and its Enforcement' in Elanore Fox and Daniel Sokol (eds), *Competition Law and Policy in Latin America* (Hart 2009).

25 Ley Orgánica del Artículo 28 Constitucional en materia de Monopolios, 1931, (Diario Oficial, Republica de Mexico).

26 Ley 155, 1959, (Diario Oficial, Colombia).

27 Ley 13305, 1959, (Diario Oficial, Republica de Chile).

28 Lei Ordinária 4137, 1962, (Diário Oficial da União, Brazil).

members.[29] The strategies of the CAS and Mercosur were different when implemented, but both were aimed at achieving legal harmonisation.

The Andean Community used supranational legal and institutional organisations that complemented the structure of the legal systems in each of the national jurisdictions involved.[30] The Andean Parliament first enacted Decision 230 in 1987 as the first set of measures to impede certain practices that distorted the process of effective competition.[31] These practices mainly condemned price distortions and restrictions of supply in the Region, but they were not a proper set of prohibitions of anticompetitive behaviour. A few years later, Decision 285-1991[32] revoked Decision 230 and defined a set of minimum standards of competition law in the region, establishing a system of competition law for infringements in the Community and an institutional framework to cope with such investigations.[33] Most of the countries developed their own systems, with many more prohibitions than those defined by Decision 285, but generally followed the structure of prohibitions[34] as this Decision was enacted before most of the Andean states had enacted their own competition regimes in 1992.

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29 *Acuerdo de Cartagena* (26 May, 1969), Preamble.

30 Ibid.

31 Decisión 230, 1987, (Gaceta Oficial, Acuerdo de Cartagena), Article 1.

32 See Decisión 285, 1991, (Gaceta Oficial, Comunidad Andina).

33 Ibid.

34 Decision 285 defined also a general prohibition and a set of prohibitions for anticompetitive agreements and abuse of dominance. See Ibid., Arts. 5-7.

In 2005 the Andean Parliament decided to enact Decision 608-2005[35] and repealed Decision 285. Decision 608 was enacted with the same aim as Decision 285: to protect the common market and the process of integration from restrictive practices.[36] This new decision limited the scope of the Community competition law to anticompetitive acts that have effects in more than one Member State[37] and maintains the same binary structure established in Decision 285.[38] The whole process led all the Andean Community members except Ecuador to enact a national competition law. The first country to enact competition legislation was Colombia in 1959 with Act 155.[39] In 1992, Decree 2153 of 1992[40] reviewed the structure of Colombian competition law using Decision 285. Similar legislative history had the Peruvian and Venezuelan competition laws, where in 1991 Legislative Decree 701[41] approved the general regime for the promotion of competition and Act 25868[42] created the National Institute for the Defence of Competition and the Protection of Intellectual Property.[43] Venezuela, who is no longer a member of the Andean Community, was during the nineties the most

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35 Decisión 608, 2005, (Gaceta Oficial, Comunidad Andina).

36 Ibid., Preamble.

37 Ibid., Article 5.

38 Ibid., Article 7-9.

39 Ley 155, Article 6, of the Colombian Commerce Code of 1888, defined the prohibition of monopolisation by restricting and prohibiting corporations from monopolising subsistence goods or any other branch of industry. See Palacios, *Derecho de los Servicios Públicos*, p. 51.

40 Decreto 2153, 1992, (Diario Oficial, Colombia).

41 Decreto Legislativo 701, 1991, (Diario Oficial, Perú).

42 Decreto Ley 25868, 1992, (Diario Oficial, Perú).

43 Decisión 285-1991.

active country of the region in competition law.[44] Its competition law regime was enacted in 1992, with the Law for the Promotion and Protection of Free Competition[45] by the Superintendence for the Promotion of Competition.[46]

On the other hand, Bolivia and Ecuador have the last legislative developments. Bolivia's competition law was enacted in 2008, with Decree 29519,[47] which designated the Superintendence of Companies as the competition authority. Ecuador passed its national competition law in October, 2011.[48] However, before the enactment of the Ecuadorian Law on Market Power Control, Ecuador had as 'default' competition legislation the Andean Community's Decision 608.[49] This was decided by the Andean Parliament by Decision 616 of 2005, where it was said that Decision 608 may remain as Ecuador's default rule while competition legislation was enacted in the country.[50]

The process in Mercosur was structured by a set of decisions and protocols of the Common Market Commission. Despite Mercosur being the youngest community, it was the one that developed fastest.[51] The Treaty of Asuncion,

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44 See De León, 'A Proposal for a New Competition Policy in Latin America'.

45 Ley para Promover y Proteger el Ejercicio de la Libre Competencia, 1992, (Diario Oficial, Venezuela),

46 Ibid.

47 Decreto Supremo 29519, 2008, (Gaceta Oficial, Bolivia).

48 Ley Orgánica de Regulación y Control del Poder del Mercado, 2011, (Registro Oficial Nº 555, Ecuador).

49 Decisión 608.

50 Decisión 616, 2005, (Gaceta Oficial, Comunidad Andina), Article 1-2.

51 *Tratado de Asunción*.

signed in 1991, and the Ouro Preto Protocol[52] led to the consolidation of the common market in the south cone. The goal of the Treaty required common legal instruments and deep institutional reforms in order to achieve uniformity of law to attain the free circulation of goods and services.[53] Article 4 of the Treaty of Asuncion obliged States to develop a common policy and rules of competition.[54] This mandate was consolidated by the Fortaleza Protocol,[55] whereby the member countries adopted the regulation of competition for the community[56] and defined a set of minimum principles to be established in each country's rules of competition.[57] A few years after, Mercosur's General Commission issued Directive 1 of 2003, which defined the rules of procedure for the region,[58] the powers of the national competition authorities and powers of Mercosur's competition authority.[59] All these decisions and protocols constitute the institutional apparatus of Mercosur aimed to guarantee 'the free access to market and the equilibrate distribution of the benefits of the process of economic integration'.[60]

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52 *Protocolo de Ouro Preto* (17 December, 1994).

53 José Tavares de Araujo Jr. and Luis Tineo, 'The Harmonization of Competition Policies among Mercosur Countries' (2004) 24 Brookling Journal of International Law 441.

54 *Tratado de Asunción*, Article 4.

55 *Protocolo de Defensa de la Competencia* (17 December, 1996).

56 Ibíd., Article 1.

57 Ibíd., Article 1.

58 Directiva 01-2003, 2003, (Grupo Mercado Común, Mercosur), Chapter IV.

59 Ibíd., Chapter VI.

60 *Protocolo de Defensa de la Competencia*, Preamble.

On the other hand, the Central American free trade community is the oldest in the region, but the least developed. The Multilateral Treaty on Free Trade and Central American Economic Integration[61] in 1958 and the Treaty of Managua,[62] of 1960, provided the first instruments of economic integration between Central American Countries.[63] Despite the efforts for economic integration in the region, only in 1993, the Central American countries amended the Treaty of the Central American Common Market[64] and by means of the Protocol of Guatemala[65] modified the structure preferences and institutions to hasten the economic integration of Central America.

The institutional reform in the Protocol of Guatemala established a new set of regional bodies, including a Parliament and a Court of Justice.[66] So far these institutions are not fully developed and deeper institutional and organisational frameworks have yet to be established. One of those institutional frameworks not yet enacted is competition law.

Competition law in the region has not been centrally defined by the Central American Common Market, the countries have individually developed regimes, based on the experiences of other Central American States, and this has led to a high degree of convergence, mostly as regards anticompetitive conduct

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61 *Convenio de Tegucigalpa* (10 June, 1958).

62 *Tratado de Managua* (13 December, 1960).

63 *Protocolo de San José* (23 July, 1962).

64 *Protocolo de Guatemala* (29 October, 1992).

65 Ibíd.

66 Ibíd.

prohibitions. In addition, Central American countries have defined an informal system of dialogue. Article 25 of the Protocol of Guatemala instructs Central American Common Market States to adopt common rules regarding the promotion and defence of competition.[67] This instruction did not lead to a formal community guideline but Central American Common Market Secretariat established the Working Group on Competition Policy for Central American Integration[68] in 'charge of executing the first phase of a regional strategy on Central America based on the goals stated in the Guatemala Protocol'.[69] This initiative has led to an important cooperation network in the Central American Common Market that has helped to define concurrent policies in competition legislation and its interpretation.

## 2. What are Emerging Economies?

As was stated at the beginning of this introductory chapter, this thesis will focus on emerging economies. The question is, for the purpose of this thesis, what an emerging economy is? The term 'emerging economies' was coined as a tool to distinguish those developing economies that were doing better in growth terms from their third world developing peers in order to grant investors reliable information about different economic conditions in the developing world.[70]

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67 *Protocolo de Guatemala*, Article 25.

68 Victoria Velásquez and others, 'The Working Group on Competition Policy of the Central American Integration' (2008) 1 Central American Competition Bulletin 1, p. 1.

69 Ibid.

70 Antoine W. van Agtmael, *The emerging markets century: how a new breed of world-class companies is overtaking the world* (Simon and Schuster 2007), p. 5; See also Pradeep S

However, even today the literature has not been able to determine a single and definite meaning for the term 'emerging economy'.

Several authors have warned that 'a basic caution to researchers is that, at present, there is no standard list of countries agreed to be emerging economies'.[71] The reason why there is not a single meaning for what constitutes an emerging economy is basically because of the heterogeneity of the countries considered to have emerging markets. Most such countries have departed from different aggregate market structures, macroeconomic policies or infrastructure conditions, and therefore, a single definition regarding what is an emerging market is always relative.[72] In many cases, the literature on the topic prefers not to define what an emerging economy is, instead of adventuring to determine an emerging economy's characteristics.[73]

The economics scholarship, however, has identified several mechanisms and particular characters to establish whether a particular economy is an emerging economy[74] and has also considered that when one considers research on emerging

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Mehta and S Chakravarthy, 'Dimensions of Competition Policy and Law in Emerging Economies' (Discussion Paper, CUTS Centre for Competition Investment & Economic Regulation,), p. 1.

71 Robert E. Hoskisson and others, 'Strategy in Emerging Economies' (2000) 43 The Academy of Management Journal 249, p. 259b.

72 See Kvint V, 'Define Emerging Markets Now' Forbes (New York, 29 Jan, 2008) <http://www.forbes.com/2008/01/28/kvint-developing-countries-oped-cx_kv_0129kvint.html> accessed January, 2012;

73 Jhones S, *BRICs and Beyond: Lessons on Emerging Markets* (John Wiley and Sons 2012), p. 4-5; Zhu M, 'Emerging Challenges' (2008) 48 Finance & Development 48, p. 48

74 See Ann C. Logue, *Emerging Markets for Dummies* (Wiley Publishing, Inc. 2011); Peter Montiel, *Macroeconomics in Emerging Markets* (Cambridge University Press 2011); David J. Arnold, 'New Strategies in Emerging Markets' (1998) 40 Sloan Management Review 7; Hoskisson and others, 'Strategy in Emerging Economies'.

economies, it is important to clarify the definition and the boundaries that lead to determine which countries are included and excluded.[75] This does not mean that it is not also possible to determine a conceptual framework to determine what an emerging economy is.[76] That is why, for the purpose of this thesis, we refer to emerging economies to such economies that are experiencing a rapid pace of economic growth and have a set economic stable macroeconomic policies and rules favouring economic liberalization.[77]

This definition has two main features. First, it develops the notion of emerging economies from their characteristic of rapid economic growth. And second, it considers that emerging economies are composed by those jurisdictions that have had defined a set of fiscal and macroeconomic policies that distinguish these middle and low income economies from other middle and low income economies.

Regarding economic growth, this is the expansion of an economy's aggregate production and productive capacity,[78] the literature has assured that

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75 See Settles A and Kuskova V, 'Methods of Assessing Group Variation in Comparative Emerging Markets Research' in Wang C, Ketchen D and Berg D (eds), *West Meets East: Towards Methodological Exchange*, (Emerald Books 2012), p.; Kim Z and Jung M, 'Theoretical Approach to Define Emerging Markets and Emerging Market Global Companies: Double Triangle Model' (2009) 12 International Area Studies Review 1; Hoskisson and others, 'Strategy in Emerging Economies', p. 259b.

76 See Settles A and Kuskova V, 'Methods of Assessing Group Variation in Comparative Emerging Markets Research', p. 127-28.

77 Hoskisson and others, 'Strategy in Emerging Economies', p. 249a. See also Mehta and Chakravarthy, 'Dimensions of Competition Policy and Law in Emerging Economies', p. 1-4.

78 See Montiel P, *Macroeconomics in Emerging Markets* (Cambridge University Press 2011), p. 6. (stating that macroeconomics is primarily concerned with what determines how the level of the economy's productive capacity (potential GDP) changes over time.').

emerging market economies 'are characterized by significant and rapid economic growth, as evidenced by rising gross domestic product (GDP)'.[79] Similarly, it has been stated that regularly it is the rapid expansion of production capacity and the above average increase in a country's production what indicates the principal short and long term aim of emerging economies economic policy.[80] Thus, achieving, and being able to achieve, rapid economic growth is at the core of the definition of what an emerging economy is and what its main economic policy aims are.[81]

Given the latter, in this thesis an emerging economy, or an emerging market, is a country that, not being a developed economy, has grown steadily and has had as its main economic policy the achievement of sustained and accelerated [short and long term] growth. This is a necessary condition for a country to be considered an emerging economy.

In addition to economic growth, emerging market economies are also countries that have an adequate infrastructure, stable political conditions and sufficient human capital.[82] Then, not only economic growth but also other

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79 Carrasco ER and Williams S, Emerging Economies after the Global Financial Crisis: The Case of Brazil (University of Iowa College of Law 2011), p. 6.

80 See Mehta PS and Chakravarthy S, 'Dimensions of Competition Policy and Law in Emerging Economies' (Discussion Paper, CUTS Centre for Competition Investment & Economic Regulation,); Tay-Cheng Ma, 'The Effect of Competition Law Enforcement on Economic Growth' 7 Journal of Competition Law and Economics 301; Eleanor M. Fox, 'In Search of a Competition Law Fit for Developing Countries' (New York) [2011] 11 NYU Law and Economics Research Paper No 11-04 21; Thomas Ulen, 'The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development' in Michael Faure and Xinzhu Zhang (eds), *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar Publishing 2011).

81 Kim Z and Jung M, 'Theoretical Approach to Define Emerging Markets and Emerging Market Global Companies: Double Triangle Model' (2009) 12 International Area Studies Review 1, p. 3.

variables related to economic growth, such as sound macroeconomic policies, stable macroeconomic background, strong and stable political institutions, openness to trade, foreign direct investment and high levels of education are to be found.[83] It is also a characteristic of emerging economies that, as the term itself suggests,[84] countries come from a point and are in the path of evolving to another stage during a period.[85] This suggests that an emerging economy is in the path to achieve a different phase of economic performance and, therefore, that emerging economies are at different stages on such path and their policies regarding economic size, macroeconomic stability, political institutions, openness to trade and foreign direct investment and education may be at different levels of achievement.

Emerging economies regularly have highly concentrated markets.[86] As was said before, emerging markets come from different stages of development in the different areas related to growth.[87] However, most emerging economies have highly concentrated industries and markets with very low intensities of

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82 Logue, *Emerging Markets for Dummies*, p. 21.

83 Dominic Wilson and Roopa Purushothaman, 'Dreaming with BRICS: The Path to 2050' in Jain Shubash (ed), *Emerging economies and the transformation of international business* (Edward Elgar Publishing 2006), p.27-31.

84 Hoskisson and others, 'Strategy in Emerging Economies', p. 263b.

85 Ibid., p. 263b.

86 See Ajit Singh, 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions' (G-24 Discussion Paper Series, No 18, Research Papers for the Intergovernmental Group of Twenty-Four on International Monetary Affairs); Mehta and Chakravarthy, 'Dimensions of Competition Policy and Law in Emerging Economies'; Patrick Rey, 'Competition Policy and Economic Development' (*Institut d' Economie Industrielle, Universite des Sciences Politiques*, 1997) <http://idei.fr/doc/by/rey/competition.pdf> accessed 11 January, 2011.

87 See Michael Spence and et. al., *The Growth Report: Strategies for Sustained Growth and Inclusive Development* (Commission on Growth and Development, 2008).

competition.[88] This is shown in many empirical studies where emerging markets are studied in order to determine whether their character of being highly concentrated economies, where markets are dominated by a few economic groups, have a positive relation with industries' profitability.[89] This feature is especially important for competition policy where dominance analysis is regularly related to industries' cost structure and not to the country's aggregate markets and industries concentration.[90]

In addition, emerging economies are working on an on-going process of liberalization. It is a feature of emerging markets that most economic policies are embedded in an economic process of liberalization of trade, in order to facilitate a country's openness to trade and free markets. The literature has found that this change in domestic policies to more market-oriented policies is shown by the lowering of foreign trade tariffs and joining regional trading associations; however, 'this change is neither smooth, automatic, nor uniform'.[91]

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88 See World Economic Forum, *The Global Competitiveness Report 2011-2012* (World Economic Forum 2011).

89 See Gordon Wilmsmeier and Ricardo Sánchez, 'Evolution of shipping networks: current challenges in emerging markets.' [2010] Zeitschrift fuer Wirtschaftsgeographie 180 ,; Shrimal Perera, Michael Skully and J. Wickramanayake, 'Bank Market Concentration and Interest Spreads: South Asian Evidence' (2010) 5 International Journal of Emerging Markets 23 ,; Manoj K. Sharma and Harpreet K. Bal, 'Bank Market Concentration: A Case Study of India' (2010) 6 International Review of Business Research Papers 95; Ali Mirzaei, Guy Liu and Tomoe Moore, 'Does Market Structure Matter on Banks' Profitability and Stability? Emerging versus Advanced Economies' [2011] Brunel UL Economics and Finance Working Paper Series 1.

90 See John Sutton, *Technology and Market Structure: Theory and History* (MIT Press 1998); and Jeffrey Perloff, Larry S. Karp and Amos Golan, *Estimating Market Power and Strategies* (Cambridge University Press 2007).

91 Hoskisson and others, 'Strategy in Emerging Economies', p. 252a.

In summary, emerging economies are countries that have steadily expanded their economic capacity and have as main economic policy the achievement of accelerated [short and long term] economic growth, and are characterized by concentrated industries, stable macroeconomic conditions and markets in an on-going process of market liberalization. In the next section it will be shown what Latin American countries are emerging economies.

## 3. What Latin American Countries Are Emerging Economies?

One of the purposes of this thesis is to describe competition policy regarding abusive pricing in Latin American emerging economies. But, following the criteria defined in the previous section, which countries in Latin America are emerging economies?

Latin American economies[92] are regularly considered developing and third world economies. However, recent analysis has shown that some of the economies in Latin America have sound and robust economic systems that have allowed some of these countries to grow even in times of economic turmoil.[93] This feature, in addition to the consistent economic policies followed by some Latin American

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92 A country is called Latin American if it belongs to the group of countries in America that speak Spanish or Portuguese. These are 19 countries, located in Continental and Caribbean America. The countries are: Mexico, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, Cuba, Dominican Republic, Colombia, Venezuela, Ecuador, Peru, Brazil, Paraguay, Bolivia, Uruguay, Argentina and Chile.

93 See Liliana Rojas-Suarez, 'The International Financial Crisis: Eight Lessons for and from Latin America' [2011] 202 Centre For Global Development Working Papers; Clinton Carter, 'Latin America Stays Steady in the Storm' (2012) <http://blog.frontierstrategygroup.com/2012/02/latin-america-stays-steady-in-the-storm/> accessed 7 February, 2012.

countries in the previous years, has had the effect to position some Latin American economies not as third world developing countries but as emerging economies.

As was said before, sustained growth and sound and stable macroeconomic policies have helped a few Latin American economies to be considered emerging economies. Some of these economies have been identified to have the potential to grow at a pace similar to the rhythm experienced by economies such as China or India. In addition, several measures and rankings regarding which countries or jurisdictions are considered emerging economies have been released. Most of these are produced by investment banks and other credit and risk rating institutions to inform investors whether a developing economy is committed to achieve sustained and accelerated growth.[94]

According to the Table 1, the most important emerging market indexes regularly classify as emerging economies in Latin America, the economies of Brazil, Chile, Colombia, Peru and México. Only one index classifies Argentina as an emerging economy and most of them consider no other Latin American country as an emerging economy.

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[94] See for example: Standard & Poors, 'S&P Emerging Regions and Countries Mapping Guide' (2012) <https://www.sp-indexdata.com/idpfiles/emdb/prc/active/support documents/SP_Emerging_Mapping_Guide_Colombia.xls> accessed February 12, 2012; Dow Jones, 'Dow Jones Total Stock Market IndexesSM' (2011) <http://www.djindexes.com/mdsidx/downloads/brochure_info/Dow_Jones_Total_Stock_ Market_Indexes_Brochure.pdf> accessed 2 February, 2012; BBVA, 'Cross-Country Emerging Markets Analysis: Economic Watch' (2011) <http://www.bbvaresearch.com/KETD/fbin/mult/101215_EAGLEs_02_tcm348-239478> accessed 2 February, 2012; FTSE, 'FTSE Global Equity Index Series Country Classification' (2012) <http://www.ftse.com/Indices/Country_ Classification/Downloads/Sept%202011/FTSE_Country_Classification_Matrix_Sept_ 2011.pdf> accessed 2 February, 2012.

**Table 1: Latin American Countries in Emerging Economies Indexes[95]**

| Country Name | EAGLES-BBVA | FTSE | MSCI | S&P | DowJones |
|---|---|---|---|---|---|
| Argentina | Nest | Frontier | - | Frontier | - |
| Bolivia | - | - | - | - | - |
| Brazil | Eagle | Advanced Emerging | Emerging | Emerging | Emerging |
| Chile | Eagle | Emerging | Emerging | Emerging | Emerging |
| Colombia | Nest | Emerging | Emerging | Emerging | Emerging |
| Costa Rica | - | - | - | - | - |
| Cuba | - | - | - | - | - |
| Dom. Republic | - | - | - | - | - |
| Ecuador | - | - | - | Frontier | - |
| El Salvador | - | - | - | - | - |
| Guatemala | - | - | - | - | - |
| Honduras | - | - | - | - | - |
| Mexico | Eagle | Advanced Emerging | Emerging | Emerging | Emerging |
| Nicaragua | - | - | - | - | - |
| Panama | - | - | - | Frontier | - |
| Paraguay | - | - | - | - | - |
| Peru | Nest | Emerging | Emerging | Emerging | Emerging |
| Uruguay | - | - | - | - | - |
| Venezuela | - | - | - | - | - |

In economic terms, Tables 2 and 3 show that these countries have a strong relation with achieved growth during the past years and the soundness of other macroeconomic variables indicate that Brazil, Chile, Colombia, Mexico and Peru are the economies in the region that have steadily increased their productive capacity and have had as main economic policy the achievement of accelerated [short and long term] growth and their markets are on-going a process of market liberalization.

95 See Standard & Poors, 'S&P Emerging Regions and Countries Mapping Guide' (classifies economies emerging economies and frontier economies); Dow Jones, 'Dow Jones Total Stock Market IndexesSM'; BBVA, 'Cross-Country Emerging Markets Analysis: Economic Watch' (classifies economies as Eagles (Emerging and Growth-Leading Economies) and nest (those to be an EAGLE in the near future)); FTSE, 'FTSE Global Equity Index Series Country Classification' (classifies economies as Advance Emerging, Emerging and Frontier, being frontier the economies about to reach the emerging economy status).

**Table 2: Latin American Emerging Economies Openness to Trade Indicators[96]**

| | Tariffs | | | Foreign Direct Investment (Percentage of GDP) | | | Foreign Direct Investment (Percentage of GDP) | | |
|---|---|---|---|---|---|---|---|---|---|
| Country Name | Current (%)[97] | Tariff Variation (Last 20 Years) | Tariff Variation (Last 10 Years) | Current (U$ Dollars Net Inflows)[98] | FDI (Average growth 10 years) | FDI (Average growth 20 years) | FDI (%GDP)[99] | FDI (Average %GDP last 10 years) | FDI (Average %GDP last 20 years) |
| Argentina | 11,44 | -24,8% | -24,0% | 6.336.827804 | 14,56% | 13,14% | 1,72% | 2,08% | 2,45% |
| Brazil | 13,44 | -104,8% | -18,8% | 48.437.734.672 | 14,89% | 25,77% | 2,32% | 2,46% | 2,21% |
| Chile | 4,85 | -126,6% | -46,1% | 15.094.834.931 | 17,93% | 33,93% | 7,10% | 6,57% | 5,90% |
| Colombia | 11,23 | -7,0% | -9,6% | 6.764.505.639 | 26,4% | 24,86% | 2,35% | 3,43% | 2,84% |
| Mexico | 7,82 | -82,7% | -56,9% | 18.679.273.363 | 6,27% | 31,52% | 1,81% | 2,78% | 2,63% |
| Peru | 4,83 | -271,0% | -63,4% | 7.328.242.370 | 30,36% | 17,65% | 4,67% | 3,70% | 3,45% |
| High Income: OECD | 3,23 | 0,0% | -43,1% | 652.490.547.509 | -0,85% | 13,14% | 1,56% | 2,35% | 2,35% |

The latter can be seen in the countries' economic performance of the last two decades. On average these economies have achieved real growth at rates ranging from 3 to 5% during the last two decades, and 4% on average during the last decade. This means that, in terms of growth, these emerging Latin American countries have grown on average more than twice as fast per year and almost three times as fast during the last decade when compared with the economic growth in the OECD High income countries. In addition, commitment to liberalization is explained by the reduction of average tariffs. These emerging economies have reduced their tariff to an average of 8.9%, almost double the average OECD High

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96 See World Economic Forum, *The Global Competitiveness Report 2011-2012*; World Bank, *World Development Indicators, WDI* (World Bank 2011).

97 'Trade-weighted average tariff rate | 2010' World Economic Forum, *The Global Competitiveness Report 2011-2012, pp. 521-24.*

98 'Foreign direct investment is net inflows of investment to acquire a lasting management interest (10 percent or more of voting stock) in an enterprise operating in an economy other than that of the investor. See World Bank, *World Development Indicators, WDI* (World Bank 2011).

99 'Foreign direct investment is net inflows of investment to acquire a lasting management interest (10 percent or more of voting stock) in an enterprise operating in an economy other than that of the investor' as a percentage of Gross Domestic Product. See World Bank, *World Development Indicators, WDI* (World Bank 2011).

Income average tariff. However, the tariff has reduced 100% on average during the last two decades and 36% during the last decade. Similarly, foreign direct investment has grown in these emerging economies at a rapid pace during the last two decades, showing a strengthening confidence of investors in these economies' performance. During the last decade foreign direct investment net inflows has grown in these emerging economies at an average of 19% per year and around 25% per year during the last two decades. This has leaded foreign direct investment in Latin American emerging economies to grow on average fourteen times[100] during these two decades.

[100] Countries such as Brazil have grew their FDI 49 times, Chile almost 18 times and Colombia around 14 times in 20 years. The OECD high income countries grew their FDI around four times but have reduced their levels by 3% during the last decade.

**Table 3: Latin American Emerging Economies Growth Trends, Market Structure and Size Indicators**[101]

| | | Growth | | Market Structure | | Market Size | |
|---|---|---|---|---|---|---|---|
| Country Name | Current (%)[102] | Average Growth (Last 10 Years) | Average Growth (Last 20 Years) | Intensity of Local Competition[103] | Extent of Market Dominance[104] | Local Market Size[105] | Foreign Market Size[106] |
| Argentina | 9,16% | 4,56% | 4,29% | 4,3 | 3,3 | 4,8 | 5,1 |
| Brazil | 7,49% | 3,60% | 3,08% | 5,1 | 4,2 | 5,6 | 5,5 |
| Chile | 5,20% | 3,74% | 5,10% | 5,5 | 3,5 | 4,1 | 4,9 |
| Colombia | 4,31% | 4,10% | 3,40% | 4,7 | 3 | 4,6 | 4,7 |
| Mexico | 5,39% | 1,81% | 2,67% | 4,5 | 2,9 | 5,4 | 5,9 |
| Peru | 8,78% | 5,71% | 4,88% | 4,9 | 3,4 | 4,2 | 4,7 |
| High Income: OECD | 2,91% | 1,46% | 2,03% | - | - | - | - |

The latter illustrates the changes that during the last two decades these economies have faced. As may be seen, these Latin American emerging economies have had a fast and rapid growth pace. This feature distinguishes these economies from developed economies, as compared with high income OECD countries.

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101 World Economic Forum, *The Global Competitiveness Report 2011-2012*; World Bank, *World Development Indicators, WDI*.

102 'Annual percentage growth rate of GDP at market prices based on constant 1987 local currency'. See World Bank, *World Development Indicators, WDI*.

103 'How would you assess the intensity of competition in the local markets in your country? [1 = limited in most industries; 7 = intense in most industries] 2010–11 weighted average'. See World Economic Forum, *The Global Competitiveness Report 2011-2012*, pp. *521-24*

104 Perception regarding 'How would you characterize corporate activity in your country? [1 = dominated by a few business groups; 7 = spread among many firms] | 2010–11 weighted average'. See World Economic Forum, *The Global Competitiveness Report 2011-2012*, pp. *521-24*

105 'Sum of gross domestic product plus value of imports of goods and services, minus value of exports of goods and services, normalized on a 1–7'. See World Economic Forum, *The Global Competitiveness Report 2011-2012*, pp. *521-24*

106 'Value of exports of goods and services, normalized on a 1–7 (best) scale | 2010'. See World Economic Forum, *The Global Competitiveness Report 2011-2012*, pp. *521-24*

Similarly, regarding market structure, the emerging economies studied show very high levels of aggregate market concentration[107] and industry structures with low intensity of competition.[108] In fact, it is well documented that dominance and super-dominance are pervasive market characteristics in emerging economies.[109] The case is not different for Latin American countries. Some authors blame country size, development levels[110] and regulation[111] as the drivers of high market concentrations and low competition intensity levels,[112] whereas other authors centre on political structures and elites.[113] Whatever may the cause be, the fact is that Latin American emerging economies' industries are characterized by single dominant firms, oligopolistic structures and concentrated industries,[114] and these market structures favour the existence of a wide number of dominant undertakings in multiple markets and such common market structures may affect institutional choice and regulatory design in domestic regulation and in

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107 The measure of market concentration used is the World Economic Forum. This is a perception index of market participants that assess the extent to which markets are concentrated. See World Economic Forum, *The Global Competitiveness Report 2011-2012*, p. 427.

108 Similarly, the measure of competition intensity is the World Economic Forum's 'Intensity of Local Competition" perception variable. See Ibid., p. 428.

109 See Singh, 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions'; Mehta and Chakravarthy, 'Dimensions of Competition Policy and Law in Emerging Economies'.

110 See Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003)

111 See Ignacio De León, 'A Proposal for a New Competition Policy in Latin America' [1999] 25 Brooklyn Journal of International Law.

112 See World Economic Forum, *The Global Competitiveness Report* (Oxford University Press 2009), p. 33-35.

113 See Taimoon Stewart, *An Empirical Examination of Competition Issues in Selected Caricom Countries: Towards Policy Formulation* (Sir Arthur Lewis Institute of Social and Economic Studies 2004).

114 World Economic Forum, *The Global Competitiveness Report*, p. 404-405.

competition authorities' policy. This connection between prevailing market structures and the nature and purpose of competition law will be an important theme addressed in this thesis.

In addition, Latin American economies are markets with a large domestic market size. These economies are in the Top 50 economies measured by local market size, which, in addition to relatively large population and population density, indicate that these economies have a great potential for growth in the following decades.[115]

In summary, this section showed that Latin American emerging economies could be limited to five economies: Brazil, Chile, Colombia, Mexico and Chile. Argentina, before considered an emerging economy, it is no longer characterized as one, and however, it will be part of this research.

## 4. Do Emerging Economies Require a Specially Tailored Competition Policy?

During the last two decades, competition law and policy and related institutions have flourished around the world. During the 1980s, no more than forty countries had implemented competition laws and most of those jurisdictions did not enforce competition laws until very recently. But, in the course of the last two decades,

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115 The economies have large local economies -measured as the sum of gross domestic product and the value of imports excluding the value of exports. For example, Brazil is the 8th largest local economy, Mexico is the 11th, Argentina the 22, Colombia the 28th, Peru is the 44th and Chile is the 46th. See World Economic Forum, *The Global Competitiveness Report 2011-2012*, p. 472.

more than a hundred jurisdictions have enacted and started enforcing competition regulations.[116] Ranging from left wing economies such as China and Venezuela to open countries such as Singapore and Brazil, these economies have relatively new competition law enforcement systems that were generally aimed at promoting competition in their economies.

Most of these economies have simply 'imported' their competition laws and therefore have transplanted them from different institutional models.[117] The literature has studied this phenomenon and has questioned whether particular economic circumstances of these economies, economic policy goals and market structure should matter in these economies' competition policy design.[118] Most of the aforementioned literature on comparative competition law has found that there have been different models and different mechanisms to apply and implement competition laws in economies in transition or in developing economies, but there are only few clear cut conclusions regarding when those particular circumstances

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116 See Keith N. Hylton and Fei Deng, 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Law and their Effects' (2007) 74 Antitrust Law Journal 271; Michael Nicholson, 'An Antitrust Law Index for Empirical Analysis of International Competition Policy' (2008) 4 Journal of Competition Law and Economics 1.

117 See G. Bruce Doern and Stephen Wilks (eds), *Comparative Competition Policy : National Institutions in a Global Market* (Clarendon Press 1996); David J. Gerber, 'Two Models of Competition Law' in Hanns Ullrich, Wolfgang Fikentscher and Ulrich Immenga (eds), *Comparative Competition Law : Approaching an International System of Antitrust Law* (1. Aufl. edn, Nomos 1998); Hanns Ullrich, Wolfgang Fikentscher and Ulrich Immenga, *Comparative Competition Law : Approaching an International System of Antitrust Law* (1. Aufl. edn, Nomos 1998); Yang-Ching Chao, *International and Comparative Competition Laws and Policies* (Kluwer Law International 2001); Hylton and Deng, 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Law and their Effects'; A E Rodriguez, 'Does Legal Tradition Affect Competition Policy Performance?' (2007) XXI The International Trade Journal 417; Daniel Gerber, 'Comparative Antitrust Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008).

118 See Fox, 'In Search of a Competition Law Fit for Developing Countries', p. 9-15; Gal, *Competition Policy for Small Market Economies*, p. 250-264; Heba Shahein, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow' in ASCOLA (ed), *New Competition Jurisdictions: Shaping Policies and Building Institutions, Sixth ASCOLA Conference* (2011), p. 28-35.

should matter. In fact, following the same principle, not all economies are equal, and therefore, not all competition law regimes should follow the same principles.[119] That is why general rules and standards might be tailored in order to fit to the general economic goals of the host economy.

As explained in the previous section for the case of Latin America, regularly emerging economies have transplanted other jurisdictions' competition laws into their domestic laws and have then contextualized or tailored their statutory rules and standards[120] in order to cope with their domestic juridical system. In some cases, such transplants were supposed to provide emerging economies with the institutional tools and enforcement systems that competition authorities and competition policy makers have in high income economies.

However, while enforcing such laws, most competition authorities in emerging economies have faced the dilemma of choosing from competition policy rules and standards aiming either at market efficiency, social, producer or consumer welfare, but without providing a clear cut guiding principle in order to allow these economies to coherently choose among the large set of rules and standards available. In addition and most importantly for the purposes of this thesis, those rules and standards chosen are not regularly or coherently linked or

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119 According to Fox 'Little has been written at the grass roots level' this is the 'choice of a perspective or centre of gravity around which the substantive principles of competition law are formed'. See Fox, 'In Search of a Competition Law Fit for Developing Countries', p. 9.

120 See Shahein, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow', (Shows three approaches that new jurisdictions have followed in designing domestic competition laws).

aimed at the attainment of general economic policy goals such as achieving a rapid and sustained pace of economic growth.[121]

Then, having regard to the economic characteristics of emerging economies including highly concentrated industries and the general economic goal of emerging economies, this is the achievement of accelerated economic growth, this thesis proposes that competition law and policy design in Latin American emerging economies should follow a guiding principle in order to choose among the rules and standards applicable to the enforcement of competition law. Such guiding principle, having regard to these economies' characteristics is, for the purpose of this thesis, the achievement of economic growth.

The aforementioned proposal, after being presented in a general framework, is later applied to the case of the rules and standards regarding dominance and the prohibitions of excessive pricing in Latin American emerging economies, and therefore, a second set of sub-questions is addressed. First, from the 'menu' of mainstream standards on dominance, what have Latin American emerging economies have found and what approach is justified for these jurisdictions if economic growth is deemed as the competition law and policy's guiding principle. Second, regarding the standards that have been developed and enforced on prohibitions on abusive pricing, particularly in the case of excessive pricing and price predation, what are the mainstream policies, how have Latin American emerging economies enforced such abused and what approach should

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[121] See Robert Cotter and Hans-Bernd Schaefer, *Solomon's Knot: How Law Can End the Poverty of Nations*, vol 2011 (Second Edition edn, Princeton University Press 2011), p. 3.

be followed having regard to economic growth as the guiding principle of law and policy design.

## 5. The Thesis Plan

Chapter A explains what kind of competition policy Latin American emerging economies should follow having regard to economic growth as their particular economic goal and competition law and policy's guiding principle. In this chapter the reasons, shape and scope for a different approach to competition policy design in Latin American emerging economies is explained. The governing thesis contending is that achieving sustained growth should be the general guiding principle for Latin American emerging economies competition law and policy design. The chapter concludes stating that having regard to the characteristics and economic policies of emerging economies, competition law and policy in Latin American emerging economies should be led by economic growth as the tool devised to choose among the range of standards applicable in the enforcement of competition law. It is also shown how the guiding principle proposed fits in Latin American emerging economies current statutory goals and what should be done in order to apply this proposal in the jurisdictions studied.

Chapter B engages in the study of dominance, and the question regarding what policies have Latin American emerging economies followed and what approach is justified if economic growth is to be taken as guiding principle of these economies' competition law and policy design. First, the chapter starts showing that the concept of dominance, even in the current literature, has not yet

reached a consensus regarding what kind of economic power leads to a determination of what dominance is.[122] Then it is studied dominance, from what it is to which policy should be followed by emerging economies, having regard to the achievement of economic growth as the guiding principle of policy design for Latin American emerging economies. Chapter B concludes that dominance, having regard to the guiding principle should neither be considered a synonym of market power nor the ability to act without having regard to other market participants, but rather the economic power to exclude.[123] In addition, in Chapter B, the aforementioned standard is later on related to a quantitative measure, that, having regard to the aggregate and industrial economic structure and the economic policy defined by the State, could work as a prioritizing tool appropriate for Latin American emerging economies.[124]

In Chapter C, abusive pricing conduct is analysed starting by the study of by excessive pricing. Chapter C is aimed at determining what is the best rule or standard in excessive pricing for emerging Latin American economies, having

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122 See Robert O'Donoghue and A. Jorge Padilla, *The Law and Economics of Article 82 EC* (Hart 2006); George. B. Shepherd, Johanna Shepherd and William. G. Shepherd, 'Antitrust and Market Dominance' [2001] 46 Antitrust Bulletin; Joao Azevedo and Mike Walker, 'Dominance: Meaning and Measurement' [2002] 23 European Competition Law Review; M. A. Utton, *Market dominance and antitrust policy* (2nd edn, E. Elgar 2003); Ian Dobbs and Paul Richards, 'Output Restriction Measures of Market Power and Dominance' [2005] European Competition Law Review 572; John Vickers, 'Abuse of Market Power' (2005) 115 The Economic Journal F244; Russell Pittman and Maria Tineo, 'Abuse of Dominance Enforcement under Latin American Competition Laws' in Philip Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar 2006); Ariel Melnik, Oz Shy and Rune Stenbacka, 'Assessing Market Dominance' 68 Journal of Economic Behavior & Organization 63; Vasilis Droucopoulos and Panagiotis Chronis, ''Assessing Market Dominance': A Comment and an Extension' (2010) 109 Bank of Greece Working Papers 15.

123 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 108.

124 See Aaron Edlin, 'Stopping Above-Cost Predatory Pricing' (2002) 111 The Yale Law Journal 941, p. 952 (stating that price predation is achieved when a firm charges abnormally low prices to drive or chasten rivals from the market but those low prices are not the result of competition on the merit but temporary until the rivals exit).

regard to economic growth as the policy's guiding principle. It starts showing the debate regarding excessive pricing and concluding that there are not yet clear-cut rules regarding exploitative pricing. Then, after analysing whether the analysis and application of the prohibition on excessive prices in Latin America has been appropriate, it is studied whether taking into account that economic growth as the Latin American emerging economies guiding principle for policy design, a standard granting dominant undertakings the right to charge an excessive price provides incentives to attain rapid growth and, in addition, an administrable, sound and robust policy. This standard and concept of price predation encourages investment, innovation and entry, and therefore provides incentives for sustained economic growth. Here, once again, the thesis pursues a thematic concern to show relevant differences between emerging economies and developed economies and, of central importance, it aims to show how these differences should affect the shaping of competition law and policy, as emerging economies may choose their standards based on a single policy guiding principle. It is also shown how the proposed rule fits in Latin American emerging economies current statutes and what should be done in order to apply this proposal.

Chapter D studies price predation, the other side of the coin in abusive pricing. Chapter D is aimed at determining what the best standard in excessive pricing cases, having regard to economic growth as the policy's guiding principle is. Predatory pricing, has traditionally been a controversial notion in competition law[125] and the current mainstream literature shows that it remains a relatively

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[125] See Roger D. Blair and Jeffrey L. Harrison, 'Airline Price Wars: Competition or Predation' (1999) 44 The Antitrust Bulletin 489, p. 494. According to the authors the question is: If competition involves winners and losers, the sole extent of competition is to

vague concept that has not yet defined a single set of clear rules,[126] but a set of different rules and standards. This chapter establishes that, the analysis and application of the prohibition on price predation in Latin American emerging economies may have not been appropriate having regard to economic growth as the guiding principle for the design of these economies competition laws. Once again the differences that characterise emerging economies, and the consequences of those differences for regulatory design, are thematically emphasised. In Chapter D it is found that price predation is an exclusionary abuse that has as goal to drive competitors from the market by the direct use of market power to set prices that are substantially different from competitive prices.[127] Having this in mind, and taking into account economic growth as the guiding principle for competition policy design, it is found that, Latin American emerging economies should define a rule or standard that prohibits above and below cost price predation. This rule encourages investment, innovation and entry, and therefore provides incentives for sustained economic growth and discourages strategic behaviour by dominant

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exclude, hence, what's unlawful exclusionary conduct? The authors show that most people would agree that predation and price predation are undesirable forms of exclusion but price predation should be taken with caution, as such is a conduct where there is also agreement that should not be prohibited unless the form of competition that may replace it is fully understood.

126 See Timothy P. Roth, 'Predation, Cost-Based Tests and Predatory Intent' (1995) 5 Journal of Legal Economics 35, p. 35a-35b (stating that three recurring themes are still being discussed by the literature on predation: 1. The notion of predatory pricing, 2. the reliance on A-T's cost based test and; 3. The Courts' failure to take into account the industrial organization literature); James C. Miller III and Paul Pautler, 'Predation: The Changing View in Economics and the Law' (1985) 28 Journal of Law and Economics 495, p. 495 (Stating that predation is among the most difficult problems in economics and the law, since it is one of those specific business practices that may undermine competition or be itself a part of the competitive process). Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: an Analysis of Antitrust Principles and their Application* (3rd edn, Aspen 2006), §7.23a (holding that there's been a relative failure to delineate appropriate rules due to an "exacerbated fear" that dominant undertakings will use predation as a means to exclude rivals).

127 See Edlin, 'Above Cost Predatory Pricing', p. 952 (stating that price predation is achieved when firm charges abnormally low prices to drive or chasten rivals from the market but those low prices are not the result of competition on the merit but temporary until the rivals exit).

undertakings. Finally, the chapter also shows how the proposed does not regularly fit in Latin American emerging economies current statutes and proposes a regulatory reform in order to apply this proposal.

In Chapter E concluding remarks are presented. The purpose of this section is to return to the considerations made in the previous chapters regarding dominance, excessive pricing, and price predation to show how it is possible to design a coherent body of substantive rules using the guiding principle presnted in Chapter A, aiming policy at enhancing economic growth while protecting the process of competition.

This section comprises two sections: the first section examines the definition of dominance aimed at achieving growth and; the second section shows how the abusive pricing standards are suitable with the guiding principle and the way the rules proposed interact.

# A. GROWTH AS THE GUIDING PRINCIPLE FOR COMPETITION LAW AND POLICY DESIGN IN LATIN AMERICAN EMERGING ECONOMIES

## 1. Introduction

In this chapter a guiding principle for the design of competition law and policy for Latin American emerging economies will be proposed. This guiding principle is set to be used as a lighthouse to indicate the path that, among the large set of competition law and policy standards, Latin American emerging economies policy makers should choose.

In order to achieve that aim, first, the goals of competition law, as they currently stand in the literature, will be described and will be discussed. For that, first it will be shown that the protection of competition, for emerging economies, only makes sense if for 'competition' it is meant the process of competition and not the model of perfect competition. Second, the mainstream approaches to the goals of competition law, with special emphasis on the goals of competition law in unilateral conduct legislation, will be described. Finally, a case will be made for why a different approach to the selection of competition law standards is justified in emerging economies, concluding that, at least for Latin American emerging economies, economic growth should be the guiding principle for competition policy design.

It must be stated that whether particular economic circumstances and particular economic policy goals should matter in competition law and policy design is not a new question. During the past decade, part of the literature has shown the importance of market and economic structure to design, implement, and evaluate competition law and policy. Gal, for example, argues that small [developed] economies, which are characterized by small numbers of population size and population density, require specially tailored competition policies, stating that this is justified by the pervasive presence of scale economies and high entry barriers.[128] De Leon, referring specifically to the Latin American case, states that such economies lack policy identity and that such identity disorder is driven, among other, by the incomplete deregulation process of these economies that calls for a new policy and institutional design.[129] Similarly, other authors have proposed that developing economies, because of their particular circumstances, should determine and tailor competition law according to their particular characteristics and goals.[130] None of these authors, however, has taken into account the fact that competition policy may be also driven by wider economic policy aims that may

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128 Gal, *Competition Policy for Small Market Economies* (arguing for the need for a specially tailored competition policy for small economies); De León, *Latin American Competition Law and Policy: a Policy in Search of Identity*, p. 514 (explaining why Latin America economies lack policy identity and what the policy should strive for).

129 De León, *An Institutional Assessment of Antitrust Policy: The Latin American Experience* (Stating that consumer welfare–orientated policies implemented in Latin America do not promote market goals because of the state's excessive interventionism in antitrust policy); De León, *Latin American Competition Law and Policy: a Policy in Search of Identity*, p. 514 (explaining why Latin American economies lack policy identity and why the policy should strive for efficiency and no other goals).

130 See Rajan Dhanjee, 'The Tailoring of Competition Policy to Caribbean Circumstances: Some Suggestions' (2004) 9 Caribbean Dialogue 27; Kate and Niels, 'Mexico's Competition Law: North American Origins, European Practice' in ; Fox, 'In Search of a Competition Law Fit for Developing Countries'; Hanns Ullrich, 'International Harmonisation of Competition Law: Making Diversity a Workable Concept' in Hanns Ullrich, Wolfgang Fikentscher and Ulrich Immenga (eds), *Comparative Competition Law : Approaching an International System of Antitrust Law* (1. Aufl. edn, Nomos 1998).

also help to shape a better and more coherently design of competition law institutions.

What it is important for this chapter is that Latin American emerging economies lack a particular general path in their competition law and policy, and the literature has not proposed a guding principle in line with such path.[131] This Chapter proposes a solution to that problem by definig a single guiding principle for law and policy design, that may grant coherence to the policy of these emerging economies.

## 2. The Goals of Competition Law and Policy

In this section, the mainstream approaches to competition law and policy goals will be described. First, the object of the law will be defined (i.e., what is competition?), in order to show that, for emerging economies, the object of competition law should be the protection of the process of competition. Then, the goals of competition law and policy in the mainstream literature and case law will be examined to give a full account of conventional thought regarding the goals of competition law, and to conclude that, leaving aside the problem of re-distribution of wealth trough competition law.[132] Finally, the goals of competition law in Latin American emerging economies will be described.

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131 See De León I, Latin American Competition Law and Policy: a Policy in Search of Identity (Kluwer Law International 2001).

132 See Kaplow L, 'On the Choice of Welfare Standards in Competition Law' in ASCOLA (ed), The Goals of Competition Law, Fifth ASCOLA Conference (ASCOLA 2010), p. 13.

## i) What is 'Competition' for Competition Law and Policy

Before determining what the goals of the law are, it will be defined what the law is protecting. What is competition? For competition law purposes, suprisingly, there is still no consensus in the literature regarding what competition means.[133] Bork, for example, asserts that the literature has not yet arrived at a definitive conclusion or satisfactory definition of competition.[134] Similarly, Vickers found that competition is a concept 'that has taken a number of interpretations and meanings, many of them vague'.[135] However, most authors claim that there are only two concepts of competition.[136] Despite this assertion may be misleading,[137] as the history of the economic doctrines shows that economists have found many ways to define what competition is in economic terms, for the purpose of competition law and policy, two concepts of competition are regularly considered: competition as an ideal state and competition as a process.

### (1) Competition as a State

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133 Stuke, 'Reconsidering...', pp. 4–10.

134 Bork, *The Antitrust Paradox: a Policy at War with Itself*, p. 61.

135 John Vickers, 'Concepts of Competition' [1995] 47 Oxford Economic Papers 1, p. 3.

136 See Stuke, 'Reconsidering...', pp. 4–10 (stating that competition law and competition scholars have focused solely on static competition rather than dynamic competition); Bakhoum, 'Reconsidering...', p. 1 (stating that developing economies should focus on dynamic competition rather than static perfect competition models).

137 Vickers, 'Concepts...', p. 7 (stating that the concept of perfect competition departs from the concept of competition as rivalry).

As shown by the literature, the competitive market perfect equilibrium model was developed basically by Walras[138] and Arrow-Debrew[139] and McKenzie;[140] a more recent approach was defined by Mas-Colell.[141] A rough description of this model is that a competitive economy has an unlimited number of markets for all goods in the economy and, in all such markets, a large number of profit maximizer producers[142] and utility maximizer consumers[143] act as price takers—because prices are unaffected by their own actions—and, at the markets prices, production and consumption clear themselves.[144] Similarly, there is a partial equilibrium for each of the markets when there are homogeneous goods, free entry and exit, and complete and perfect information, and its welfare consequences imply that no one would be better off unless someone is made worse off.[145]

Having the latter model in mind, competition policy could be designed to achieve the welfare and competitive outcomes highlighted in the perfect competition model. If the markets depart from such a description, intervention,

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138 See Leon Walras, *Elements of pure economics, or, the theory of social wealth* (Rutledge 2003).

139 See Kenneth Arrow and G. Debreu, 'Existence of an Equilibrium for a Competitive Economy' (1954) 22 Econometrica 265.

140 See L. W. McKenzie, 'On the Existence of General Equilibrium for a Competitive Market' (1959) 27 Econometrica 54.

141 See Andreu Mas-Colell, *The Theory of General Economic Equilibrium: a Differentiable Approach* (Cambridge University Press 1990).

142 The competitive equilibrium model assumes that producers maximize profits. See Mas-Colell, Whinston and Green, *Microeconomic Theory*, pp. 135–143, 314.

143 Ibid., pp. 50–57, 314.

144 Ibid., p. 314.

145 See A. Marshal, *Principles of Economics* (MacMillan 1920) cited by Mas-Colell, Whinston and Green, *Microeconomic Theory*, p. 343.

either behavioural or structural, is justified to guarantee the ideal model of competition, where producers and consumers actions have no effects on pricing.

In conclusion, this concept of competition departs from the perfect competition model to arrive at a state or situation. Competition is therefore a state of affairs regarding the interaction between consumers and producers in which no one has the power or knowledge to set prices for a homogeneous good.

### (2) Competition as a Process

The notion of competition as a state of perfect equilibrium gave birth to a large amount of literature criticizing the real meaning of competition. Probably Hayek[146] gave the soundest criticism and rebuilt the concept of competition as a process of rivalry [and discovery].[147] As Hayek said, '...if the state of affairs assumed by the theory of perfect competition ever existed, it would not only deprive of their scope all the activities which the verb "to compete" describes but would make them virtually impossible'.[148]

Vickers, for example, contrasting with the Neoclassical concept of competition as a situation, considered competition to be 'a rivalrous behaviour with respect to prices and other variables in a world characterized by flux,

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146 See F. A. Hayek, 'The Meaning of Competition' in F. A. Hayek (ed), *Individualism and Economic Order* (The University of Chicago Press 1949).

147 Ibid., p. 99.

148 Ibid., p. 92.

uncertainty, and disequilibrium'.[149] This approach to competition as a process or a dynamic process leads competition policy in a different direction. It considers that intervention is justified if the process of rivalry or competition is being limited or if the particular market requires competition or more competition. Then, intervention is required in this process if there is need of 'greater freedom of rivals', 'an increase in the number of rivals', or 'independent behaviour between rivals'.[150] Thus, competition is a process where the behaviour of agents plays a crucial role.

In summary, the literature has regularly identified two concepts of competition that are aimed at the protection of an 'ideal' situation or the protection of the process of rivalry. In a subsequent section it will be shown that, having regard to Latin American emerging economies, the protection of the process seems to be a reasonable concept and aim of competition laws.

### ii) The Economic Goals of Competition Law: Between Consumer and Social Welfare

In this section, the traditional goals of comeptition law will be explained in order to highlight the multiple options that emerging economies have had when determining the goals of their competition law and policy. In fact, similar to the question regarding the meaning of competition, consensus is also lacking in terms of the goals of competition law. As in the concepts of competition, it may be

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149 Vickers, 'Concepts...', p. 7.

150 Ibid., p. 3.

misleading to claim that there is one or a pair of goals of competition.[151] However, recent competition law and policy literature on goals have defined two different but closely related goals: the achievement of consumer welfare and the achievement of social or total welfare. Both, regardless the approach, are different conceptions of the same economic concept of efficiency.[152]

These goals have an economic background and meaning. Before continuing, a few words are warranted on the use of economics to determine the goals of antitrust and competition law and policy. In the past decades, competition law has used economic grounds and theories to give competition law and policy a single aim: to make competition authorities' and policymakers' decisions predictable. Current competition law is based on economic grounds, because of the law's pretention of certainty and legal security, which other methodologies may not grant.[153]

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151 See Bouterse, *Competition and Integration: What Goals Count? EEC Competition Law and Goals of Industrial, Monetary, and Cultural Policy* (Kluwer 1994) Gal, *Competition Policy for Small Market Economies* Townley, *Article 81 EC and Public Policy* Bakhoum, 'Reconsidering...' in George L. Priest, 'Advancing Antitrust Law to Promote Innovation and Economic Growth' in Kaufmann Task Force on Law Innovation and Growth (ed), *Rules for Growth: Promoting Innovation and Growth Through Legal Reform* (Ewing Marion Kaufman Foundation 2011) Stuke, 'Reconsidering...' in Dhanjee, 'The Tailoring of Competition Policy to Caribbean Circumstances: Some Suggestions' Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?' (1977) 125 U Pa L Rev 1191 Schwartz, 'Justice and Other Non-Economic Goals of Antitrust' (1979) 127 U Pa L Rev 1076; Peña, 'Competition Policies in Latin America post Washington consensus' in.

152 See Bishop and Walker, *The Economics of EC Competition Law : Concepts, Application and Measurement*, §2-017.

153 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 71b.

Several authors have made a good case for the use of both, economic and noneconomic goals in competition law and policy.[154] Most authors consider values such as efficiency, promotion of equality, employment, the protection of small- and medium-sized enterprises, the environment, national security and defence, industrial policy, and others as the range of possible goals of competition law. However, for example, Hovenkamp concludes that, if courts were to be guided by multiple goals, conflicting policies must be later balanced.[155] Furthermore, if competition law is intended to be a coherent body of law, rules for balancing conflicting interest should also be clear[156] and, for such purpose, would probably best be based on economic rules, such as efficiency or cost–benefit analysis.[157]

Now, having briefly stated why the achievement of either economic goals such as efficiency is justified, now description of social welfare and consumer welfare as goals of competition law, will be presented in order to provide grounds to the discussion regarding the most apporpriate goal of competition policy for emerging economies.

### (1) Social Welfare

Some recent literarture has considered that social welfare should be considered the sole goal of competition law and policy, as it protects, indiferently, the society as a

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154 See Townley, *Article 81 EC and Public Policy* ; Schwartz, 'Justice and Other Non-Economic Goals of Antitrust'.

155 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 71b.

156 See Townley, *Article 81 EC and Public Policy* (showing a set of principles to be used for balancing competition law goals with other public policy goals).

157 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 71b.

whole.[158] Indeed, social welfare or allocative efficiency refers to 'the welfare of society as a whole'.[159] This concept departs from the perfect competition model, in which prices and marginal costs are equal, and therefore the market is in equilibrium. According to the allocative efficiency or social welfare standard, if consumers are willing to pay more for a good or service than the marginal costs of production, then the state or situation is better when more units of the good or service are produced at the price consumers are willing to pay. Similarly, if consumers are willing to pay less for a good or service than the marginal costs of production, then the state or situation is better when less units of the good or service are produced at the price consumers are willing to pay. Only when prices are equal to the marginal costs of a particular good or service is there social welfare.[160]

Allocative inefficiency comes from the state where prices are different from marginal costs, such as in the case of monopoly pricing (explained in Chapter C). Social welfare comes from the addition of consumer and producer surplus. Consumer surplus refers to the difference between the buyers' maximum price for a certain good or service and the price buyers actually pay.[161] Also, the perfect competition model tends to minimize costs at the competitive price. The difference between total revenue at the competitive price and the sum of

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158 See for example Kaplow L and Shavell, *Fairness v Welfare* (Harvard University Press 2005); Kaplow L, 'On the Choice of Welfare Standards in Competition Law' in ASCOLA (ed), The Goals of Competition Law, Fifth ASCOLA Conference (ASCOLA 2010)

159 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 75a.

160 Bishop and Walker, *The Economics of EC Competition Law : Concepts, Application and Measurement*, §2-015; 2-016.

161 Mas-Colell, Whinston and Green, *Microeconomic Theory*, pp. 50–57; Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, §1.1.

producers' costs represents the producers' surplus.[162] The addition of both consumers' and producers' welfare determines social welfare.

### (2) Consumer Welfare

Competition law and policy is most commonly explained as a system to indirectly protect the interest of consumers; by protecting competition, the interests of consumers are also protected. Consumer welfare, as stated above, is equivalent to consumer surplus.[163]

The perfect competition model tends to maximize the surplus of consumers or consumers' welfare.[164] The consumer welfare standard, instead of maximizing social welfare (the sum of consumers' and producers' surplus), considers outcomes that maximize consumer surplus to be the guiding principle of competition policy.

Both U.S. and European authorities have advocated for consumer welfare as the goal of competition law enforcement. The US-DOJ has stated that it is the goal of antitrust laws to prohibit practices that deprive consumers of the benefits of competition:

> Most States have antitrust laws... Essentially, these laws prohibit business practices that unreasonably deprive consumers of the

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162 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 5b.

163 Mas-Colell, Whinston and Green, *Microeconomic Theory*, pp. 50–57; Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, §1.1.

164 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 5b.

> benefits of competition, resulting in higher prices for inferior products and services... Free and open competition benefits consumers by ensuring lower prices and new and better products... Consumers benefit from competition through lower prices and better products and services.[165]

As stated by the former Deputy Assistant Attorney for Antitrust, Christine Varney, unilateral conduct case law has also shown a preference for consumer welfare and the protection of consumers through competition law.[166] For example, in *Brooke Group*[167], the Court's opinion regarding price predation was that, unless recoupment is feasible, 'predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced'.[168] In addition, the Court said:

> [w]e were particularly wary of allowing recovery for above-cost price cutting because allowing such claims could, perversely, 'chil[l] legitimate price cutting', which directly benefits consumers.[169]

Thus, the Court considered that allowing plaintiffs to recover for above-cost price cutting may deprive 'consumers of the benefits of lower prices', which 'does not constitute sound antitrust policy'[170], making it clear that consumer welfare is what

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165 U.S. Department of Justice, *Antitrust Enforcement and the Consumer* (US-DOJ 1996), p. 1b.

166 In fact, the recent bilateral Free Trade Agreements signed by the US with other governments have included clauses that indicate that the parties will consider the competition legislation to be aimed at the protection of consumers' welfare. See *US-Peru Trade Promotion Agreement (April 12, 2006, February 1, 2009),* article, 13.2., *US-Chile Free Trade Agreement* (June 30, 2007, entered into force January 1, 2004), article 16.1.; *US-Colombia Free Trade Agreement* (June 30, 2007, entered into force March, 2012), article 13.1, *US-Korea Free Trade Agreement* (June 30, 2007, entered into force march 15, 2012), article 16.1.

167 See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993).

168 Ibid., p. 224.

169 Ibid., p. 224.

170 Ibid., p. 224.

matters in such cases. Similarly, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[171], the U.S. Court considered that, in the case of predatory bidding, such behaviour,

> presents less of a direct threat of consumer harm than predatory pricing. A predatory-pricing scheme ultimately achieves success by charging higher prices to consumers. By contrast, a predatory-bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses.[172]

The EU case law, however, has not been specifically deemed to protect consumer welfare directly but indirectly. In fact, in some cases, the European Courts have been reluctant to state consumer welfare as the sole goal of competition law enforcement.[173] For example, in *France Télécom*, the Court stated that the statute prohibits not only behaviour that is detrimental to consumers but also behaviour that is detrimental to the competitive process.[174]

However, EC competition authorities have followed a consumer welfare standard or at least have found competition law's guiding principle in achieving consumer welfare. For example, referring to the case of efficiencies in abuse of

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171 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.,* §IV.b.

172 Ibid., §IV.b.

173 See Pinar Akman, '"Consumer Welfare" and Article 82EC: Practice and Rhetoric' (2009) 32 World Competition 71 (Showing there is a large discrepancy between EC policy and case law regarding consumer welfare and the goal of competition law).

174 *CJEU France Télécom*, §105. The Court stated: '... since Article 82 EC refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure..., an undertaking which holds a dominant position has a special responsibility not to allow its behaviour to impair genuine undistorted competition on the common market'.

dominance cases, the EC's Guidance in Article 82[175] explicitly recognized that consumers should not be harmed, even in cases where dominant firms show there are efficiencies from their unilateral behaviour.[176] The Guidance considers that 'the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets',[177] showing the special interest that the European Commission grants to the protection of consumers' interests in competition law.

In fact, according to the Commission's statement, referring to the case of abuse of dominance:

> The main principles of the effects-based approach to Article 82 are the following: Fair and undistorted competition is the best way to make markets work better for the benefit of EU business and consumers... The focus of the Commission's enforcement policy should be on protecting consumers, on protecting the process of competition and not on protecting individual competitors.[178]

In summary, the achievement of efficiency, either in its consumer or social welfare versions, is regularly seen as the ultimate goal of competition policy.

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175 See European Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (2009) C 45 Official Journal.

176 Ibid., §29; See Christine Varney, *Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness.* (U.S. Department of Justice 2009), p. 7.

177 European Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings', §30.

178 European Commission, 'Antitrust: Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings' (*European Commission*, 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1877&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 11th January, 2012.

Having explained the most common economic goals of competition law and policy, either in enforcement and the literature, and finding that both are based on the concept of economic efficiency, in the following section it will be explored what are the statutory goals of competition law defined by Latin American emerging economies, in order to show what has been defined by legislators and enforcement authorities, and later determine whether they are justified.

### iii) The Goals of Competition Law in Latin American Emerging Economies

Latin American emerging economies have defined several statutory goals of competition law. Ranging from attaining social welfare to the protection of the social role of property, statutory competition law and policy goals in Latin American economies have sought to achieve a large set of economic and non-economic public policy objectives. However, most statutes in Latin America have considered it more important to protect the 'process of competition' than an ideal state of competition.

Regarding the case of particular efficiency goals, this is consumer, producer or social welfare, it is important to highlight that competition authorities have not used in a consistent or coherent way such statutory goals in their enforcement practice. For example, in the case of social welfare, only Argentina's

statute defines the attainment of 'general economic interest' as an objective.[179] Such language in the Argentinean Competition Act has been interpreted as the total welfare standard.[180] Several decisions of the Argentinean Competition authority have considered that the concept of general economic interest may also be assimilated to social welfare.[181] For example, in *Impsat*[182] the Argentinean authority decided that not only the restrictions to competition must be proven, but also the restriction to the 'general economic interest', because 'there are anticompetitive conducts that may not engender an actual or potential damage to the general economic interest'.[183]

In *YPF*, the Argentinean authority defined social welfare as the standard to evaluate the concept of general economic interest. The authority stated that:

> As explained above, the concept of harm to the general economic interest, understood as economic efficiency, refers to those circumstances in which the abusive or anti-competitive action carried out results in less quantities commercialized than the equivalent to the equilibrium in competitive market. This reduction of the marketed quantity implies that there is decline in consumption that generate a positive net social value (price minus

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179 Ley 25156, Article 1.

180 OECD, *Competition Law and Policy in Argentina: A Peer Review* (OECD Country Studies, 2006), p. 10. The report states: '[o]ther factors such as producer welfare "fairness" and economic growth are said not to be primary objectives of the competition law, although economic benefits such as these are the inevitable results of efficiency enhancements brought about by the application of the consumer welfare standard.' The Supreme Court of Justice's case law has assimilated the 'general economic interest' to the 'general economic welfare in a market'. See *A. Gas y otros v. AGIP Argentina S.A.* Fallo del 23 de Noviembre de 1993 Supreme Court, Argentina.

181 See *Autogas S.A.I.C. v. YPF S.A. y YPF Gas S.A.* ; *AVIABUE v Airlines* ; *Impsat v Telefónica de Argentina S.A et. al.*.

182 *Impsat v Telefónica de Argentina S.A et. al.*

183 Ibid., §66, §161; See *A. Gas y otros v. AGIP Argentina S.A.* (the Argentinean Supreme Court held that, the damage to the general economic interest, according to the language of the Law, could be not only actual but potential).

> cost), reason why social welfare decreases. At the same time, there is a monetary transfer from consumers to producers.[184]

Chilean competition law Statute is much more explicit about its goals. According to article 1 of Decree-Law 1 of 2004, the goal of competition legislation is 'to promote and defend free competition in the markets'.[185] This goal was clearly stated by the Chilean Competition Tribunal in *Comasa,*[186] stating that:

> It is not an objective of the rules of free competition to protect only a determined economic agent, even if it has been able to be affected by such behaviour, but it must protect free competition and markets rivalry, regardless of who can be benefited or harmed by this.[187]

The peer review conducted by the OECD on Chile's regime showed that:

> Chile's government regards the principal goal of its competition law as being to promote economic efficiency, with the expectation that in the long run this maximises consumer welfare. The law does not express this goal, though, nor indeed other.[188]

Case law, however, has not been helpful to identify the welfare standard followed by the Chilean Tribunal or the Supreme Court in such cases.

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184 *Autogas S.A.I.C. v. YPF S.A. y YPF Gas S.A.*, p. 170; See *AVIABUE v Airlines*, §VII.104-VII.105;

185 Decreto Ley 1 de 2004, 2004, (Diario Oficial, Chile), Article 1.

186 *Comercial y Agrícola S.A. v Cooperativa Agrícola Pisquera Elqui Ltda*..

187 Ibid., §44.

188 OECD, *Competition Law and Policy in Chile: Accession Review* (OECD Country Studies, 2010), p. 24. In some unfair competition cases, protection of consumer interests is found to be the goal of the law. However, the Tribunal is not considering competition law issues but trademark violations that have an effect on competitive fairness. See *Farmacéuticas Knop Limitada v Farmacias Ahumada S.A.* Sentencia 24 de 2005 Tribunal de Defensa de la Libre Competencia, Chile.

On the other hand, consumer welfare has been advocated by most of the authorities. Peruvian competition law is the most explicit about the protection of consumer welfare as the single goal of competition law. The statute defines as its goal the elimination of anticompetitive practices to grant consumers the benefits of entrepreneurial growth.[189] The Statute states that:

> This Act prohibits and punishes anti-competitive conduct in order to promote economic efficiency in the markets for the well-being of consumers.[190]

The goals of the statute are clear. As stated by the OECD, in reference to Law 25868, 1992:

> The Article's references to free competition and consumer benefits, together with the absence of any non-efficiency goals, make this provision a remarkably clear statement of intent to promote economic efficiency. This unusual lack of ambiguity may result from the law's being a Presidential decree rather than the product of the kind of compromise that legislators often find necessary.[191]

In fact, references to consumer welfare exist in other parts of the law. For example, article 3 of the Law 25868, 1992, banned conduct 'related to economic activity that constitutes an abuse of dominance or that restrains free competition in a manner that injures the general economic welfare'. The new statute required that the harm to consumer welfare be proven in any case of 'relative prohibitions'.[192] In cases of 'relative prohibitions', to verify the existence of the anticompetitive

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189 Decreto Ley 25868,

190 Ibid., Article 1.

191 OECD, *Competition Law and Policy in Peru: An OECD Peer Review* (OECD Country Studies, 2004), pp. 18–19.

192 Relative prohibitions are those not considered ancillary.

action, the competition authority must prove the existence of the conduct and that it has, or could have, negative effects on competition and consumer welfare.[193]

Finally, this goal has been affirmed by the Peruvian Tribunal in the *Asociación de Fondos de Pensiones* cases, in which the Commission and the Tribunal studied an abuse against the 'interest of consumers' and construed the Peruvian Statute stating:

> What was indicated in the previous paragraph orders the Tribunal to remember the purpose pursued by the State's constitutional duty to facilitate and monitor free competition, which, in the end and in the light of the 'special duty of protection' of the State, is no other than ensuring the largest well-being of consumers.[194]

Brazilian law has defined a group of goals of competition law in article 1 of the Law 8884 of 1994, stating that, following the constitutional provisions,[195] the law 'sets out antitrust measures in keeping with such constitutional principles as free enterprise and free competition, the social role of property, consumer protection, and restraint of abuses of economic power'.[196] The new Law 12559 of 2011,[197] in force in May 2012, reproduces article 1 of the Law 8884 of 1994 and considers those four constitutional values as goals of competition law. In some

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193 Decreto Ley 25868, Article 9.

194 *Central Únitaria de Trabajadores del Perú y J.Dies-Canseco v AFP Horizonte, AFP Integra, AFP Unión Vida, Profuturo AFP y Asociación de AFPs*, p. 23; See also: *Central Únitaria de Trabajadores del Perú y J.Dies-Canseco v AFP Horizonte, AFP Integra, AFP Unión Vida, Profuturo AFP y Asociación de AFPs* ; *AATC v Consettur Machupicchu*, §30;

195 Articles 170 and 173 of the Brazilian Constitution.

196 Lei 8884, Article 1.

197 Lei 12529, Article 1.

cases, such as *SDE v Santos Brasil*,[198] the Competition Tribunal has referred to consumer welfare, indicating that it is the goal of the competition law to protect consumers' welfare. In *ADROFAR v. Drogaria Sao Paulo et al.*,[199] the Brazilian Authority decided that, to find a violation of the statute, damage to consumers' welfare must be proven in addition to evidence of anticompetitive conduct.[200]

Several decisions on price predation have stated that:

> It is therefore appropriate to define predatory pricing as a commercial practice held by a firm with market power, which sacrifices profits of short term with goal of reducing competition, and that it can produce the following effects: reduce the welfare of consumers and maximize the profits of the infringer in the long term.[201]

In addittion, according to the contributions given at the International Competition Network,[202] the Brazilian agencies consider that the objective of competition law includes not only the protection of the process of competition but also the social role of property and consumer protection. The Brazilian Tribunal, however, is keen to affirm that 'the great majority of its decisions are based on a "pro-

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198 *SDE v Santos Brasil S/A, et. al.* Administrative Proceeding nº 08012.007443/1999-17 Conselho Administrativo de Defesa Econômica, Brazil.

199 *ADROFAR v Drogaria São Paulo et. al.* Averiguação Preliminar No. 08012.012806/2007-06 Conselho Administrativo de Defesa Econômica, Brazil.

200 Ibid., p. 120.

201 Ibid., p. 3; See *Refinaria Petroleo de Manginhos et. al. v Petrobras* Administrative Proceeding No. 08012.007897/2005-98, CADE, Brazil.

202 International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* (Unilateral Conduct Working Group, 2007).

consumer" premise and that it generally "prioritize[s] consumer welfare [over] total welfare"'.[203]

The competition policy objectives of Mexican competition law are set out explicitly in the Federal Competition Statute. Article 2 of the Statute states that the objective of competition law is:

> ...to protect the competitive process and free market access by preventing monopolies, monopolistic practices, and other restraints of the efficient functioning of markets for goods and services.[204]

Case Law has shown that the Mexican competition authority has defined consumer welfare as the welfare standard in competition cases. For example, in *CFC v. Aeropuerto de Cancún,*[205] the party's main contention was the unlikely effects of the abusive conduct on consumer welfare. The Mexican Competition authority found that, despite the fact that there was some sort of maximization of efficiencies, or social welfare, consumer welfare would be impaired by the barriers to entry in the airports services market.[206] Similarly, in *CFC v Telmex,*[207] the Mexican competition authority found that the Mexican telecommunications company was abusing its dominant position by obstructing other agents' access to internet services by tying their service of local telephony to the internet access

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203 Ibíd., p. 11.

204 Ley Federal de Competencia, Article 2

205 *Comisión Federal de Competencia v. Aeropuerto de Cancún, S.A. de C.V. y Servicios Aeroportuarios del Sureste, S.A. de C.V.* Recurso de reconsideración, Expediente No. RA-003-2011 Comisión Federal de Competencia, Mexico.

206 Ibíd., pp. 121–122.

207 *Comisión Federal de Competencia v. Grupo de Telecomunicaciones Mexicanas S.A. de C.V.*.

service, a market where the Telmex was dominant, thus impeding entry and consequently reducing consumer welfare.[208]

In the opinion of the Mexican Federal Competition Commission, the competition law's object is 'to protect the process of competition by eliminating monopolies, monopolistic practices, and other restrictions to the efficient functioning of markets.'[209] This position is also held by the OECD, which believes that the Mexican competition law is guided by the efficiency criteria. The OECD stated that:

> Efficiency is the guiding touchstone for the law's application. Other commonly encountered competition policy concerns are subsumed in the efficiency-based analysis. For example, there are no provisions or doctrines about 'fairness' or 'fair competition,' nor about protecting the interests of small enterprises or limiting industrial concentration. And although the law is part of a program to develop a more market-oriented economy, the law takes no explicit note of the goal of promoting economic growth. The law's underlying rationale contemplates that growth will follow from greater competition and efficiency.[210]

The International Competition Network states that, according to the responses given by Mexico, in unilateral conduct cases, 'before determining whether a unilateral practice is anticompetitive, the authority must evaluate the efficiency

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208 Ibíd., §IV.a; §IV.b.

209 International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, p. 13.

210 OECD, *Competition Law and Policy in Mexico: An OECD Peer Review* (OECD Country Studies, 2004), p. 11.

gains demonstrated by the company under investigation and the net effect of the practice on consumer welfare'.[211]

Colombian competition law has two sets of goals: one set defined in the Constitution and another set defined bythe Statute. The Constitution stated that the State must protect the process of competition, explicitly saying that it should 'impede the obstruction and restriction of economic liberty and prevent or control any abuse by persons or firms of their dominant position in the national market.'[212] The Constitutional Court has construed that provision as stating that 'the Constitution has elevated free competition as a leading principle for economic activity to the benefit of consumers and entrepreneurial freedom...'[213]

Similarly, the Constitutional Court has stated that the goal of competition law is to promote market efficiency and the interest of consumers[214] and held that:

> Competition ...through market institutions, offers the economic Constitution the opportunity to base itself on them with a view to promoting economic efficiency and the welfare of consumers... the object protected by the Constitution is the competition process itself, not competitors, whether large or small; free economic competition is conceived as both an individual right and a collective right, the purpose of which is to achieve a state of real, free and undistorted competition, which will allow entrepreneurs to earn profits while generating benefits for the consumer with goods

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211 International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, p. 10.

212 Constitución Política, 1991, (Diario Oficial, Colombia), Article 333.

213 Sentencia T-240 de 1993 Constitutional Court, Colombia.

214 See Sentencia C-535 de 1997 Constitutional Court, Colombia.

> and services of better quality, greater guarantees, and a real and fair price.[215]

This was confirmed by Law 1340 of 2009. Article 3 of Law 1340 states that competition law enforcement should only proceed in cases where the Competition Authority seeks to achieve free participation of firms in the market, consumers' welfare, or economic efficiency. These goals, as have just been shown, define the achievement of dynamic competition, consumer surplus, and social welfare as goals of competition law, granting the authority the ability to enforce the statute using any of these goals.[216]

In summary, the competition laws of the Latin American emerging economies studied here have had two distinct goals. The first goal is the protection of the 'process of competition' of the principle of free competition. Either by constitutional, statutory, or administrative principles, competition authorities have found the goal of competition law to be the protection of the process of competition. For example, the Brazilian agencies characterize their competition law's objective as establishing 'antitrust measures in keeping with such constitutional principles as free enterprise and open competition'.[217]

The second goal, the achievement of consumer welfare, seems to be, in light of international practices, the most common standard practiced in Latin American emerging economies. Only Argentina adopts the social welfare standard

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215 Sentencia C-369 de 2002 Constitutional Court, Colombia.

216 Act 1340-2009, Article 3.

217 International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, p. 14.

as the single welfare standard, despite the fact that most of the jurisdictions studied, such as Brazil, Colombia, and Mexico, seem to protect through competition not only consumer welfare. Only Peru has as its single statutory goal the protection and achievement of efficiencies following the consumer welfare standard.

Finally, most jurisdictions have defined several economic and non-economic public policy goals in their statutes, but such goals are not regularly taken into account in the region's enforcement practice. For example, Brazil is aimed at protecting for certain principles, including "free competition," "the social role of property," "consumer protection," and "private property", but there are no cases where such a goal has been definitive for finding a remedy.[218] According to the OECD report, Colombia should, because of constitutional provisions, also strive to 'rationalise the economy in order to improve the quality of life, to distribute opportunities and the benefits of development equitably, to preserve a healthy environment, to achieve full employment of human resources and harmonious development of the regions' as such are benefits attributed to free competition by the Colombian Constitution.[219] Both, the case of Brazil and the case of Colombia, seem to be tough jobs for a competition authority with limited powers and functions.

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[218] OECD, *Brazil - Peer Review of Competition Law and Policy* (OECD Country Studies, 2009), pp. 10-12.

[219] OECD, *Colombia - Peer Review of Competition Law and Policy* (OECD Country Studies, 2009), pp. 16–17.

In summary, Latin American emerging economies Statutes have defined their competition law system aimed at the protection of the 'dynamics of competition' and the protection of efficiency, in either in consumer or social welfare perspective. Both seem to be goals not consistently protected in the region, as most authorities have followed enforcement standards that may impair one or both goals.[220]

## 3. Economic Growth as Guiding Principle of Competition Law and Policy for Latin American Emerging Economies

According to the previous section, competition authorities in Latin American emerging economies have defined and have regularly followed in their enforcement practice two goals of competition law and policy: the protection of the dynamics of competition and the protection and achievement of efficiency, either thorugh consumer or social welfare. At first sight, both seem to be sound and robust goals for a consistent development of competition law and policy. However, as will be shown in the next chapters, Latin American emerging economies policies are not coherent. Most jurisdictions follow different efficiency standards or different concepts of competition while enforcing their own statutory prohibitions. In adition to the lack of clarity of the statutes that will be shown later on, these erratic enforcement practices have ameliorated the consistency of policy and have not provided policy makers and enforcers with one single path to provide soundness to the economy's competition policy. In several cases, following a

[220] See Chapters B, C and D.

single standard, such as consumer welfare, is not only costly and difficult to administer but also may impair the potentials for economic growth. The same could be said about other standards such as social or producer welfare, which are also difficult to administer and, in some ocations, may also impair the potentials for economic growth.

This section will show why the protection of the dynamics of competition is the concept of competition that should be protected by emerging Latin American economies. Also, this section will show why the achievement of social, consumer or producer welfare or any efficient rule or standard may be indifferent for Latin American emerging economies when the selection or the rules and policy design is based on a guiding principle of the policy. Then, this section will conclude that Latin American emerging economies should designe and enforce their competition laws looking to achieve efficiencies but guided by a policy principle. It will also be shown as well that this principle should, having regard to these economies economic characteristics, be economic growth, this is the expansion of an economy's productive capacity.

### i) The Protection of the Process of Competition

As shown in Section 2, a rough description of the perfect competition model is that a competitive economy has an unlimited number of markets for all goods in the economy and, in all such markets, there is an equilibrium, because the large

numbers of profit maximizer producers[221] and utility maximizer consumers[222] act as price takers (given that prices are unaffected by their own actions) and, at such market prices, production and consumption clear the market. This market situation is considered to be the ideal state of a market, because in such a state, no party can be better off without the other party being worse off.

Given this state, Bishop explained that following the consumer or the social welfare standard is practically the same,[223] because the maximization of consumer welfare has as its consequence the maximization of social welfare.[224]

But markets subject to antitrust scrutiny in emergin economies such as the Latin American are not regularly close to the competitive market standard. To achieve a better outcome, economic theory has relied on the concept of 'pareto superiority'. Under pareto superiority, the efficiency standards gain a different role, because the intervention of the authority, at least in cases of abuse of dominance, leads to the attempt to restore or to establish a competitive market. When deciding which market structure to prefer to make the market more competitive, this is closer to the perfect competition ideal structure; competition authorities could use standards of behaviour that grant prevalence to new situations where there are gains in consumer surplus or producer surplus. Despite

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221 The competitive equilibrium model assumes that producers maximize profits. See Mas-Colell, Whinston and Green, *Microeconomic Theory*, pp. 135–143, 314.

222 Ibid., pp. 50–57, 314.

223 Bishop and Walker, *The Economics of EC Competition Law : Concepts, Application and Measurement*.

224 Ibid., §02-017.

criticism, most authors view this decision as distributionist.[225] The fact is that having the perfect competition model as an ideal state, competition authorities of emerging Latin American economies should have to take decisions with strong redistributive effects in the short term in order to achieve such a market structure. Those decisions are highly complex and likely to generate multiple errors.

Emerging economies' markets are regularly very far from the perfect competition situation. As shown in the first chapter, most emerging economies are highly concentrated economies with low intensities of competition.[226] Their point of departure to arrive at a competitive market will require that the competition authorities make a strong effort to achieve efficiencies that improve their actual situation to reach superior states. In addition, this perfect world is only attainable in the very long term. It is very unlikely that, using a tool such as competition law enforcement, a market with a dominant undertaking becomes perfectly competitive.[227] That is why it is probably a wiser decision for policy makers to focus competition authorities resources on the protection of the dynamics of competition and to provide incentives for the existence of rivalry rather than trying to achieve an unrealistic ideal state or situation. Hayek was very clear on this point, stating that 'we should worry much less about whether competition in a given case is perfect and worry much more whether there is competition at all.'[228]

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225 See Townley, *Article 81 EC and Public Policy*

226 See World Economic Forum, *The Global Competitiveness Report 2011-2012*.

227 See Bakhoum, 'Reconsidering...'

228 Hayek, 'The Meaning of Competition', p. 105.

The protection of the process of competition is not only a better goal than achieving perfect competition but is a more administrable goal for emerging economies. It is a better goal, because it is basically looking at the protection of the process of rivalry in the market, making it easier to detect practices or behaviours that could restrict such process without worrying about the effects of a certain practice on consumers' welfare. As stated by Hayek, the 'purpose of a competitive order is to make competition work; that of so-called "ordered competition", almost always to restrict the effectiveness of competition'.[229]

### ii) Competition Law and Policy Standards

Having stated that emerging market economies should worry less about perfect competition and more about the process of competition and its effects, the question becomes whether these authorities should prefer consumer welfare over producer or social welfare, or should social welfare be the policy goal in emerging economies.

Lets start having in mind that all standards have a distributive effect. In fact, economic theory shows that in equilibrium there is a distributive indifference in the social welfare standard, because once efficiency is achieved, both producers' profits and consumers' utility is maximized. This makes preferring one

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[229] F. A. Hayek, 'Free Enterprise and the Competitive Order' in F. A. Hayek (ed), *Individualism and Economic Order* (The University of Chicago Press 1949), p. 111.

or the other irrelevant, because in the long term, the best possible scenario leads both producers and consumers to maximize.

In non-equilibrium situations, the authorities have to decide who, in the short term, will be made better off by a standard. Townley, for example, showed that regardless of which standard is used, the three standards (i.e., consumer welfare, producer welfare, and total welfare) have distributive effects.[230] Similarly, Bishop and Walker showed that it makes no difference which standard is followed, because they all lead to the same long-term outcome.[231] Therefore, choosing either consumer or producer welfare is a redistributive decision in which the competition authority grants a certain property right on either group.

Then, for example, if a certain pareto superior decision may produce a consumer surplus of 10 and producer surplus of nine, and an alternative decision would grant a consumer surplus of 11 and a producer surplus of 13, then privileging consumer welfare over producer or social welfare would destroy value even for consumers. Similarly, if a certain pareto superior decision may grant a consumer surplus of five and producer surplus of seven, and an alternative decision would grant a consumer surplus of seven and a producer surplus of six, then privileging producer welfare over consumer or social welfare would destroy value even for producers. In both cases, social welfare grants the larger surplus to the society regardless of which group is privileged.

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230 See Townley, *Article 81 EC and Public Policy*, p. 19.

231 Bishop and Walker, *The Economics of EC Competition Law : Concepts, Application and Measurement*, §02-017.

Similarly, if a certain non–pareto superior decision may produce a consumer surplus of -1 and producer surplus of nine, and an alternative decision would grant a consumer surplus of one and a producer surplus of five, then privileging consumer welfare over producer or social welfare would destroy value for the society. Similarly, if a certain non–pareto superior decision may grant a consumer surplus of seven and a producer surplus of -3, and an alternative decision would grant a consumer surplus of one and a producer surplus of two, then privileging producer welfare over consumer or social welfare would destroy value even for the society. In both cases, privileging social welfare grants the larger surplus for the society, regardless of which group is privileged.

Thus, if pareto superior and non–pareto superior allocations to social welfare grant gains to the whole economy, then no decision should be made based on any standard other than social welfare, because regardless of who wins and who loses, the society is better off.

In summary, this section shows that from the point of view of efficiency, whatever standard is chosen, it complies with the premise of being indiferent for competition policy purposes, since all standards will grant gains to society as a whole or to certain groups of society. It is also shown that social welfare might provide larger wins to society in certain situations.[232]

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[232] See Kaplow L, 'On the Choice of Welfare Standards in Competition Law' in The Goals of Competition Law (Edward Elgar 2012).

### iii) Economic Growth as the Guiding Principle for Competition Law and Policy Design

Perfect competition and the concepts of efficiency were explained in the previous sections of this chapter. The question in this section is whether economic growth should be considered the policy's guiding principle for Latin American emerging economies.

First, as has been highlighted, efficiency is, in public policy, a very flexible term. Despite its technical meaning, it is often based on political considerations that seem to put the balance in favour of consumers. As Hovenkamp stated:

> Antitrust analysts commonly use a substitute, the 'consumer welfare' principle. Many people who probably believe that maximizing allocative efficiency should be the exclusive goal of antitrust, *state* that the goal of antitrust should be to maximize the welfare of consumers. Spoken is such terms, the goal sounds very attractive and certainly less technical...[233]

However, is efficiency, or partial equilibrium efficiency, the only economic goal taken into account in competition law and policy design? In regard to emerging economies' economic goals and aggregate concentration levels that lead to 'imperfect' market structures, competition law and policy goals in emerging economies should not be based on the selection of a single achievement of partial equilibrium efficiency but on the use of a guiding principles aimed at achieving sustained economic growth. Hovenkamp stated that:

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[233] Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 77a.

> The perfect competition model does one thing quite well: given sufficient data it can predict whether a certain practice is efficient or inefficient, by a given definition of efficiency.[234]

The following section will explain economic growth and will develop the idea and clarify why growth should be the guiding principle of competition law and policy in Latin American emerging economies.

### (1) Basic Growth Economics

Economic growth, this is the expansion of and economy's production or productive capacity, or, as explained by Montiel, 'an increase in productive "capacity", whether that capacity is used or not',[235] is probably one of the most interesting issues in economic analysis. This is because 'economic growth is the driving force behind improvements in people's living standards'.[236] Literature on the topic is, therefore, extensive. To make a long exposition brief, several models have guided the economics of growth in the past decades,[237] but for the purpose of this thesis, two are important: the Solow model (the exogenous growth model)[238] and the Romer model (the endogenous growth model).[239]

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234 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 71b.

235 Montiel P, *Macroeconomics in Emerging Markets* (Cambridge University Press 2011), p. 6.

236 Robert Cotter and others, 'The Importance of Law in Promoting Innovation and Growth' in Kaufmann Task Force on Law Innovation and Growth (ed), *Rules for Growth: Promoting Innovation and Growth Through Legal Reform* (Ewing Marion Kaufman Foundation 2011), p. 1.

237 See Xavier Sala-i-Martin, *Lecture Notes on Economic Growth* (2nd edn, Anthony Bosch 2000); Barro and Sala-i-Martin, *Economic Growth* ; Rey, 'Competition Policy...'

238 Sala-i-Martin, *Lecture Notes on Economic Growth*, pp. 9–50.

239 Ibid., pp. 56–61.

Both, Solow and Roemer's, are neoclassical models of growth that consider capital, labour, and innovation (technology) to be the drivers of growth.[240] On the one hand, the Solow model studied the process of growth and considered this process to be driven by exogenous and sporadic improvements in the technologies of production.[241] On the other hand, the Romer model, in regard to the problem of explaining why growth was sustained in some countries and not in others, found it necessary to endogenously explain the changes in innovation by introducing a production function for innovation –technology- that could explain such factor as a driver of growth.[242]

The Solow model trusted in the general equilibrium of the economy, which was 'a technical matter of organizing production so as to use society's resources more efficiently'.[243] Such efficiency leads the economy to a steady-state level of growth.[244] With the Romer model, institutions became an important aspect of the

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240 Ibid., p. 13; Linda Yueh, 'Economic Growth with the Advent of International Economic Law: Implications for Emerging Economies' in Michael Faure and Xinzhu Zhang (eds), *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar 2011), p. 79; Rey, 'Competition Policy...' , pp. 4–5; See Cotter and others, 'The Importance of Law in Promoting Innovation and Growth', p. 6 (stating that accepted framework considers that the combination of physical capital, human capital, and innovation are the drivers of growth).

241 Sala-i-Martin, *Lecture Notes on Economic Growth*, pp. 20–21; Thomas Ulhen, 'The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China' in Michael Faure and Xinzhu Zhang (eds), *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar 2011), pp. 15–16; Yueh, 'Economic Growth with the Advent of International Economic Law: Implications for Emerging Economies', p. 84.

242 Sala-i-Martin, *Lecture Notes on Economic Growth*, pp. 59–60; Yueh, 'Economic Growth with the Advent of International Economic Law: Implications for Emerging Economies', p. 84.

243 Ulhen, 'The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China', p. 16.

244 Sala-i-Martin, *Lecture Notes on Economic Growth*, pp. 22–23; Yueh, 'Economic Growth with the Advent of International Economic Law: Implications for Emerging Economies', p. 78.

process of growth.[245] Lack of well-defined property rights reduces the flow of capital, which is critical to generating growth.[246] Absence of a well-defined system of incentives for the production of information and innovation reduces the possibilities of growth through innovation (technology) advances.[247]

In conclusion, both models believe that it is investment and innovation the variables that drive an economy to expand its production and productive capacity.[248] Similarly, both models are affected positively or negatively by the legal framework.[249]

### (2) Growth Economics and Institutional Design

The models explained are useful for determining and setting in the debate the drivers of economic growth. Legal institutions, such as the rules and standards for competition law enforcement, gain relevance to enhance the effectiveness of such drivers of growth, because, correctly designed, these institutions might improve an economy's possibilities to achieve accelerated and sustained growth.[250]

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245 Ulhen, 'The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China', p. 17; Cotter and Schaefer, *Solomon's Knot*, pp. 2–3.

246 Yueh, 'Economic Growth with the Advent of International Economic Law: Implications for Emerging Economies', p. 79.

247 Robert Cotter, 'Innovation, Information, and the Poverty of Nations' (2005) 33 Florida State University Law Review 333, pp. 391–392.

248 Yueh, 'Economic Growth with the Advent of International Economic Law', p. 83.

249 Ibid., p. 84.

250 Ibid., p. 85 ('legal and institutional considerations of each country... can influence the steady state level of growth through its shaping of the factors relevant to growth').

One more element may be important to determine why economic growth and no other economic concept should be considered here. Economic growth is a positive concept, that, as has been accounted by the literature on the topic, has had defined a large set of empirical regularities that make its grounds and determinants sound.[251] Other concepts such as economic development[252] or subjective wellbeing[253] have been proposed by the literature as possible competition law and policy determinants that could also be used as the policy's lighthouse. However, given that economic growth is the general economic goal of Latin American emerging economies, there is no reason why these economies should not be guided in other economic policies such as competition policy by economic growth. In addition, using a normative concept as the ones shown afore, may only create more conflicts regarding the coherence of public economic policy than solutions for an achievable and coherent competition policy design.

Despite the previous conclusion, it is whorth showing why a concept such as economic development should not be used as competition policy's guiding principle for the Latin American emerging economies. Despite economic development is regularly confused or used interchangeably with the concept of economic growth, it has been regularly shown by the literature that economic

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251 See Barro RJ and Sala-i-Martin X, *Economic Growth* (2nd edn, MIT Press 2004), p. 12-16.

252 See Fox EM, 'In Search of a Competition Law Fit for Developing Countries' (New York) [2011] 11 NYU Law and Economics Research Paper No 11-04 21; Bakhoum M, 'Reflections on the Goals of Competition Law in Developing Countries' in ASCOLA (ed), *The Goals of Competition Law, Fifth Conference* (ASCOLA 2010); Miroudot S, Pinali E and Sauter N, *The Impact of Pro-Competitive Reforms on Trade in Developing Countries* (OECD 2007).

253 See Stuke ME, 'Reconsidering Competition Law and The Goals of Competition Law' in ASCOLA (ed), *The Goals of Competition Law, Fifth ASCOLA Conference* (ASCOLA 2010); Layard R, 'Happiness and Public Policy: a Challenge to the Profession' (2006) 116 The Economic Journal C24.

development is a normative concept that refers not only to the quantitave aspects of economic progress but also to 'qualitative change and restructuring in a country's economy'.[254] The normative nature of the concept of economic development imposes an approach that is charged with values and aspitarions that may be difficult to achieve for policy makers as such concept would lead competition policy to be aimed at correcting other 'imperfections' of Latin American economies, but not those related with their emerging economy nature and it consequent economic policy.

Having regard to these economies general economic policy and the normative nature of other concepts such as economic development, economic growth is therefore a better option for policy design. In fact, as was explained at the beggining of this section, economic growth is regularly defined as an increase in the production of an economy or the expansion of an economy's productive capacity over time.[255] This is not a normative but a positive concept that is not value-ladden. This characteristic of the concept of economic growth grants an advantage that makes it superior for policy decision making guidance, as its drivers and determinants are simple to identify.

The latter conclusion could not be applied, for example, for the concept of economic developement.[256] Since economic development refers to a normative

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254 Soubbotina TP, *Beyond Economic Growth: An Introduction to Sustainable Development* (The World Bank 2004), p. 7, 99.

255 Barro RJ and Sala-i-Martin X, Economic Growth (2nd edn, MIT Press 2004), p. 12-16.

256 It is important to highlight that here, economic development is referred as a normative concept that refers to the achievement of a standard or quality of life. It is regularly stated that '[t]he main goal of economic development is improving the economic well being of a

notion that includes other variables such as income distribution, literacy, education, health, and so forth,[257] it is therefore funded on economic and non-economic characteristics that make policy markers role much more complicated when deciding about where to guide the law and the policy. In fact, unlike the concept of economic growth,[258] the determinants of economic development, in which economic growth is included,[259] are much more dificult to identify and therefore, the elements to take into account in order to choose the standards for competition law applicable in Latin American emerging economies could be much more intrincated than before, eliminating the coherence that the simple identification of the drivers of growth may grant. In fact, it is stated by the literature in development economics, that '[a]s there is no single definition for economic development, there is no single strategy, policy, or program for achieving successful economic development',[260] and such a uncertainty on the programme may also impair the likelihood of a coherent design of competition law and policy.

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community through efforts that entail job creation, job retention, tax base enhancements and quality of life'. (See International Economic Development Council, 'Economic Development Reference Guide' (*IECD*, 2012) accessed June, 2012). Some authors in the field of competition policy, interchange the terms economic growth with economic development. Economic development is a normative concept founded on certain qualities of an economy. (See International Economic Development Council, 'Economic Development Reference Guide' (*IECD*, 2012) accessed June, 2012). This latter fact about economic development makes tremendously difficult to use such concept as the guiding principle of competition policy in Latin American emerging economies.

257 Soubbotina TP, *Beyond Economic Growth: An Introduction to Sustainable Development* (The World Bank 2004), p. 99.

258 This is not to assure that the theory of economic growth have found the 'holy grail' for growth, but to state that the concept has a positive base that has proven to explain in many ways the causes of growth.

259 Barro RJ and Sala-i-Martin X, *Economic Growth* (2nd edn, MIT Press 2004), p. 12-16.

260 See International Economic Development Council, 'Economic Development Reference Guide' (*IECD*, 2012) accessed June, 2012.

Having shown why economic growth is the concept that should guide competition policy design, it is important to highlight that institutions and institutional design can either foster or discourage growth-enhancing activities.[261] In this section, capital investment and innovation are seen and found to be essential for the enhancement of economic growth. Also, legal rules that provide incentives to invest or innovate are considered to become growth-enhancing institutions that have a positive effect on economic growth.

In the following sections, investment and innovation will be explained regarding their properties as economic growth determinants, and the incentives that legal institutions designed to encourage innovation and investment grant for competition and the competitive process, in addition to the enhancement of economic growth.

### (1) Incentives for investment as economic growth determinant

Economic growth, referred here as the expansion of production or the productive capacity of an economy overtime, has been closely related to capital investment. An investment is the use of an ammount of goods or services employed in the future or current production of other goods or services.[262] Investment basically contributes to economic growth since the aim of the use of goods is not

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261 Cotter and others, 'The Importance of Law in Promoting Innovation and Growth', p. 6.

262 See Barro RJ and Sala-i-Martin X, *Economic Growth* (2nd edn, MIT Press 2004), pp. 24-25; Cotter R and Edlin A, *Law and Growth: A Framework for Research* (Berkeley Program in Law and Economics Working Paper Series, UC Berkeley 2011), pp. 13-14; This is different from intellectual property, which is one of the legal institutions designed in order to provide incentives to innovate.

consumption but the deferral of consumption in order to produce goods or services that are aimed at creating value and wealth.

The literature on the topic has found that sustained economic growth is a function of production which is in turn a function of capital investment.[263] In fact, invetment is the most important driver and determinant of economic growth over time,[264] due to its rival character and the impact that capital invstment has on per capita production changes and the aggregate function of production of goods and services. This shows that, as was shown for the case of investment, investment is functionaly related to economic growth since the rate of economic growth depends on the rates of positive changes of technology, labor force, and capital stock.[265] Empirical evidence has also shown that 'invetments' are essential for sustained growth.[266]

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263 See Swan TG, 'Economic Growth and Capital Accumulation' (1956) 32 Economic Record 334; Solow R, 'A Contribution to the Theory of Economic Growth' (1956) 70 The Quarterly Journal of Economics 65; Barro RJ and Sala-i-Martin X, *Economic Growth* (2nd edn, MIT Press 2004), pp. 17, 24-26; Cotter R and Edlin A, *Law and Growth: A Framework for Research* (Berkeley Program in Law and Economics Working Paper Series, UC Berkeley 2011), pp. 13-14.

264 See Montiel P, *Macroeconomics in Emerging Markets* (Cambridge University Press 2011), pp. 6-7; Barro RJ and Sala-i-Martin X, *Economic Growth* (2nd edn, MIT Press 2004), p. 63-65.

265 Montiel P, *Macroeconomics in Emerging Markets* (Cambridge University Press 2011), p. 7.

266 See Bond S, Leblebicioglu A and Schiantarelli F, Growth and the Role of Capital Accumulation: Chronicle of a Death Prematurely Foretold? (Nuffield College, Oxford and Institute for Fiscal Studies 2004); Li X and Liu X, 'Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship' (2005) 33 *World Development* 393; Bond S, Leblebicioğlu A and Schiantarelli F, 'Capital Accumulation and Growth: a New Look at the Empirical Evidence' (2010) 25 *Journal of Applied Econometrics* 1073;

The above reasons have show why designing institutions that provide incentives to invest is probably a policy decision that might lead to economic growth. This is especially important for emerging economies, because economies with high levels of capital 'encounter fewer and fewer returns to capital investment, but developing economies allow capital to reap large return for a long term'.[267] And therefore, institutions that promote investment and competition may lead to larger investments that promote growth.

Investment is also a mechanism that is aimed at enhancing competition in the market.[268] Whent there is investment in a market, such promote entry and become more competitive proding increased competition intensity. Investment is regularly aimed at increasing production, creating value and profits, and this feature of investment makes the competitive process to be more dynamic.

### (2) Incentives for innovation as economic growth driver

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267 Yueh, 'Economic Growth with the Advent of International Economic Law: Implications for Emerging Economies', p. 79.

268 Gilbert R, 'Looking for Mr. Schumpeter: Where Are We in the Competition Innovation Debate?' in Jaffe AB, Lerner J and Stern S (eds), *Innovation Policy and the Economy*, vol VI (The MIT Press 2006), p. 168 (Concluding that competition is likely to provide incentives for innovation if competition in the product's market is intense and innovation makes the old product/technology obsolete); Aghion P and Griffith R, *Competition and Growth: Reconciling Theory and Evidence* (MIT Press 2008), pp. 33-51; Hasan I and Tucci CL, 'The innovation-economic growth nexus: Global evidence' (2010) 39 Research Policy 1264., §5 (proposing a theory that reconciles the idea that competition leads to innovation with the empirical analysis that shows that there is no relation between competition and innovation); Aghion P and others, 'Competition and Innovation: An Inverted-U Relationship' (2008) 120 Quarterly Journal of Economics 701 (developing a model in which theory and empirical analysis and the Schumpeterian tradition are put together by constructing a model of competition and innovation in an inverted-U relationship).

As explained in the previous sections, economic growth refers to the expansion of production or the productive capacity of an economy overtime. Innovation, referred here as the increase new kinds of goods or methods of production and/or increases in the quality of the existing products and techniques of production by continuing series of improvements and refinements,[269] greatly contributes to such expansion.

The literature on the topic has found that in most markets there are no chances for sustained economic growth unless there is a change in production technology or the methods of production.[270] In fact, as shown by the literature, innovation is a driver and a determinant of economic growth over time,[271] due to the endogenous character and the impact that innovation has on technological changes and the function of production of goods and services. This shows that, as was shown for the case of investment, innovation is functionaly related to economic growth since the rate of economic growth depends on the rates of positive changes of technology, labor force, and capital stock.[272] In addition, empirical evidence has shown that 'quantity of inventive activity, as well as its

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269 See Barro RJ and Sala-i-Martin X, *Economic Growth* (2nd edn, MIT Press 2004), pp. 317-319; Cotter R and Edlin A, *Law and Growth: A Framework for Research* (Berkeley Program in Law and Economics Working Paper Series, UC Berkeley 2011), pp. 13-14; This is different from intellectual property, which is one of the legal institutions designed in order to provide incentives to innovate.

270 See Cotter R and Edlin A, *Law and Growth: A Framework for Research* (Berkeley Program in Law and Economics Working Paper Series, UC Berkeley 2011), pp. 13-14.

271 Barro RJ and Sala-i-Martin X, *Economic Growth* (2nd edn, MIT Press 2004), pp. 311-312; Montiel P, *Macroeconomics in Emerging Markets* (Cambridge University Press 2011), pp. 6-7 (defining innovation as the change in the rate of growth of production technology, and showing the impact of technology change on economic growth); Grossman GM and Helpman E, 'Endogenous innovation in the theory of growth' (1994) 8 Journal of Economic Perspectives 23; .

272 Montiel P, *Macroeconomics in Emerging Markets* (Cambridge University Press 2011), pp. 7-8.

quality, are associated with economic growth'.[273] These reasons show why designing institutions that provide incentives to innovate in the market is probably a policy decision that might lead, in addition, to the so desired economic growth. These institution are those that 'increase the pace of innovation',[274] for example by 'improving the flow, development and marketing of new ideas'.[275]

The effect of innovation has also been studied not only as a driver of economic growth, but also as mechanism to enhance competition in the market.[276] Markets are more competitive and the intensity of competition in markets is increased when there is a larger ammount of innovative activity and rivalry by firms participating in a market. This feature of innovation makes the competitive process to be seen as a race series where innovative activity may grant leadership for a single race but such leadership does not mean that the 'race' is over, making competitive rivalry a constant process of investment and innovation.[277] In fact,

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273 See Aghion P and Griffith R, *Competition and growth: reconciling theory and evidence* (MIT Press 2008), §3.

274 Robert Cotter and Aaron Edlin, *Law and Growth: A Framework for Research* (Berkeley Program in Law and Economics Working Paper Series, UC Berkeley 2011), p. 2.

275 Ibid., p. 19.

276 Gilbert R, 'Looking for Mr. Schumpeter: Where Are We in the Competition Innovation Debate?' in Jaffe AB, Lerner J and Stern S (eds), *Innovation Policy and the Economy*, vol VI (The MIT Press 2006), p. 168 (Concluding that competition is likely to provide incentives for innovation if competition in the product's market is intense and innovation makes the old product/technology obsolete); Aghion P and Griffith R, *Competition and Growth: Reconciling Theory and Evidence* (MIT Press 2008), pp. 33-51; Hasan I and Tucci CL, 'The innovation-economic growth nexus: Global evidence' (2010) 39 Research Policy 1264., §5 (proposing a theory that reconciles the idea that competition leads to innovation with the empirical analysis that shows that there is no relation between competition and innovation); Aghion P and others, 'Competition and Innovation: An Inverted-U Relationship' (2008) 120 Quarterly Journal of Economics 701 (developing a model in which theory and empirical analysis and the Schumpeterian tradition are put together by constructing a model of competition and innovation in an inverted-U relationship).

277 See Boldrin M and others, 'Competition and Innovation' in Miron J (ed), *Cato Papers on Public Policy*, vol 1 (Cato Institute 2011), p. 120; Encaoua D and Hollander A,

several decades of economic theory have argued and empirically shown that competition is 'conducive of good economic performances and good management practices'[278] and as shown by Stigler, most innovations 'had been created under conditions of competition'.[279]

However, some authors state that there is not always a positive relation between innovation and competition.[280] Aggion and Griffith, for example, suggest that more competition intensity in a market may lead to more innovation because it reduces pre-innovation rents by more than it reduces post-innovation rents.[281] This, as explained by the authors, is due to two effects: first, the effect granted by the reduction of profits that leads to a reduction of innovation (assuming that innovation is strictly related with profits) and; second, the escape of competition effect, due to incumbent firms innovate in order to increase rivals' entry costs, showing that more competition increases innovation. This observation indicates an inverted U shaped relation between competition and innovation that depends of the

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*Competition Policy and Innovation* (Université Catholique de Louvain 2002), p. 3. See Howitt P, 'Competition, Innovation and Growth: Theory, Evidence and Policy Challenges' in Chandra V and others (eds), *Innovation and Growth: Chasing a Moving Frontier* (OECD and World Bank 2008), p. 22.

278 Boldrin M and others, 'Competition and Innovation' in Miron J (ed), Cato Papers on Public Policy, vol 1 (Cato Institute 2011), pp. 119-121.

279 Stigler G, 'Industrial Organization and Economic Progress' in White LD (ed), *The State of the Social Science* (University of Chicago Press 1956) cited by Boldrin M and others, 'Competition and Innovation' in Miron J (ed), *Cato Papers on Public Policy*, vol 1 (Cato Institute 2011), p. 121.

280 See Aghion P and Griffith R, *Competition and Growth: Reconciling Theory and Evidence* (MIT Press 2008).

281 See Aghion P and Griffith R, *Competition and Growth: Reconciling Theory and Evidence* (MIT Press 2008), p. .

level of competition intensity, that if competition is low so it is with innovation, and if the level of competition intensity is high the level of innovation is low.[282]

Despite the aforementined, empirical evidence has shown that emerging markets show a positive relation between innovation, growth and competition. For example, Bloom et. al.[283] have shown that oppening an emerging economy such as China to competition has led to an increase in innovation and competition intensity. [284] Similarly, Gorodnichenko et. al.[285] also have shown in a study for 27 emerging economies that there is a positive relationship between [foreign] competition and innovation, indicating that there is no empirical evidence of an inverted U relationship between innovation and foreign competition as explained by previous literature.[286] Finally, Carlin et. al.[287] also make an empirical study using transition economies, in order to determine the effect of product competition

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282 See Aghion P and others, 'Competition and Innovation: An Inverted-U Relationship' (2008) 120 Quarterly Journal of Economics 701; Aghion P and Griffith R, *Competition and Growth: Reconciling Theory and Evidence* (MIT Press 2008), §3; Hashmi A, *Competition and Innovation: The Inverted-U Relationship Revisited* (Department of Economics, National University of Singapore 2012). Correa JA, 'Innovation and Competition: An Unstable Relationship' (2012) 27 *Journal of Applied Econometrics* 160, p. 166 (Stating that it was the explosive increase in the number of patent applications after the CAFC Reform in 1982 had an important effect on innovation-competition relationship, and therefore, the inverted-U relationship showed is just the outcome two different regimes).

283 See Bloom N, Draca M and Reenen JV, 'Trade Induced Technical Change? The Impact of Chinese Imports on Innovation, IT and Productivity' (2011) No. 16717 National Bureau of Economic Research Working Paper Series.

284 Bloom N, Draca M and Reenen JV, 'Trade Induced Technical Change? The Impact of Chinese Imports on Innovation, IT and Productivity' (2011) No. 16717 National Bureau of Economic Research Working Paper Series, pp. 32-33.

285 See Gorodnichenko Y, Svejnar J and Terrell K, *Globalization and Innovation in Emerging Markets* (National Bureau of Economic Research 2008).

286 Gorodnichenko Y, Svejnar J and Terrell K, *Globalization and Innovation in Emerging Markets* (National Bureau of Economic Research 2008), pp. 28-29.

287 See Carlin W, Schaer M and Seabright P, 'A Minimum of Rivalry: Evidence from Transition Economies on the Importance of Competition for Innovation and Growth' (2004) 3 Contributions to Economic Analysis and Policy 1.

on innovation and growth, finding that innovation is higher in monopolistic industries.[288]

These recent empirical studies show either that the inverted relationship between competition and innovation doen not hold[289] or that emerging economies may be in the mid range of the inverted u-shape relationship between innovation and competition intensity. What ever the case is, competition in emerging economies seem to be favored by innovative activity that enhances the process of rivalry.

In summary, the models of growth explained help to determine that the drivers and determinants of economic growth are capital and innovation (technology). To achieve economic growth, it is important to design legal institutions guided by the same aim. Particular concepts of the different approaches to efficient institutions are not necessarily growth-enhancing. In some situations, inefficient institutions from the producer point of view may grant larger rates of sustained growth. In other situations, inefficient institutions from the consumer point of view may grant larger rates of sustained growth. Emerging economies should therefore identify standards that, regardless of what approach they take from the efficiency point of view, are intended at promoting investment

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288 Carlin W, Schaer M and Seabright P, 'A Minimum of Rivalry: Evidence from Transition Economies on the Importance of Competition for Innovation and Growth' (2004) 3 Contributions to Economic Analysis and Policy 1, p. 51.

289 Boldrin M and others, 'Competition and Innovation' in Miron J (ed), Cato Papers on Public Policy, vol 1 (Cato Institute 2011), pp. 119-121; Correa JA, 'Innovation and Competition: An Unstable Relationship' (2012) 27 *Journal of Applied Econometrics* 160, p. 166 (Stating that it was the explosive increase in the number of patent applications after the CAFC Reform in 1982 had an important effect on innovation-competition relationship, and therefore, the inverted-U relationship showed is just the outcome two different regimes).

and innovation, and, through these drivers, aimed at achieving sustained economic growth.

It is important to highlight that this does not mean that growth should be the goal and first principle of competition law in emerging Latin American economies, but the guiding light for their competition law and policy design. This means that, when deciding wich institutional design is most appropriate for emerging markets, growth enhancing rules and standards, this is those rules and standards that heavily promote innovation and investment, should be preferred. Finally, economic growth is explained as a superior guiding principle than other concepts such as economic development due to its positive nature and the relatively simple identification of its drivers or determinants (investment and innovation).

### iv) Economic Growth as the Guiding Principle of Competition Law and Policy in Latin American Emerging Economies

According to previous section, competition law and policy institutions that are aimed at achieving sustained and accelerated growth should be designed in order to provide strong incentives to invest and sound incentives to innovate. Thus, in emerging economies, if competition law and policy is guided to achieve sustained economic growth, the rules applied in enforcement activities should be aimed at defining the best growth-enhancing policies from the range of consumer, producer or social welfare enhancing rules. In other words, competition law and policy in

emerging economies should guide their competition law and policy by using growth-enhancing standards.

The history of the U.S. antitrust law has shown that competition law rules and standards and their enforcement may impair growth if such a guiding principle is not clearly stated. For example, it is pointed by Priest and Hovenkamp, that some U.S. Court decisions were considered by the literature to be 'antagonistic with growth'.[290] In *U.S. v Von's Grocery Co.*,[291] the Supreme Court ruled against a transaction that seemed to be a nontypical vertical business arrangement, finding that it was contrary to competition law.[292] Also, in *U.S. v Grinell*,[293] the U.S. Court ordered a divestiture that, instead of granting the society the likely efficiencies of scale economies that may have provided entry in several other cities where Grinell had no participation, imposed several citywide monopolies owned by a few undertakings.[294] Although the literature claims that after 1977 antitrust law in the U.S. moved to reduce the obstacles that the law imposed on economic growth,[295] it is still clear that:

> …modern antitrust law helps growth only on a static manner, smoothing the path of industrial enterprise by eliminating obstacles to growth... [today's] antitrust law facilitates economic growth for

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290 See Priest, 'Advancing Antitrust Law to Promote Innovation and Economic Growth'; Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 117a.

291 *US v Von's Grocery Co.* 384 US 270 (1966) Supreme Court, US, cited by Priest, 'Advancing Antitrust Law to Promote Innovation and Economic Growth', p. 217.

292 Priest, 'Advancing Antitrust Law to Promote Innovation and Economic Growth', p. 214.

293 *United States v. Grinnell Corp.*

294 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 117a.

295 Priest, 'Advancing Antitrust Law to Promote Innovation and Economic Growth', p. 219.

> existing enterprises, but it does not directly encourage growth for new enterprise.[296]

With the above considerations in mind, what considerations should competition authorities and decision makers have when designing the rules and standards used for enforcing antitrust laws in emerging economies? Competition law and policy, seen in a dynamic competition environment, should not be concerned with a certain perspective regarding the probable static losses if such loses have in mind the incentives for investment, entry or innovation.[297] In many cases, efficient standards from the consumer welfare perspective may lead to growth-enhancing outcomes; in other cases, efficient standards from the producer welfare perspective may lead to growth-enhancing institutions.

A different argument, but with a similar outcome, is developed using simple macroeconomics of growth in emerging economies.[298] Montiel, for example, showed that the literature in macroeconomics assumes that economic growth in the short term depends on labour force, productivity, and capital stock.[299] The size of the labour force is basically given and does not change, because it is a function of demographic factors.[300] With that in mind, only short-term changes in productivity given by technology and innovation and changes in

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296 Ibid., p. 219.

297 Cotter and Edlin, *Law and Growth*, pp. 21–22.

298 See Montiel, *Macroeconomics in Emerging Markets*, p. 4.

299 Ibid., p. 8.

300 Ibid., p. 8.

capital stock 'affect the rate of growth in long-run productive capacity'.[301] Therefore, competition law institutions aimed at producing and providing incentives to innovation and investment are also rules that have the benefit to promote economic growth.

Thus, when speaking about welfare standards, the difference between social, consumer and producer surplus should also be made with the understanding that short-term events may have an effect on long-term economic growth. Achieving sustained growth is a process that involves at least capital stock, innovation, and its interaction, and policy design requires choosing which rule is better for achieving economic growth. Consumer surplus grants consumers more disposable income, which may be used for more consumption or for savings, depending on the consumer's marginal propensity to consumption. Similarely, producer surplus is regularly associated with capital investment. In macroeconomic terms, investment comes from firms (or savings by consumers) by using capital in the development of physical infrastructure or investing in R&D, which in turn expands the economy's productive capacity and may therefore it might enhance growth.[302] Finally, total welfare, although it is closer to the concept of economic growth than the other welfare standards, it is not always necessarily a growth-enhancing standard. Total welfare is the sum of consumer and producer welfare. Its maximization results in an efficient outcome. However, as stated before, such maximization does not grant the economy with an expansion in economic capacity.

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301 Ibid., p. 8 (For the author, increases in economic capacity are equivalent to 'economic growth').

302 Ibid., p. 6.

Therefore, consumer, producer, or total welfare should not necessarily be considered preferred standards among each other, because preferring a consumer or producer welfare standard could make the economy as a whole worse off. Markets are regularly linked, and an efficient outcome in favour of producers in one market may make other producers or consumers worse off in another market.[303]

In summary, policy makers and competition authorities in Latin American emerging economies should prefer efficient rules that may lead to achieve growth though the promotion of investment and innovation; that is, those efficient rules that also provide direct incentives to investment and innovation. Economic growth, determined by innovation and investment, is then the guiding principle that provides policy makers with a tool and a path to chose among the range of equally valuable efficient rules that also provide incentives to grow.

In the following chapters, the ideas above developed will be applied. The case of dominance and abusive pricing will be studied, showing and making an especial emphasis on the rules and standards developed in mainstream literature and the institutions that should be adopted in Latin American emerging economies, having regard to economic growth as competition policy's guiding principle. It will also be studied whether the rules or standards proposed are applicable in these emerging economies' current legal system.

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303 See for example the case of buyer power in input markets. Unless there is double marginalization, competition authorities should not intervene. However, non-intervention may lead to prices that are so low that there are little or no incentives to producers in the upstream market to invest in quality or new developments.

# B. MARKET POWER AND DOMINANCE FOR LATIN AMERICAN EMERGING ECONOMIES

## 1. Introduction

Dominance has been and is currently at the core of antitrust analysis, industrial economics, and competition law.[304] In competition law and economics literature the concept of dominance has been highly controversial due to its close relation with market power,[305] a widely discussed concept in economic scholarship.[306] Despite that economic literature and several competition authorities have proposed different rules and presumptions regarding dominance, there is no consensus neither in economic literature nor in legal scholarship about the concept of dominance and what kind of economic power constitutes dominance.[307] The story

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304 A simple search on legal and economics scholarship databases show that the word dominance paired with the words "competition law" produces a set of 19,800 articles or papers with such words. Similarly searching dominance but paired with the words "antitrust law" produces 20,100 hits. Compared to the same search but using the word 'cartels' there are 11,600 and 13,400 hits respectively. Using periods, from 1900 to 1950s, the search for dominance and antitrust or competition law, produces 8 hits for the first search and 154 for the second search. From 1950 to 1975 the results produce 181 for the first and 1450 for the second. From 1975 to 2000, the search produces 4180 and 7860. After the year 2000, 1600 and 12500. This also shows that dominance is a topic that has currently been in legal scholarship.

305 Neither in this chapter nor in the thesis is issues related to market definition assessed. The term *market* in this chapter assumes a standard procedure of market definition was prepared and carried on and that the relevant market was defined and properly delineated.

306 See Perloff, Karp and Golan, *Estimating Market Power and Strategies*, pp. 1, 14.

307 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC* ; Shepherd, Shepherd and Shepherd, 'Antitrust and Market Dominance'; Azevedo and Walker, 'Dominance: Meaning and Measurement'; Utton, *Market dominance and antitrust policy* ; Dobbs and Richards, 'Output Restriction Measures of Market Power and Dominance'; Vickers, 'Abuse of Market Power'; Pittman and Tineo, 'Abuse of Dominance...' in ; Melnik, Shy and Stenbacka, 'Assessing Market Dominance'; Droucopoulos and Chronis, ''Assessing Market Dominance': A Comment and an Extension'.

in Latin American emerging economies has not been different, as there is neither consensus nor a single policy to define what dominance is.

In this chapter, the guiding principle of economic growth proposed in the previous section will be used to determine what concept of dominance and which policy should Latin American emerging economies follow. Indeed, in order to define a sound theory of abusive pricing in emerging Latin American economies, the concept of dominance should be defined before determining the boundaries of any kind of abuse. Therefore, it is the goal of this Chapter to establish whether the analysis of dominance in emerging Latin American economies is appropriate and determine whether or not a different approach to dominance in Latin American emerging economies is justified having regard to the highly concentrated structure of these economies and the guiding principle of competition policy design for Latin American emerging economies.

In this chapter it is shown that dominance is neither a synonym for market power nor the ability to act without regard to other market participants; rather it is a function of market power and other exogenous and endogenous factors that ultimately may evidence that an undertaking has the power to exclude. In simple words, in this chapter and throughout this thesis, dominance is defined as a position in a market that grants an undertaking the power to price and exclude. This definition departs from the traditional or mainstream approach to dominance, where there is a reluctance to define dominance in a market as something different from market power or the ability to behave independently.[308] In addition, in this

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[308] O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 108.

chapter, this standard is related to a quantitative prioritizing tool that takes into account the aggregate and industrial economic structure of the economy and other endogenous and exogenous variables that might be appropriate for emerging economies.

The chapter is structured as follows: First, sections 2 and 3 present the law and economic analysis approaches to market power and dominance. In addition, the legal mainstream perspectives on dominance are described, showing the different standards used by different high income jurisdictions. In Section 4, a description and assessment of the rules and standards of emerging Latin American economies with respect to dominance are presented to show the different policies followed by such jurisdictions. Finally, having regard to economic growth as the guiding principle for policy design, Section 5 proposes a definition of dominance that emerging economies should use, and prioritizing tool to measure dominance in economies characterized by high aggregate concentration and low levels of competition intensity. In this section, it is found that dominance should be defined as the power to price and exclude. This definition of dominance avoids likely Type I errors in dominance analysis providing incentives to entry and encouraging economic growth.

In addition, in this chapter a prioritization tool is proposed, which, if used by emerging economies, might allow the authority to take into account endogenous and exogenous variables such as the economy's aggregate concentration, the market power of a particular undertaking, the economy's

openness to trade, and the government's industrial policy, in order to find a strict method to prosecute dominance cases.

## 2. The Law and Economics of Market Power

In this section the main perspectives of economic analysis of market power are shown. It is studied whether market shares are the most effective and administrable way to screen and assess whether an undertaking poses market power and, in addition, what other price-cost measures have been developed in order to screen whether an undertaking is exercising its market power. First, the economics of market power will be analysed and the methods to measure market power will be scrutinised, in order to determine what the most administrable standard is.

### i) The Economics of Market Power

The control of economic power, and more specifically the control of market power, was the cause of antitrust law.[309] As Hay et al. state, 'the concept of market power is at the core of antitrust. Philosophically, antitrust policy is aimed

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309 See Ernest Gellhorn, William Kovacic and Stephen Calkins, *Antitrust Law and Economics in a Nutshell* (US-AID ed, US-AID and Comisión Federal de Competencia 2004), p. 20 (arguing that competition law pretends to control the exercise of private economic power, stopping monopolies, sanctioning cartels, and promoting precompetitive behaviour). As shown by Freyer (cited by Robert F. Himmelberg, 'Does Antitrust Matter? A Comparative History of Antitrust Policy and the Evolving Corporation in Britain and the United States' (1993) 21 Reviews in American History 273, Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America: 1880-1990* (Cambridge University Press 1992)) competition law in the United States started due to the 'fear that concentration of power of any kind threatened liberty and equality'.

primarily at preventing firms from achieving, retaining, or abusing market power'.[310] Market power is, therefore, at the core of antitrust economics.

### (1) What is market power?

The term *economic power* refers to the ability that an undertaking possesses in the development of economic transactions. The expression *market power* refers to the economic power of an undertaking to 'raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded'.[311] Following Landes and Posner, market power is the 'ability to set price above marginal cost'.[312] The authors depart from the perfect competition model, whereby prices are equal to marginal costs.[313] Then, if an undertaking can price above marginal cost, 'the implication is that the firm does not face perfect competition'[314] and therefore has economic power.

This approach to market power has been criticized by part of the literature. For example, Bishop and Walker considered that, for policy purposes, a definition of market power based on the ability to price above short-run marginal cost is not useful because 'using the marginal cost standard, virtually all firms have some

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310 George Hay, 'Market Power in Antitrust' (1992) 60 Antitrust Law Journal 20, p. 807.

311 William M. Landes and Richard A. Posner, 'Market Power in Antitrust Cases' (1981) 94 Harvard Law Review 937, p. 937.

312 Ibid., p. 937.

313 In perfect competition firms are price takers and therefore, the first order condition to maximize profits is given by the $p = c'$.

314 Landes and Posner, 'Market Power in Antitrust Cases', p. 939.

degree of market power'. Thus, such a definition is not a helpful indicator of effective competition or economic power.[315]

Regardless of the approach taken, market power is comprised of at least three elements that are identifiable in every firm deemed to have market power. First, the exercise of market power leads to lower output.[316] As stated by Bishop, if market power is the control over or the power to determine prices, the way to increase or reduce prices is through output.[317] Second, there is market power if the increase in price must lead to an increase in profitability.[318] Third, market power is exercised relative to the benchmark of the outcome under conditions of effective competition.[319]

The simplest way to understand market power is in the case of monopoly. The monopolist, as well as the monopsonist, is the sole producer of a good or service with no substitutes, and therefore has the ability to set prices above marginal costs since the monopolist faces no competition.[320] Since the monopolist

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315 Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010), p. 3-002.

316 See Azevedo and Walker, 'Dominance: Meaning and Measurement', p. 6a; Dobbs and Richards, 'Output Restriction Measures of Market Power and Dominance', p. 577; Bishop and Walker, *The Economics of EC Competition Law : Concepts, Application and Measurement*, p. 3-003.

317 Bishop and Walker, *The Economics of EC Competition Law : Concepts, Application and Measurement*, p. 3-003.

318 Ibid., p. 3-004. (showing that the elasticity of demand and the cross-elasticity of demand determine the extent an individual firm can profitably raise prices).

319 Ibid., p. 3-003.

320 This is assuming the monopolist does not face constraints from customers that have countervailing market power.

faces no restraint, the monopolist can choose the output that maximises profits.[321] This power to set prices without regard to any factor other than marginal revenues and marginal costs[322] is named a monopoly power.

Holding market power must be distinguished from having a certain amount of market power.[323] According to the economic and industrial organizational literature, there are different levels of market power. Monopoly power is a large amount of market power,[324] but there are different levels of market power depending on an undertaking's ability to depart from the competitive market.[325]

### (2) Factors determining market power

Market power, as stated before, is a market setting that, according to economic theory, departs from lack of agents in one side of the market. The first consequence is that such agents have the ability, inexistent in perfect competition settings, to profitably alter prices away from perfect competition levels.[326]

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321 Utton, *Market dominance and antitrust policy*, pp. 4–5.

322 According to the economic literature, the monopolist maximization problem is solved by complying with the first-order condition, according to which the marginal cost must be equal to the marginal revenue in order to determine the optimal amount of output,. See Hal R. Varian, *Intermediate Microeconomics: A Modern Approach* (7th edn, W.W. Norton 2006).

323 See Landes and Posner, 'Market Power in Antitrust Cases'.

324 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 272a.

325 The case of monopoly indicates the largest extent to which market power is exercised. The perfect competition model, on the other hand, shows where there is no space for market power to be exercised.

326 Andrea Mas-Colell, Michael Dennis Whinston and Jerry R. Green, *Microeconomic Theory* (Oxford University Press 1995), p. 383; Hal R. Varian, *Microeconomic Analysis* (3rd edn, W.W. Norton 1992) (stating that the permanent characteristic of the monopolist is that it holds market power, since the output sold is a continuous function of its price, a fact that

Economic theory has found several market settings where there is market power, such as monopoly, monopsony, duopoly, duopsony, oligopoly, and oligopsony.[327] The conditions, characteristics, and consequences of market power are different and varied depending on the structure of the market. However, the simplest way to explain the market efficiency problems caused by market power is through the case of monopoly. A single dominant market player leads to monopoly/monopsony power, as referred to afore. In this section the consequences of monopoly power are assessed.

### (i) The monopolist problem

Mainstream economic analysis focuses on rational decision making.[328] Monopolists, or single firms producing a product or service in a certain market, face a profit-maximizing problem. As the monopolist is a single producer of a certain good or service, the demand for the good or service is a function of the price decided by the monopolist. Then, the monopolist's profit-maximizing problem, formally stated, is

$$\mathrm{Max}_{p,q}\ py - cy \qquad (1)$$

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contrasts with the competitive setting where the producer reduces its revenues to zero if it charges a price different from the market price). *See* Hal R. Varian, *Análisis Microecónomico* (3rd edn, A. Bosch 1992), p. 276.

327 Game theoretical evidence, on the other hand, has shown that other market characteristics make markets with lack of agents on one or both sides of the market behave similarly to a competitive market. Then, most conclusions reached here may have some exceptions applicable to certain markets. See Robert Gibbons, *A primer in game theory* (Harvester Wheatsheaf 1992); Mas-Colell, Whinston and Green, *Microeconomic Theory*, Chapter 7–11; Sutton, *Technology and Market Structure: Theory and History*.

328 Mas-Colell, Whinston and Green, *Microeconomic Theory*, pp. 3–14 (stating that microeconomic theory aims to model 'individual decision making' where there is interaction between individuals pursuing their own interests).

$$s.t. D(p) \geq y$$

Where $p$ is the price, $y$ is the production of the good, and $c$ is the cost per unit of $y$. The problem is restated if $y$ is considered to be equal to D(p). The revenues of the monopolist, using an inverse function of demand,[329] are a function of prices that are also a function of quantities. Then, the monopolist maximization problem may be restated as

$$\mathrm{Max}_{\mathrm{p,q}}\, \mathrm{p(y)y} - \mathrm{cy} \qquad (2)$$

### (ii) Profit maximization condition

The first-order condition, or the mathematical requirement in order to optimize the monopolist's profits, is given by the solution to the problem of the monopolist. In this case, the monopolist should charge a monopoly price, which is the price that satisfies demand where the marginal revenue is equal to the marginal cost.

According to these conditions, the monopolist's optimal output should be such that p'(y*)y*+p(y*), the marginal revenue, is equal to c'(y*), the marginal cost. Then, the solution to the optimization problem is to find y*. In order to maximize, the monopolist must choose a level of output that maximizes profits

[329] See Ibid., pp. 384–385; Varian, *Microeconomic Analysis*, p. 276. An inverse function of demand pictures demand as a function of quantities produced.

where the marginal revenue is equal to the marginal cost. This leads to a price that is higher than the price in a perfectly competitive setting.[330]

### ii) Economic Effects of Market (monopoly) Power

The aforementioned features of monopolistic market structures, and the consequent monopoly pricing, lead to several effects on total and consumer welfare.

#### (1) Effects on total and consumer welfare

Monopolies are, on economic grounds, generally inefficient.[331] The simplest explanation is that monopolistic prices are higher than competitive prices due to output restriction.[332] In this fashion, consumers are worse off as they face lower quantities and higher prices. Yet the producer is better off as it produces less and

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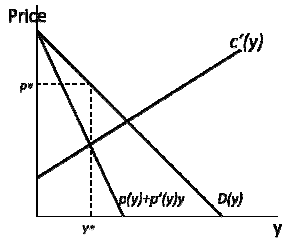
330 Graphically, the model states that the price $p_m$ results from the optimal quantity $y^*$, which leads marginal revenues to be equal to marginal costs: p*(y*)+p*'(y*)y* = c'(y*).




The graphic also shows that not only is monopoly price larger than the competitive price but also at y*, production is lower than in the perfectly competitive setting.

331 This general statement does not apply to monopolies with natural scale economies.

332 Hal R. Varian, *Microeconomía Intermedia: Un Enfoque Actual* (7th edn, Antoni Bosch 2006), p. 424.

gets higher revenues per unit of output. The inefficiency resides in the fact that the optimal level of output is one that maximizes the monopolist's welfare not social welfare.[333]

The fact that prices are higher and quantities are lower leads to a deadweight welfare loss for consumers.[334] Consumers' welfare is reduced since quantities are lower and prices are higher, reducing the quantities of output available.[335] The producer–monopolist increases its welfare as it charges more per unit of output and thus increases its total profits. The monopolist can also choose the level of quality regardless of the level of output.[336] Then, holding the level of output constant, a change in quality may imply a change in the demand function, which may alter the demand's sensitivity to prices.[337]

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333 Varian, *Análisis Microecónomico*, p. 280–81; Mas-Colell, Whinston and Green, *Microeconomic Theory*, pp. 385–86.

334 According to Mas-Colell et. al., Mas-Colell, Whinston and Green, *Microeconomic Theory*, p. 385-386, the amount of such deadweight welfare loss is given by the following equation $\int_{q^*}^{q^c}[p(s) - c'(s)]ds > 0$, where $q^*$ is the monopolic level of output and $q^c$ the competitive level of output.

335 According to Varian, a quasi-lineal consumer utility function, *u(y)+x* is $W(y) = \max_y u(y) - c(y)$. This implies an optimal level of output, $y^c$, that is given by $u'(y^c) = p(y^c) = c'(y^c)$. In the monopoly situation the level of output will be $p(y^*) + p'(y^*)y^* = c'(y^c)$. Using the inverse demand function in the social utility function, then $W(y) = [u(y) - p(y)y] + [p(y)y - c(y)]$, which represents the consumer surplus plus the profits. Therefore, in the monopoly setting, the marginal utility, $u'(y^*)$ minus the marginal revenue, $p(y^*) + p'(y^*)y^*$ is equal to $p'(y^*)y^*$. See Varian, *Análisis Microecónomico*, p. 280; see also: Thomas G. Krattenmaker, Robert H. Lande and Steven C. Salop, ' Monopoly Power and Market Power in Antitrust Law' (1988) 76 The Georgetown Law Journal 241, p. 266.

336 Varian, *Análisis Microecónomico*, p. 281 (stating that monopolists choose factors related to the good or services they produce other than just output).

337 Ibid., p. 282. The author states that the quality of a product could be represented by the letter, *q*, as a numeric level. Then the welfare function depends on quality and costs, then $W(y,q) = u(y,q) - c(y.q)$, where $\frac{\partial u}{\partial q} > 0$ and $\frac{\partial c}{\partial q} > 0$. If the monopolist maximizes profits then the problem $\max_{y,q} p(y,q)x - c(x,q)$, is translated to the first order conditions $p(y^*,q^*) + \frac{\partial p(y^*,q^*)}{\partial y}y^* = \frac{\partial c(y^*,q^*)}{\partial y}$ and $\frac{\partial p(y^*,q^*)}{\partial q}y^* = \frac{\partial c(y^*,q^*)}{\partial q}$. Having regard

In conclusion, both in the cases of price and quality, consumer welfare and allocative efficiency are sacrificed by the monopolist's conduct. As there is a reduction in both consumer and productive efficiency, there is also a large reduction in social welfare. In simple terms, the firm sells its products only to those consumers willing to buy at a price or quality above marginal costs.

### (2) Exploitative effects

The conduct of a monopolist is regularly judged as exploitative.[338] It is seen as exploitation since the monopolist can choose its level of output, and despite having the decision-making power not to restrict output, the rational behaviour of the monopolist leads to profit maximization through output restriction, which in the end increases prices to consumers above marginal costs.

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to the total welfare function, $W(y,q)$, the relation with $y^*$ and $q^*$, then $\frac{\partial W(y^*,q^*)}{\partial y} = \frac{\partial u(y^*,q^*)}{\partial y} - \frac{\partial c(y^*,q^*)}{\partial y}$ and $\frac{\partial W(y^*,q^*)}{\partial q} = \frac{\partial u(y^*,q^*)}{\partial q} - \frac{\partial c(y^*,q^*)}{\partial q}$, that substituting with the first order conditions derived from the solution to the monopolist problem leads to the following conclusions $\frac{\partial W(y^*,q^*)}{\partial y} = -\frac{\partial p(y^*,q^*)}{\partial y} y^* > 0$ and $\frac{\partial W(y^*,q^*)}{\partial q} = \frac{\partial u(y^*,q^*)}{\partial q} - \frac{\partial p(y^*,q^*)}{\partial q} y^*$. Then, according to the first equation having quality fixed, the monopolist production is low having regarded the social optimum. However, Varian finds that the condition regarding quality is ambiguous since a change in quality expands and displaces the demand function, changing the price elasticity of demand, which in turns determines the relation of quality and prices. Varian, *Análisis Microecónomico*, p. 282–83.

338 See Hay, 'Market Power in Antitrust'; Krattenmaker, Lande and Salop, ' Monopoly Power and Market Power in Antitrust Law' (stating that there are differences in the treatment of 'anticompetitive economic power that is exercised by restricting one's own output and such power exercised by restricting the output of one's rivals'); Bruce Lyons, *The Paradox of the Exclusion of Exploitative Abuse* (University of East Anglia 2007); M Motta and D Steel, 'Exploitative and Exclusionary Excessive Prices in EU Law' in C-D. Ehlermann and I. Atanasiu (eds), *What Is an Abuse of a Dominant Position?* (Hart Publishing 2006); Richard A. Posner, 'Exclusionary Practices and the Antitrust Laws' (1974) 43 The University of Chicago Law Review 506; Robert M. Feinberg, 'The Lerner Index, Concentration, and the Measurement of Market Power' (1980) 46 Southern Economic Journal 1180;

### (3) Distributive effects

On the other hand, the monopolist's decision to restrict output begets a distributive effect.[339] High prices and a shortage of products quantity make consumers pay higher prices that transfer rents from consumers to the monopolist, causing producers to have more rents and consumers to enjoy fewer products on the same budget. Then, there is a distributive effect whereby consumers transfer a large portion of their rents to producers due to the lack of competitive pressure on the producer's side. This only due to the power of the monopolist; in a competitive situation, the producer would never be able to extract such rents from consumers. In addition, consumers are harmed. Consumers lose their ability to make purchases at competitive market prices, and the benefit, derived from buying at a marginal cost price, is lost.

## iii) How is market power measured?

The literature has defined several methods to determine market power. Such methods are based on evidence that is endogenous, and sometimes exogenous, to the market where market power is exercised.

### (1) Market shares

339 Krattenmaker, Lande and Salop, ' Monopoly Power and Market Power in Antitrust Law', p. 265.

According to Landes and Posner, the standard method of determining market power requires first the definition of a relevant market[340] and then the determination of market participants' shares in order to establish whether such undertakings are 'large enough to support an inference of the required degree of market power'.[341] Market shares are regularly used as means to determine and infer whether there is market power in a particular antitrust concern.[342] These inferences basically consider that market structure allows defining and making a sound inference of the exercise of market power in a particular market.

The most important structural measures in a market or industry are the number of firms and the relative size of firms.[343] Assuming that structure shows the exercise of market power, then the larger the firms are and the larger the relative size between firms, the more market power can be exercised. The economic assumption of the dominance model is that large firms use their market power to increase their market share or maintain it.[344]

Concentration measures are regularly used as a method to determine what the dynamics of market power in a particular market are. The most common concentration variables are C4, C8,[345] and the Hirschmann–Herfindahl Index

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340 Hay, 'Market Power in Antitrust', pp. 807–9.

341 Landes and Posner, 'Market Power in Antitrust Cases', p. 938.

342 See Hay, 'Market Power in Antitrust' (advocating for the use of market shares to define market power in antitrust cases).

343 Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 20.

344 Ibid., p. 20–21.

345 This measures indicate what the share is of the four largest firms in the Industry. Other ratios are C8, C20, and C50.

(HHI).[346] With the use of these variables, market power can be assessed[347] due to the fact that particular market structures indicate the exercise of market power in a particular market. It is assumed that, for example, seller concentration is an indicator of profitability, but profitability does not affect structure.[348]

Despite the aforementioned, both market shares and market concentration measures have been seen by the literature as administrable but poor substitutes for direct measures of market power and the exercise of market power.[349] Several problems have been identified. For example, Perloff et al. state that most of the commonly used measures of market structure are not exogenous, and it is assumed that the number of firms defines a level of competition even though there can be competitive industries with a small number of firms.[350] In addition, the literature considers that many concentration measures are regularly biased since they heavily rely on market definition in order to determine the exercise of market

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346 Keith Cowling and Michael Watterson, 'Price-Cost Margins and Market Structure' (1976) 43 Economica 267; Kenneth Hendricks and R. Preston McAfee, 'A Theory of Bilateral Oligopoly' (2010) 48 Economic Inquiry 391. If all participants' shares are available, the most commonly used function is that which equals the sum of the squares of each firm in the industry. The authors consider that the HHI is the most appropriate result if firms behave in a Cournot fashion.

347 See Hay, 'Market Power in Antitrust', pp. 821–824. For example, Landes and Posner regularly advocate for a technical definition of market power based on price–cost margins; however, if market shares are required to be defined to determine market power, then calculations should be based upon production capacity rather than revenues or production volumes since such calculations incorporate supply substitutability capacity and production expansion Landes and Posner, 'Market Power in Antitrust Cases', p. 947–49; Michael S. McFalls, 'The Role and Assessment of Classical Market Power in Joint Venture Analysis' [1997-1998] 66 Antitrust Law Journal 651, pp. 661–63

348 Perloff, Karp and Golan, *Estimating Market Power and Strategies*, pp. 20–22.

349 See Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 274a. The OECD states that '[m]arket share data continue to be the "high priest" in assessing whether a firm has substantial market power, although the limitations of market shares as proxy of market power are widely acknowledged.'

350 Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 22.

power.[351] However, even with an accurate and sound market definition, large market shares are neither proof of substantial market power nor market power. Therefore, assuming there is correlation between high shares and market power always depends on other conditions that may limit a firm's ability to raise prices.[352] Also, market shares never provide conclusive evidence of market power. That is why 'they are not a proper substitute for a comprehensive examination of market conditions'.[353]

What is most surprising is that U.S. and E.U. competition authorities and courts, despite acknowledging the limits of market shares to determine market power, heavily rely on them to, in a first stage of analysis, infer market power or presume dominance. Monti, a former commissioner at the EU Competition Commission, for example, considers market shares as the 'most important data to determine dominance' and explains that, that is why the European Commission uses 'market definition and market shares as an easily available proxy for the measurement of the market power enjoyed by firms'.[354] Similarly, the UK's OFT

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351 See Ibid., p. 22.

352 See OECD, *Substantial Market Power and Competition* (Public Affairs and Communications Directorate 2008), pp. 3–4; International Competition Network, *Dominance/Substantial Market Power Analyisis pursuant to Unilateral Conduct Laws* (ICN Unilateral Conduct Working Group 2008).

353 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 111.

354 Mario Monti, 'Market Definition as a Cornerstone of EU Competition Policy: Speech by Commissioner Mario Monti' (*European Commission*, 2001) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/439&format=HTML&aged=0&language=EN&guiLanguage=en#file.tmp_Foot_1> accessed 23 March, 2011, p. 1.

considers that 'market power is more likely to exist if an undertaking has a persistently high market share'.[355]

Finally, rivals' market shares are also considered as indicators of market power or lack of economic power. If market power grants independence in pricing, a firm's competitor should be unable to limit such an undertaking's behaviour. Therefore, relative market power, or the distance between the leader and follower measured in market share percentages, in certain cases has helped authorities or courts to find market power. For example, in certain merger cases such as DuPont–ICI,[356] a stable difference between a large firm and its closest rival has given the courts a criterion to determine the likelihood of market power by the large firm.[357]

### (2) Price–Cost Measures

Industrial organization literature has looked at the relation between market power and profits. For example, Bain in 1951[358] made a study finding that industries with higher concentration had higher profits,[359] concluding that profits were regularly

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355 UK's Office of Fair Trading, *Assessment of Market Power, Competition Law Guidelines* (Office of Fair Trading 2004), pp. 11–14.

356 Case IV/M.214 *DuPont/ICI* 1999 ECR II-753, §202.

357 The relative weight of shares between a dominant firm and its closest rival, or the relative market power, should not be underestimated in short-term analysis, if a rival is able to quickly expand production to meet demand constrained by the dominant firm. See for example Hoffmann LaRoche. The Court stated that large market shares are not a problem if competitors with much smaller shares are able to rapidly meet demand.

358 See Joe S. Bain, 'Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-1940.' (1951) 65 Quarterly Journal of Economics 293.

359 Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 25.

higher in industries with high barriers to entry and high concentration.[360] Other studies such as Mann's in 1966 showed that industries with very high barriers to entry 'enjoy higher profits than those with substantial barriers, which in turn earn higher profits than those with moderate to low barriers'.[361] Similarly, other econometric studies regularly conclude that there is a correlation between profitability and certain endogenous barriers to entry such as advertising-to-sale ratios and the ratio of research and development expenditures to sales.[362]

In addition, Perloff et al. show that a 'gigantic' body of literature examines the relation between price–cost margins and industry structure;[363] these studies, however, have been heavily criticised and their results have been contradicted in several ways.[364] Despite the aforementioned, the literature has found merit in and has identified several different price–cost measures[365] that are regularly useful at proving the exercise of market power. In this section the most common measures are reviewed: the Lerner index and price-average variable cost margin.

### (i) The Lerner index

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360 See Cowling and Waterson, 'Price-Cost Margins and Market Structure' (develops a theoretical model of the relationship between structure and performance and relates change in price–cost margins to changes in concentration); Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 26.

361 See Michael Mann, 'Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries, 1950-1960' (1966) 48 The Review of Economics and Statistics 290; Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 26.

362 Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 26.

363 Ibid.

364 Ibid.

365 See Ibid., for a thoughtful review of all measures.

The Lerner index determines market power by measuring the excess of marginal cost.[366] The index departs from the assumption that in a competitive market, prices are equal to marginal costs and any departure or difference of prices from marginal costs shows some sort of power to determine prices.[367] As stated by Lerner the 'degree of monopoly' is an index of 'divergence from an optimum',[368] and therefore the Index shows a ratio of the divergence between marginal cost and average receipt. '[I]n the words of Lerner—it is in the divergence between these . . . that the essence of monopoly is to be found'.[369]

The Lerner index, as shown by Landes and Posner, is defined by the ratio between prices of good *i* ($p_i$, stated by Lerner as average receipt) and marginal costs of good *i* ($c'_i$). The rate is defined as

$$L_i = \frac{p_i - c'_i}{p_i} \qquad (3)$$

The ratio essentially shows the relation between price of the good *i*, $p_i$, and the marginal cost of the good *i*, $c'_i$, in a determined time.[370] The index therefore, shows the extent to which an undertaking can depart from the competitive price,

366 See Landes and Posner, 'Market Power in Antitrust Cases', pp. 939–41.

367 See Abba P. Lerner, 'The Concept of Monopoly and the Measurement of Monopoly Power' [1934] Review of Economic Studies 157.

368 Ibid., p. 174.

369 Ibid., p. 169.

370 See Ibid., p. 174.

since in perfect competition, the equilibrium price is equal to the marginal cost, $p_i = c'_i$.[371]

The possibility of calculating the Lerner index immediately disregards the need to define the relevant market. This is because the index defines the market power of an individual firm for a particular good, and therefore the index shows most of the information regarding the position and the independence of such an undertaking in the market. According to Hovenkamp, the Lerner index would be enough to make unnecessary the relevant market and the market share.[372] Similarly, some consider that the Lerner index 'measures market imperfection rather than monopoly or oligopoly power'.[373]

The literature states that the most difficult problem of the Lerner index is that it is not administrable since it is very difficult to accurately measure marginal costs. Even Landes and Posner believe that the utility of the Lerner index is only 'conceptual', due to the need to use elasticity of demand, a variable that is difficult to measure and administer.[374] However, if marginal cost can be directly measured,

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371 See Ibid., p. 174.

372 See Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, pp. 274a-274b, citing Landes and Posner, 'Market Power in Antitrust Cases', p. 944.

373 Tibor. Scitovsky, 'Economic Theory and the Measurement of Concentration' [1955] Business Concentration and Public Policy 101, p. 105, cited by Kenneth G. Elzinga and David E. Mills, 'The Lerner Index of Monopoly Power: Origins and Uses' (2011) 101 The American Economic Review 558, p. 558b.

374 Landes and Posner, 'Market Power in Antitrust Cases', pp. 939-941.

a good Lerner index can be determined and there should be a good way to define power relations in a market or an industry.[375]

### (ii) Price-Average Variable Cost Margins

The Lerner index is, in essence, a price–cost margin that reflects the exercise of an undertaking's power to diverge from competitive prices. The margin is the difference between the price and the marginal cost. The price-average cost margin is an index that departs from the same assumption as the Lerner index but considers the average variable cost instead of marginal costs as a measure of variability, due to the difficulties of measuring marginal costs. Mathematically, such an index follows the same functional form as the Lerner index:

$$PAC_i = \frac{p_i - AC_i}{p_i} \quad (4)$$

where $PAC_i$ represents the Price-Average Cost Index and $AC_i$ represents the average cost.

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375 Perloff, Karp and Golan, *Estimating Market Power and Strategies*, pp. 29–30. Studies based on the Lerner index have found interesting results regarding market power and prices. For example, Weither et al. studied the Lerner index for the undertakings participating in the US airline industry, finding good evidence regarding market power, as measured by the relation of number of incumbents, marginal costs, and profits with market structure and prices. Jesse Weither, Robin C. Sickless and Jeffrey Perloff, 'An Analysis of Market Power in the US Airline Industry' in D. Slottje (ed), *Measuring Market Power* (2003) cited by Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 30. (Weither et al. concluded that there was enough evidence to hold that preventing a single firm from dominating a route, or an air transport market in the US industry, may substantially lower prices, and that even in cases of duopoly dominance, the mark-up of the market is lower than the mark-up when there's a single firm dominant).

This index has been used by several authors in industrial organization analysis in order to determine whether conduct and performance are related, and what their relation is with market power and profits. For example, Perloff et al. report Collins and Preston's[376] model to determine whether there is a relation between price–cost margins and industry structure. To test such relations, the authors used the price-average variable cost margin and related it with concentration ratios (the relation of capital and output and other ratios),[377] finding a significant association between concentration and margin.

The problem with this margin is conceptual. In the long term, every competitive market will have a price equal to the marginal cost. This indicator helps to determine whether there is market power. Using the AVC as a market power benchmark variable may reduce the likelihood of determining with certainty if there has been real exercise of market power, as average variable costs are regularly higher than marginal costs. And therefore, if the measure of performance given by the AVC test is viewed as evidence of the existence of market power, most of these measures could be biased.

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376 Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 30. See Norman R Collins and Lee E Preston, 'Price cost margins and industry structure' (1969) 51 The Review of Economics and Statistics.

377 The authors test the price-average cost margin as a dependent variable of the industry concentration ratios and the Tobin-q, $\frac{p_i - AVC_i}{p_i} = \alpha + \beta C4_i + c\frac{pk_i K_i}{p_i q_i} + \cdots$ where AVC is average variable cost, C4 is the concentration ratio and pkK/oq is the bookvalue of capital to the value of output. The authors find that even very large increases in concentration may only raise prices in very modest amounts.. Perloff, Karp and Golan, *Estimating Market Power and Strategies*, p. 28.

In summary, this section showed that market power is a concept related to the ability that an undertaking has in the market in order to define prices. The most effective and administrable way, according to the economic literature, to screen and assess whether an undertaking poses market power is the market shares. Other price-cost measures have proven to be ineffective and costly to screen whether an undertaking is exercising some sort of market power.

## 3. The Law and Economics of Dominance

In this section, it will be shown that, as well as for the market power analysis case, there are multiple ways to define what dominance is and how it should be measured. This section, then, aims at explaining the mainstream standards on dominance that Latin American emerging economies could use to design their policy. First, the definitions of dominance and a definition of dominance will be proposed and the law and economics of such concept will be analysed. Then, the mainstream methods to define and measure dominance will be explained in order to define if there is a method to define whether an undertaking possesses there is dominance.

### i) What is Dominance?

Dominance[378] is a concept that is regularly used in the legal literature but has been poorly developed in the economic scholarship. This feature has increased uncertainty about what competition law protects when proscribing abuse of dominance. Recent legal literature has suggested that dominance is and should be equivalent to market power.[379] Other parts of the literature have granted dominance a different meaning, stating that dominance is a legal rather than economic concept, larger than mere market power.[380]

The economic perspective of dominance is associated with market power, more specifically with monopoly power.[381] Under this perspective, any undertaking that has some sort of market power is, at the same time, dominant. Therefore, it has been said that a dominant agent is any undertaking that has the ability to 'raise price above the competitive level'[382]; this is the 'ability to [rationally] set price above marginal cost'.[383] In a different fashion, dominance is considered as having not only market power but also the level of market power

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378 As explained later in this section, dominance is also used regularly as an equivalent to monopoly power, market power, or market dominance.

379 See Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review 253; OECD, *Substantial Market Power and Competition* ; Vickers, 'Abuse of Market Power'; Krattenmaker, Lande and Salop, ' Monopoly Power and Market Power in Antitrust Law' (arguing that 'attempting to distinguish between market power and monopoly power creates a false dichotomy' despite that 'real differences, with significant legal and policy implications, do exist')

380 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 108 (stating that in EU competition law, there is an economic concept of dominance; however this does not correspond with the legal definition); Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice* p. 271a–b, (showing that in US antitrust law, dominance is a concept larger than mere market power).

381 Elhauge, 'Defining Better Monopolization Standards', p. 257.

382 Landes and Posner, 'Market Power in Antitrust Cases', p. 937.

383 Ibid., p. 937.

equivalent to monopoly power.[384] Elhauge, for example, criticises the US courts' definition of dominance for being ill-suited since it defines market power as something larger that the ability to raise prices above the competitive level.[385] Therefore, according to Elhauge, market power should be considered not strictly as monopoly power but as power that grants a 'significant' or 'substantial' degree of market power.[386]

However, the pure economic perspective of dominance fails in identifying that according to economic theory, a single firm can behave independently from competitors only when it participates in a market with high barriers to entry and inelastic demand.[387] Therefore, in some circumstances, an undertaking may be able to set prices but will not be able to behave 'independently' from rivals.[388]

The legal perspective of dominance considers dominance simply as certain 'immunity' from the normal forces of rivals and consumers.[389] This perspective departs from CJEU's case law, which has set certain boundaries on what it is a

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384 Elhauge considers that the fundamental problem starts with *Grinnell* (*United States v. Grinnell Corp.* 384 U.S. 563 Supreme Court, US), where the Supreme Court states, 'the offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'.

385 Elhauge, 'Defining Better Monopolization Standards', p. 257

386 Ibid., p. 257.

387 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 107.

388 This is due to the fact that power to determine prices depends on residual demand.

389 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 107.

dominant undertaking. In *United Brands*[390] the Court of Justice of the European Union defined dominance as a

> position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[391]

In addition, Hoffman-La Roche[392], also quoting *United Brands*, added that

> such a position does not preclude some competition . . . but enables the undertaking . . . if not to determine, at least to have an appreciable influence on the conditions under which the competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate in its detriment.[393]

The legal concept of dominance, therefore, goes beyond mere market power. Market power is the ability to determine prices above marginal costs, which under the aforementioned standard, seems not to be enough to find an undertaking dominant. This is not a feature unique to European law. Commenting on US antitrust law, Hovenkamp considers that in *Trinko*[394], the court reaffirmed the 'inclusive approach' to monopoly power, stating that illegal monopolization is

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390 See Case 27/76 *United Brands Company and United Brands Continental B.V. v Commission of the European Communities* [1978] 1 CMRL 429 European Court of Justice.

391 Ibid., §57; and Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR I-00461 ECR European Court of Justice, §38.

392 See *Hoffmann-La Roche & Co. AG v Commission of the European Communities.*

393 Ibid., §39–40.

394 See *Verizon Communications Inc. v. Law Offices Of Curtis V. Trinko, LLP* 540 U.S. 398 (2004).

the sum of substantial market power and its exercise.[395] The exercise of that power is not by pricing, since monopoly pricing, as stated by Scalia, is lawful.[396] Therefore, as defined by Judge Wyzanski in *United Shoes*,[397] it is an exclusionary practice.[398] However, according to Hovenkamp, current antitrust literature may state that the 'lever' that the dominant firm needs in order to make its exclusionary practice work is not the present ability to raise prices above marginal costs, but rather its ability 'to dominate a market in a way that forecloses access to rivals'.[399]

In conclusion, dominance goes beyond independency of pricing and goes as far as the possibility to exclude.[400] This, as in the case of market power, is also a matter of degree. The question that remains is, then, how to measure dominance.

### (1) Factors determining dominance

Dominance is a legal concept based on economic grounds. As stated before, market power is just the possibility to increase prices above marginal costs.

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395 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 271a.

396 See *Trinko*, p. 879 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system".)

397 See ***United States v. United Shoe Machinery Corp.*** *110 F. Supp. 295 (1953)* United States District Court, District of New Jersey, cited by Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 271a.

398 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 271a.

399 Ibid., p. 271a. The author also stated that 'acts by the monopolist designed to discourage potential competitors from entering the field, or to prevent competitors from increasing output', are exclusionary acts.

400 See Areeda and Hovenkamp, *Antitrust Law*, §3A-651a. According to Areeda and Hovenkamp, exclusionary acts are actions by a dominant undertaking that 'are capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals' and that either 'do not benefit consumers at all'; 'are unnecessary for the particular consumer benefits that the acts produce' or 'produce harms disproportionate to the resulting benefits'.

Dominance requires, in addition to market power, the existence of other factors since it goes beyond the possibility of pricing above marginal cost and implies independence from other market forces. Then, reinterpreting Krattenmaker et all's statements,[401] market power is about the restriction of the firm's own output; dominance is not only about the restriction of the firm's own output but also about the possibility to restrict other firm's output.[402]

Market forces that help a firm's ability to restrict its own and its rivals' output include factors such as barriers to entry and consumer-switching costs. There are also countervailing structural factors such as buyer power and market contestability.[403] Such factors are considered below.

### (a) Barriers to entry

Several definitions have been proposed regarding what a barrier to entry is. For example, Bain considers that entry barriers are factors that allow established firms to 'elevate their selling prices above the minimal average costs of production and distribution without inducing potential entrants to enter the industry'.[404] On the other hand, Stigler considers that a barrier to entry is 'a cost advantage that an

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401 Krattenmaker, Lande and Salop, ' Monopoly Power and Market Power in Antitrust Law', pp. 247, 265 (stating that there are no meaningful differences between market power and monopoly power since both concepts are qualitatively identical, and arguing that economic power 'exercised by restricting one's own output' and anticompetitive economic power 'exercised by restricting the output of one's rivals' are the problems that antitrust should face).

402 Ibid., p. 265.

403 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 118.

404 Joe S. Bain, *Barriers to New Competition* (Harvard University Press 1956), p. 2; Joe S. Bain, *Industrial Organization* (Wiley and Sons 1968), p. 252; See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 117.

incumbent firm enjoys compared to entrants'[405] and is a 'cost of producing . . . which must be borne by a firm which seeks to enter the industry but which is not borne by firms already in the industry'.[406]

The literature has identified several barriers to entry. O'Donoghue and Padilla, for example, consider that the characteristics inherent in the relevant market lead to identify legal and economic barriers to entry and expansion.[407] In terms of legal barriers to entry, the authors show state monopolies,[408] authorization or licensing requirements,[409] intellectual property rights,[410]and other regulatory barriers.[411] By the same token, the authors consider that there are economic

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405 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 118.

406 Bain, *Industrial Organization*, p. 252; See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 118. Other definitions are by Fisher, who considers that it is a barrier to entry 'any factor that prevents entry when it is socially beneficial' O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 118; by Von Weizacker, who considers 'that any differential cost advantage that prevented an efficient allocation of resources' O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 118; by Ferguson, who defines barriers to entry as 'factors that make entry unprofitable while permitting a established firm to set prices above marginal cost, and to persistently earn monopoly profits' James M. Ferguson, *Advertising and Competition: theory measurement* (Ballinger 1974), p. 10; By Bork, who defines barriers to entry as representation of the realities of doing business or the superior efficiency of the incumbent firm relative to rivals O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 118; and by Stigler, who defines barriers to entry as 'a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry' Stigler, 'Barriers to Entry, Economies of Scale and Firm Size' in *The organization of Industry* (1968), p. 67. See Harold Demsetz, 'Barriers to Entry' (1982) 72 The American Economic Review 47, p. 47a–b. According to Demsetz, all these definitions 'focus attention on the different opportunities facing insiders and outsiders' and such an approach not only 'diverts attention from other types of barriers but hides the value judgements implicit in the barriers notion' Demsetz, 'Barriers to Entry', p. 48a.

407 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*., p. 120

408 Ibid.

409 Ibid.

410 Ibid.

411 Ibid.

barriers to entry such as sunk costs,[412] economies of scale and scope,[413] and network effects.[414]

Entry barriers grant incumbents competitive advantages over entrants. Each barrier has different consequences as some barriers are more insuperable than others. A barrier to entry, in summary, makes difficult the decision-making process of entry and exit and therefore supports dominant incumbents to maintain their dominant position in the market.

### (b) Switching costs

Consumer switching costs are costs associated with changing the supplier of a good or service.[415] According to Farrell and Klemperer, a product has switching costs 'if a buyer will purchase it repeatedly and will find it costly to switch from one seller to another' or 'if a buyer will purchase follow-on products such as

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412 Ibid., p. 121. These are defined as costs that will not be recovered once out of the market. There are, according to the authors, two kinds of sunk costs: i) endogenous sunk costs, or the particular investments or expenditures required to be made once in the market, such as R&D, advertising, etc., and ii) exogenous sunk costs, or investments in facilities required to enter into a specific industry. O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 121.

413 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 122.

414 Ibid., p. 123.

415 See Joseph Farrell and others, 'Coordination and Lock-In: Competition with Switching Costs and Network Effects' in *Handbook of Industrial Organization*, vol Volume 3 (Elsevier 2007) <http://www.sciencedirect.com/science/article/pii/S1573448X06030317> ; Gary Biglaiser, Jacques Cremer and Gergely Dobos, *The Value of Switching Costs* (2011).

service and repair, and will find it costly to switch from the supplier of the original product'.[416]

The presence of switching costs changes the dynamic of the market. The literature has shown that switching costs include a set of transaction costs that make competition happen in long-term relationships, rather than in short-term contracts.[417] This feature begets an 'ex post monopoly, for which firms compete ex ante'.[418]

In regards to the latter, the fact that the product or service market is characterized by switching costs makes the economic power of the incumbent larger and more difficult to challenge. The existence of switching costs enhances dominance.

### (c) Buyer power

Following O'Donohue and Padilla, buying power is considered a mechanism to ameliorate market power and therefore is a determinant of dominance.[419] Buying power is a structural condition of the market that allows consumers or buyers to have decision-making power over a supplier. The authors also show that buyer power, both in merger regulation and in Articles 101 and 102 TFEU have had

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416 Farrell and others, 'Coordination and Lock-In: Competition with Switching Costs and Network Effects', p. 1972.

417 Ibid., p. 1973.

418 Ibid., p. 1973.

419 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 129.

effects on the commission's analysis of market power since it may neutralise purchaser power,[420] or 'remov[e] the possibility of suppliers exercising market power'.[421] Strong buying power constrains suppliers' ability to raise prices.[422]

Despite the aforementioned, the economic literature only provides weak evidence regarding the effect that countervailing market power has to control actions of undertakings with a dominant position.[423] Empirical evidence has shown that the size of buyers, when having no choice due to lack of upstream competition, is not a determinant of final price paid.[424] Therefore, buyer power literature fails to explain why buyer power has little or no countervailing power against dominant undertakings.[425]

### (d) Market contestability

Market contestability is a concept developed by Baumol,[426] according to which there are highly concentrated markets in which the inexistence of barriers to entry

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420 See UPM-Kymmene/Haindl, Case COMP/M.2498, cited by Ibid., pp. 129–30.

421 See Enso/Stora, Case COMP/M.1225, §97, cited by Ibid., p. 129–30.

422 Ibid., pp. 129–30.

423 Howard Smith and John Thanassoulis, *Upstream Competition and Downstream Market Power* (2009), pp. 1–2.

424 Sara Fisher Ellison and Christopher M. Snyder, *Countervailing Power in Wholesale Pharmaceuticals* (MIT Department of Economics 2001) (the authors study the effects of buyer size on pharmaceutical markets for branded and patented (monopoly) drugs and markets for branded and generic drugs. Results show that large buyers pay prices similar to small buyers on non-substitutable pharmaceuticals (antibiotics) with valid patents).

425 Smith and Thanassoulis, *Upstream Competition and Downstream Market Power*, pp. 1–2.

426 William J. Baumol and Robert D. Willig, 'Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly' [The MIT Press] 96 The Quarterly Journal of Economics 405 (stating that in perfectly contestable markets, large fixed costs are compatible with many desirable attributes of competitive equilibrium).

makes the market outcomes similar to competitive equilibrium.[427] As stated by Baumol, 'a contestable market is one into which entry is absolutely free, and exit is absolutely costless'.[428]

Despite this feature, some parts of the literature criticize the concept of contestable markets. Following Baumol, the concept of contestability is considered an 'ultra-free entry'[429] that is free and without limits, absolute, and perfectly reversible.[430] However, contestability seems to refer to imperfect entry cases, and therefore it misplaces attention from entry conditions to a postentry struggle.[431] In any case, contestable markets countervail any chance of exercise of dominance through prices or entrant exclusion.

### ii) Economic Effects of the Exercise of Dominance

As explained above, dominance refers not only to the likely exercise of monopoly power but also to the likely restriction of the firm's output and/or its competitors' actual or potential output. Dominance, when exercised, has greater effects on welfare than the exercise of market power; it produces not only an inefficient

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427 See William J. Baumol, 'Contestable Markets: An Uprising in the Theory of Industry Structure ' (1982) 72 The American Economic Review 1.

428 Ibid., p. 3b.

429 William G. Shepherd, '"Contestability" vs. Competition' (1984) 74 The American Economic Review 572.

430 Ibid., p. 573a.

431 Ibid., p. 573b.

transfer of wealth from consumers to producers but also could independently or simultaneously reduce producers' efficiency.[432]

However, the exercise of dominance is not always defined as an abuse by the legal system. Each legal system defines abuses according to a certain tolerance to unilateral action that is considered justified, for example, due to the particular circumstances of the market place.[433] By the same token, the mere fact of holding a dominant position in a particular market does not necessarily imply its exercise, but a certain legal system may consider illegal holding a dominant position.

**(1) Exploitative effects**

The exploitative effects of the exercise of dominance are similar to those of the exercise of market power.[434] Consumers are worse off due to the restriction of output exercised by the dominant undertaking's or competitors' output restrictions. Such action translates into price increases that cause consumers to have fewer options at a higher price.

**(2) Exclusionary effects**

Dominance, when exercised, produces exploitative and exclusionary effects. As stated by Krattenmaker et al., there are several ways for a dominant undertaking to

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[432] See Krattenmaker, Lande and Salop, ' Monopoly Power and Market Power in Antitrust Law', p. 267.

[433] Patents in pharmaceutical industries may be a good example.

[434] See Section 2.2.2.2.3.

restrict a rival's output: for example, by raising its rivals' costs.[435] Dominance is also considered as the possibility of behaving independently, as defined by European authorities, and this requires that the dominant undertaking have the power to control other undertakings' output levels. Then, exclusion is exercised by restricting total output by means of reducing the dominant firm's output in order to increase prices and restrict other firms from entering the market or growing their levels of output.

### (3) Total and consumer welfare effects

The exercise of dominance has two different outcomes: first, it reduces consumer welfare, and second, it reduces production efficiency.[436] The reduction of consumer welfare is given by the reduction of total output granted by the dominant undertaking output restraint, which is intended to determine prices that are higher than marginal costs. This ability does not differ much from the output restriction ability carried out by a monopolist when exercising monopoly pricing. The reduction of other undertakings' output, or the obstruction of the growth of total output, reduces consumer welfare due to the impact that total output has on prices. In addition, production efficiency is reduced.[437]

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435 See Krattenmaker, Lande and Salop, ' Monopoly Power and Market Power in Antitrust Law', p. 266.

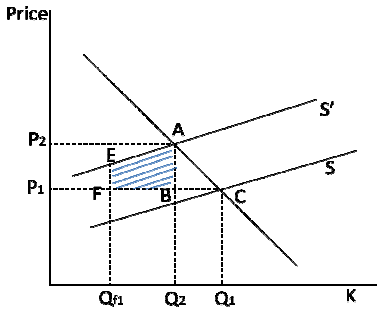
436 Ibid., p. 266.

437 Krattenmaker et al. (Ibid., p. 266) illustrate this point. The graphic below is helpful:

### iii) How Is Dominance Measured?

As shown before, there is a thin and undefined line between market dominance and market power. These unclear boundaries lead to the fact that dominance and market power are regularly measured in a similar fashion. In fact, some authors have shown discontent with the impossibility of measuring dominance in a consistent matter with the courts' standards.[438] Only certain authors have proposed measures of dominance distinct from the measures of market power reviewed above.

#### (1) Market shares




Line S represents the competitive supply curve of a market with two firms. Total output capacity of Firm 1 is denoted by $Q_{f1}$ and total capacity (Firms 1 and 2) goes to Level K. If Firm 2 is not dominant and its costs are increased by Firm 1's dominant conduct, there will be an upward shift in the supply curve from S to S'. The price rises from $P_1$ to $P_2$, while quantity falls from $Q_1$ to $Q_2$. Due to the output reduction, there is a deadweight loss in consumer surplus and a loss in production efficiency (the increase in producing production costs of the remaining output, EABF). See Krattenmaker, Lande and Salop, ' Monopoly Power and Market Power in Antitrust Law', p. 267.

438 See Azevedo and Walker, 'Dominance: Meaning and Measurement' (showing that the definition of dominance applied in the EU is meaningless and unmesurable); Lisbeth LaCour and Peter Mollgaard, 'Meaningful and Measurable Market Domination' (2003) 24 European Competition Law Review 38 (showing a function to measure dominance following the CJEU opinions).

Market shares have been used regularly as determinants and arbitrary measures of dominance by the literature. As shown above, market shares may indeed show, to some extent, the degree to which an undertaking can independently determine market conditions.[439] As in the case of market power, however, competition authorities heavily rely on evidence indicating market dominance through market shares.

Courts, for example, have found market shares are poor, or at least incomplete, evidence of dominance. For example, the Court of Justice of the European Union, in the *Hoffman-LaRoche* decision, stated that 'a substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets'.[440] However, the court also considers that 'although the importance of the market shares may vary from one market to another, the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position'.[441]

In fact, courts and competition authorities consider market shares as generalizing factors for the assessment of market power and dominance. For example, the Court of Justice of the European Union and the Commission consider that firms with market shares above 70 percent are dominant since such shares are,

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439 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, pp. 110–12.

440 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, §38–40, §41; See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC* pp. 110–12.

441 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, pp. 110–12.

in themselves, evidence of the existence of market power.[442] However, European courts have also presumed dominance when market shares are above 50 present[443] and have not found 'conclusive evidence of dominance' in market shares between 40 and 50 percent.[444] And as shown by O'Donohue and Padilla, even shares between 30 and 40 percent, despite not being enough to presume or evidence dominance, are not low enough to discharge a finding of dominance.[445] At the other end, market shares below 30 percent have been found by the Court of Justice of the European Union to be unlikely to evidence or presume dominance.[446]

U.S. courts, on the other hand, have relied on market share data to determine 'whether the plaintiff has enough market power to be guilty of illegal

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442 See *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, §59; Case T-139/98 *Administrazione Autonoma del Monopoli di Stato v Commission* [2001] ECR II-3413 ECR European Court of Justice, §52; O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 113 (stating that shares between 50 and 70 percent are found by the Courts as presumptive of market power in cases such as *Michelin I* (Case 332/81 *Nederlandsche Banden Industry Michelin NV v Commission* [1983] ECR 3461 European Court of Justice) and *AKSO* (*ECS/AKZO Chemie BV* OJ 1985 L 374/1 European Commission; Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-3359 European Court of Justice).

443 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 114 (stating that courts have presumed dominance in cases where market shares are above 50 percent but below 70 percent), citing AKZO (see *AKZO* and *AKZO* ).

444 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 114. See *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, § 58.

445 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 114. See for example *Magill TV Guide/ITP, BBC and RTE* OJ 1989 L 78/43 European Commission and T-69/89 *Radio Telefis Éireann (RTE) v Commission* [1989] ECR II-485 European Court of Justice, cited by O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 115.

446 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 115. The authors cite *SABA II* (*SABA's EEC Distribution System* OJ 1983 L 376/41 ), showing that the Commission has found an undertaking with market shares lower than 30 percent unlikely to have market power. Similarly, shares of below 40 percent are not by themselves factors to discharge a market power, but market shares between 40 and 50 percent are not considered conclusive evidence of dominance, as in *Hoffmann-LaRoche* (*Hoffmann-La Roche & Co. AG v Commission of the European Communities*, §59), where the Court considered that a market share of 43 percent is not in itself sufficient to establish market power.

monopolization'.[447] In *Moore v Jas. H. Matthews*[448] the 9th Circ. Tribunal found there was monopoly power for an undertaking with a 75–90 percent market share.[449] However, other courts have found, as a matter of law, that it is unlikely to have monopoly power in cases where undertakings have shares lower than 50 percent.[450]

Despite the aforementioned, parts of the literature consider that although market shares can be administrated as dominance indicators, such variables may be a source of false positive or negative errors.[451] Market shares alone cannot be conclusive evidence of dominance and 'therefore, they are not a proper substitute for a comprehensive examination of market conditions'.[452]

### (2) Other measures of dominance

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447 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 272b.

448 *Moore v. Jas. H. Matthews & Co.* 473 F.2d 328 (9th Circ.1972), cited by Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, p. 272b.

449 *Moore v. Jas. H. Matthews & Co.* ; *Valley Liquors v. Renfield Importers* 822 F.2d 656 (7th Cir.) *Dimmit Agri Indus., Inc. v. CPC International Inc.* 679 F2d 516 (5th Circ.1982) (stating that a market share of 50 percent is insufficient, as a matter of law, for a finding of monopolization); *Arthur S. Langenderfer v. S.E. Johnson Co.* 917 F.2d 1413 (6th Circ.1990) (stating that it is rare for an undertaking with a market share lower than 50 percent to have sufficient market power to monopolize or attempt to monopolize); *United Airlines v. Autisn Travel Corp.* 867 F.2d 737 (2d Circ.1981) (stating that a 31 percent market share is insufficient for finding monopoly power).

450 Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, pp. 272b–273a.

451 See Hay, 'Market Power in Antitrust' (advocating for the use of market shares to define market power in antitrust cases); Landes and Posner, 'Market Power in Antitrust Cases', p. 965; Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice*, pp. 274b–275a (stating that market shares can have independent relevance in monopolization cases and in every case, even large market shares cases, barriers to entry should be assessed); O'Donoghue and Padilla, *The Law and Economics of Article 82 EC.*

452 O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 136 (stating that a formalistic approach to a definition of dominance over-relying on market shares may require further review by European courts).

Most defined measures are exclusively related to market or monopoly power, not dominance. The literature has found several measures of dominance that are different from market shares. These measures of dominance are regularly based on endogenous and exogenous variables that indicate the extent to which the combination of different market features may indicate if there is a dominant firm or potential for the exercise of dominance.

### (a) Direct measures of dominance

The literature has proposed different measures of dominance that are intended to determine whether there is real independence or insensitiveness of dominant undertakings from other market forces and its likely exclusionary effects. These measures intend to determine a certain degree of independence in the market using variables that are different from market shares.

#### (i) Output restriction tests

Some authors have proposed a test that indicates the extent to which a dominant firm, by restricting its output, restricts total industry output.[453] Dobbs and Richards have developed an indicator of market dominance that is based on determining the 'extent to which a hypothetical output restriction by the

[453] Dobbs and Richards, 'Output Restriction Measures of Market Power and Dominance', p. 1.

firm . . . would lead to a restriction in overall industry output (and hence increase in price)'.[454]

The test for homogeneous products is based on a simple relation between total industry output and the changes in the dominant firm output. The function proposed by Dobbs and Richards[455] follows the following form:

$$\eta = \frac{\Delta Q}{\Delta q} \tag{5}$$

The test indicates that a variation in a firm's output will make a reduction of total output, $\Delta Q$. Then, if the relation between the change in the dominant firm's output and the total output is positive, there are grounds in an appreciable extent, to consider the dominance of the firm.[456]

In the case of heterogeneous products, the authors also find a relation between market share and the Total Output restriction, *n*. The authors consider that for heterogeneous products the relation with output restriction should be measured, taking into account the elasticity of other products in the market and the dominant firm product.[457] The functional form to determine the extent of dominance is:

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454 Ibid., p. 3.

455 Ibid.

456 Ibid. The authors propose that 'assuming locally linear demand and constant marginal costs, the *TORT* elasticity for the $i^{th}$ firm, at the current Cournot equilibrium, is given as $n_i = (1/n)S_i$ where *n* is the number of firms in the industry and $S_i$ is its market share (either by quantity or revenue)'.

457 The authors propose that 'assuming no price reaction by other firms, the *TORT* elasticity for the *ith* product, at the current differentiated product equilibrium, is $n_i = S_i + \sum_{j \neq i}((\varepsilon_{ji}/\varepsilon_{ii})\, S_j)$'.

$$n_i = S_i + \sum_{j \neq i}((^{\varepsilon_{ji}}/_{\varepsilon_{ii}})\, S_j) \qquad (6)$$

The authors conclude that the TORT index, $n_i$, which measures dominance by determining the sensibility of an industry's output changes to the dominant firm's output levels is a good indicator of market power either in homogeneous and heterogeneous goods markets. And, according to the authors, this measure is preferable to the 'simple market share indicator since the TORT elasticity takes into account the extent of product substitutability across the market'.[458]

### (ii) Elasticity test

Some authors have found a measure of dominance following the patterns defined by the European Court of Justice in cases such as *United Fruits*.[459] LaCour and Mollgaard have found that there are direct measures of dominance that make it simple to determine whether an undertaking is dominant.

The authors state that according to the EU standard, an undertaking's independence from market forces 'to an appreciable extent' simply means in economic terms that the decision-making process of the dominant undertaking is

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458 Dobbs and Richards, 'Output Restriction Measures of Market Power and Dominance', p. 8.

459 *United Brands Company and United Brands Continental B.V. v Commission of the European Communities.* The Court stated that dominance 'relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'

inelastic, or insensitive, to the behaviour of competitors, customers, and consumers.[460] A firm then is independent if a change in price has i) no meaningful price response from its competitors,[461] ii) a meaningful quantity response from its competitors,[462] and/or iii) a substantial quantity response from its customers and consumers.[463]

Then, the authors propose that the elasticity, or sensitivity, of pricing, output, and demand decisions in the dominant undertaking should be close to zero in order to consider that independence should be determined in an appreciable extent.[464]

The problem with the aforementioned system to determine dominance is its administrability. Any estimation of dominance requires that at least the dominant firm's price and output vectors, the rivals' prices and quantities matrices, and whatever other variables necessary to determine elasticity are well specified.[465] This information—in addition to the use of econometric methodologies that are

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460 LaCour and Mollgaard, 'Meaningful and Measurable Market Domination', p. 2.

461 This means that a change in the prices of rivals, *P*, has no impact on the prices of the dominant undertaking prices, *p*; therefore, the dominant undertaking is insensitive to rivals pricing conduct. This is represented by the identity, $\rho \equiv \frac{dP/_P}{dp/_p}$.

462 This means that a change in the output quantity produced by rivals, *Q*, has no impact on the dominant undertaking's output, *q*. This is represented by the identity, $\mu \equiv \frac{dQ/_Q}{dq/_q}$.

463 The authors' economic interpretation of this were that, if there is a dominant undertaking, customers would be relatively insensitive to price changes made by the dominant undertaking. This is represented by the identity, $\varepsilon \equiv \frac{dp/_p}{dq/_q}$.

464 LaCour and Mollgaard, 'Meaningful and Measurable Market Domination', pp. 2–3.

465 Ibid., pp. 4–5.

advanced but highly questionable such as dynamic price regressions and co-integration analysis for rivals' price elasticity, the import penetration test using rivals' quantity elasticity, and residual demand analysis for determining the dominant price elasticity—makes the standard much more difficult to follow.

### (b) Firm size distribution as measures of dominance

Several authors have found dominance to be a function of the relative position of firms in a particular market or the market's firm size distribution. Relative dominance, then, refers to the relation of a firm with other firms in the market, relying on market shares and other endogenous variables that determine the way firms interact according the size and industry concentration. Despite the fact that several relative dominance measures have been proposed, the most relevant ones are analysed below. Some authors, however, have criticized the relative measures of dominance, stating that the relative weight of a dominant firm to its rival must not be overstated, since what is important is, according to the authors, not the size of firms but whether rivals can quickly expand production to meet demand.[466]

#### (i) Firm size distribution

[466] O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*. The authors cite *Hoffmann LaRoche* (*Hoffmann-La Roche & Co. AG v Commission of the European Communities* ), where the European Court of Justice stated that large market shares are not a problem if competitors with much smaller shares are able to rapidly meet demand.

Kwoka[467] considered that every price–cost margin is a function of firms' inequality[468] and the number of firms in a market.[469] Therefore, Kwoka concluded that industries dominated by one or two firms have higher price–cost ratios than industries with equal-size firms or with large concentration ratios.[470] The author then concludes that industries with high-dominance industries 'are more deserving of antitrust scrutiny than highly concentrated ones'.[471]

In order to reach the latter conclusions, Kwoka proposes a definition of dominance based on firm size distribution and proposes a definition of dominance as inequality. The author considers that inequality is a distribution variable that focuses on the pattern of shares, or the relative position that each firm has with its follower in the particular market.[472] Therefore, the author proposes a way to measure market inequality using bilateral market share differences.

The function proposed by Kwoka responds to the following form:

$$D = \sum_{j=1}^{n-1}(s_j - s_{j+1})^2 \qquad (7)$$

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467 John E. Kwoka Jr., 'Large Firm Dominance and Price-Cost Margins in Manufacturing Industries' (1977) 44 Southern Economic Journal 183 (showing that price–cost margins are higher in industries that are dominant than in industries that are highly concentrated, and concluding that antitrust actions should focus on highly dominated industries rather than on concentrated markets).

468 *See* Ibid.

469 Ibid., pp. 183–184.

470 Ibid., p. 188b.

471 Ibid.

472 Ibid., p. 184b.

This function shows that where there are large gaps between consecutive firms' shares, there is inequality.[473] Gaps between firms are less significant the longer the tail of firms is.[474]

### (ii) Relative dominance

Following Kwoka, Melnik et al. propose a function to determine dominance based on the relative position of an allegedly dominant undertaking and its follower.[475] The authors propose a mathematical function that points at the individual firm, not the aggregate market, in order to define if there is dominance. The function starts by comparing a firm's market share with the follower's market share in order to infer whether there is a relative market share large enough to consider such firm dominant.[476] The authors define an equation[477] that determines whether a singular firm is surpassing a threshold in a particular industry such that a single undertaking is dominant in the industry.

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473 Ibid., p. 184a.

474 Ibid., p. 184a. If there were ten firms in a market, the equation would be represented as. This shows that in accounting for the effect of a variation in the share of one firm on inequality, the shares of the following and previous firms in the tail should be take in to account.

475 Melnik, Shy and Stenbacka, 'Assessing Market Dominance', pp. 65–66 (wherein the authors propose a new measure to assess market dominance that classifies when an individual firm, not an industry, has a dominant position).

476 Ibid., p. 65.

477 See Ibid., p. 66.

The authors state that a firm is dominant if the firm surpasses a market share limit that is endogenously defined.[478] The definition of such a threshold is based on different variables: first the market share difference between the first- and second-largest firms' market share, second the combined market share of the industry, and third a parameter that captures the potential competition that may face the largest undertaking in the market.

The authors propose a measure of dominance that reflects the variables above, which in mathematical terms is

$$S^D = g(s_1, s_2, \dots, s_D) = \frac{1}{2}[1 - \gamma(s_1 - s_2)\,(1 - \sum_{i=3}^{N} s_i)] \qquad (8)$$

where $S^D$is the market share that is considered the threshold that should not be surpassed in that particular industry. Therefore, if the number of firms is greater than or equal to two, $\geq 2$ , then whenever the market share of the largest firm is larger than $S^D$, $s_1 > S^D$, then the largest firm is considered a dominant firm. Notice that the authors use the parameter as a multiplier, which means that, the $S^D$ cannot be larger than such a parameter, determining a certain presumption of dominance.[479]

The simplified form[480] states that dominance may be measured as

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478 Ibid., p. 66. See also Droucopoulos and Chronis, ''Assessing Market Dominance': A Comment and an Extension'.

479 Melnik, Shy and Stenbacka, 'Assessing Market Dominance', p. 65.

480 If, then substituting, is, then such a term in the equation may be rewritten as, and this is equal to, which is the simplest form to calculate the dominance measure.

$$S^D = \frac{1}{2}[1 - \gamma(s_1 + s_2)(s_1 - s_2)] = \frac{1}{2}[1 - \gamma(s_1^2 - s_2^2)] \quad (9)$$

The authors' state, that $\gamma$ is a parameter that captures the 'constraint imposed by potential competition on firm 1's dominance'.[481] On the other hand, there is a fixed 'parameter' of $\frac{1}{2}$, unexplained by the model. The simplest explanation may be that following a Cournot's firm's behavioural model, if two firms have equal market share of 50 percent, neither has market power. In fact, if we substitute 50 percent as the market shares of the firms in the equation, the result would be $\frac{1}{2}$, regardless of the value of $\gamma$. That is why the measure of dominance defined by the authors is a function of $s_2$ as well.[482]

In summary, the previous section showed that, as in the case of market power, there are multiple ways to define what dominance is and how it should be measured. This section highlighted the 'menu' of standards on dominance that mainstream authorities and the literature have defined and that emerging economies could use to design their policy. In the following section, the rules and standards for defining and determining dominance in Latin American emerging economies will be analysed in order to show what the policy makers and competition authorities have chosen when designing the Latin American emerging economies policies.

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481 Melnik, Shy and Stenbacka, 'Assessing Market Dominance', p. 65.

482 Ibid., p. 69.

## 4. Dominance in Emerging Latin American Economies

As shown in the previous sections, market power and dominance are concepts that have developed in regards to deep and complex economic analysis. This has influenced competition law enforcement. Enforcers define dominance in several ways, even when the actions of the dominant undertaking are analysed using statutory definitions.

In this section, the statutes of emerging Latin American economies and the most relevant cases of each jurisdiction are described, focusing on the choice of legal standards and the arguments of competition authorities regarding dominance. Second, the question of measuring dominance is assessed and the methodologies proposed by Latin American economies are reviewed. Then, a summary of findings is shown in order to propose a question regarding what rule or standard should be followed by Latin American emerging economies in regards to their characteristics and goals, and having in mind economic growth as the policy's guiding principle. Finally, it will be shown whether this proposal fits in the current statutes of the Latin American emerging economies studies.

### i) The Standards of Dominance in Emerging Latin American Economies

The statutes of the emerging Latin American economies studied have broad and asymmetric definitions of dominance and a wide range of conducts that constitute an abuse. Regarding what is considered dominance, the statutes have two distinct approaches: i) on the one hand, to propose an open definition that is filled by enforcement, and; ii) on the other hand, to propose a very strict definition and method to get to such a result.

Regarding the open definitions of dominance, the Chilean statute, for example, is silent about what a dominant position is. In addition, there are no guidelines determining explicitly what the authority or the Tribunal considers as having or exercising a dominant position. The Colombian Decree 2153 of 1992 defines dominance as the ability to determine market conditions,[483] leaving to the authority the interpretation and scope of the words *to determine* and *market conditions*.

Similarly, the Brazilian statute defines control of a substantial part of the relevant market, as producer, distributor, customer, or financer of a product, service, or technology, relative to the product and service.[484] However, the

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483 Decreto 2153, article 45.

484 Lei 8884, article 20, §2. Some authors have stated that the term *domination* could be construed from other Brazilian statutes that directly and indirectly refer to 'monopolistic conditions' and 'market domination'. Article 3 of Law 4137 of 1962 refers to relative dominance as a market condition where 'there is a restricted number of companies in relation to another company that do not have the conditions to compete with it in a certain business or service rendering area'. Similarly, domination is found in article 5 of the same legislation where monopolistic conditions are defined as the situation 'in which a company or a group of companies controlled production, rendering of services or sale of a certain good to such extent that it eventually became the overriding influence upon the respective prices'. See Ecio Perin, 'Abuse of Dominance in Brazil. Issues and perspectives' (UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy). In the words of Perin, '[i]n the case of article 5, the relevant element in order to verify the domination is the possibility of overriding influence over the prices, which

Brazilian Law 8884 presumed there is dominance where the undertaking has a market share above 20 percent, leaving the determination of not being dominant to the parties investigated by showing there is no control of the relevant market. The current Law 12529, maintains such threshold granting the authority, CADE, the power to define a different threshold for industries with particular economic characteristics.[485] However, the new Law in force considers in Article 36.2, that there is a dominant position whenever 'a company or group of companies is able to change unilaterally or coordinately market conditions'.[486] Similarly, in the Mexican case, the Federal Mexican Competition Statute defines what dominance is. According to Article 11.i of the Mexican Competition Law, any violation of the Statute requires evidence of 'substantial market power'.[487] The same Statute in Article 13 considers that in order to determine whether an undertaking is in the capacity to exercise some influence over the market, it must have a large market share and the possibility to fix prices.[488]

On the other hand, the Peruvian statute defines dominance following the open pattern of the Chilean, Colombian, and Brazilian laws, as the ability to 'restrict, affect or distort in a substantial form the demand and/or supply conditions

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implies that, in terms of article 3, the competition is limited, insignificant and even non-existent. Hence, domination is related, in these two legal texts, to the idea of overriding influence in order to control prices through limited or insignificant competition. Although it has been repealed, Law No. 4.137/62 provides us with important information'. Perin, 'Abuse of Dominance in Brazil. Issues and perspectives'.

485 According to §2, article 36 of the Law 12.529 of 2011, 'A dominant position is presumed … when controlling 20% (twenty per cent) or more of the relevant market, and can this percentage be amended by CADE to specific sectors of the economy'. See Lei 12529, 2011, (Diario Oficial da União, Brazil).

486 See §2, article 36 Lei 12529, 2011, (Diario Oficial da União, Brazil).

487 Ley Federal de Competencia Económica, 1992, (Diario Oficial de la Federación, Mexico), article 11.i.

488 Ibíd., article 13.

in such market without its competitors, suppliers or customers can, immediately or in the near future, countervail such possibility'.[489] However, the Peruvian Statute instructs the competition authority regarding what to take into account when determining a dominant position, defining structural elements such as substantial market share;[490] the characteristics of demand and supply;[491] the technological development of the market;[492] the access to finance, inputs, and distribution networks;[493] the existence of legal, economic, or strategic barriers to entry;[494] and the existence of suppliers, clients, or competitors with bargaining power.[495]

Finally, the Argentinean statute defines dominance in a structural manner, considering that there is dominance if "there is a single supplier or customer in the national market... or without being the single supplier or customer, the undertaking is not exposed to substantial competition or, when by the degree of vertical or horizontal integration is in conditions to determine the economic viability of a competitor participant in the market, in prejudice of them".[496] The Argentinean Statute also instructs the authority in respect to what sort of analysis should conduct in order to determine whether there is a dominant position. The Act states that the authority should determine the degree in which the good or service could be substituted by other goods or services, the substitution conditions and the time

489 Decreto Ley 25868, article 7.1.

490 Ibid., article 7.1.a.

491 Ibid., article 7.1.b.

492 Ibid., article 7.1.c.

493 Ibid., article 7.1.d.

494 Ibid., article 7.1.e.

495 Ibid., article 7.1.f.

496 Ley 25156, article 4

required.[497] Similarly, the degree on which regulatory restriction limit access to products, suppliers or customers of the market;[498] and the degree to which the likely dominant could influence unilaterally prices or restrict the access to inputs or market demand and the degree to which there is countervailing market power.[499]

As is shown, statutory language and parts of the black letter laws in emerging Latin American economies have been highly asymmetrical regarding the definition of what a dominant position is. The criteria to determine whether an undertaking is dominant, varies from jurisdiction to jurisdiction, apparently not allowing the authority to depart from statutory language. But case law shows that most jurisdictions have determined what a dominant undertaking is using criteria other than just the statute.

Enforcement has been less asymmetrical than statute drafting. Three different enforcement policies regarding what constitutes dominance could be identified, keeping in mind that the countries' competition authorities have moved between enforcement policies and standards regarding dominance on several occasions during the last decade. According to what was explained afore, in terms of policy choices, dominance may have three different approaches: first, dominance is considered an equivalent concept to market power, or the ability to price; second, dominance is considered as a concept that goes beyond monopoly

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497 Ibid., article 5.a

498 Ibid., article 5.b

499 Ibid., article 5.c

pricing and as the ability to behave independently in the market; and third, dominance is considered as the ability to price and exclude. In this section it will be shown that Latin American emerging economies have defined dominance in multiple ways according to different standards, indicating a certain lack of individual policy identity.

### (1) Dominance as the exercise of market power

As shown in the previous sections, it must be highlighted that the common notion of market power, regularly advocated by mainstream competition law systems, is neither defined nor used in Latin American economies' statutory language. However, all the competition authorities have had decisions whereby the concept of dominance is considered different from market power.

Brazil has consistently held that antitrust legislation punishes the abuse of 'market power', and considers that 'market power' and holding a dominant position, which is a legal concept, are different notions with different meanings. The Brazilian Competition Tribunal Guidelines[500] have tried to clarify the concepts stating that Brazilian competition law has determined that there is a dominant position when an undertaking has a market share above 20 percent—but it is only dominant if it has 'market power'. According to the guidelines, having market power implies that an undertaking is capable of 'systematically maintain[ing] its prices above the competitive level without losing all its

[500] See Conselho Administrativo de Defesa Econômica, *Guia Prático do CADE: a Defesa da Concorrência no Brasil* (3rd Edition edn, CIEE 2007).

customers'.[501] The Brazilian Tribunal Guidelines are clear in stating that the legal concept of a dominant position is different than the concept of market power, since 'an undertaking with a dominant position in the relevant market, not necessarily poses market power'. Thus, according to the Brazilian Tribunal, 'the concept of market power is based on an undertaking's ability to raise prices without losing customers, and the mere existence of a dominant position is not a sufficient element for such enterprise to have the ability to unilaterally increase prices'.[502] The language used by the Brazilian authority seems paradoxical. Nevertheless, it is the way the authority has interpreted its statute in order to avoid considering that every undertaking with a dominant position of 20 percent or more is dominant in the economic sense.

The case law is much more explicit. In *CPI dos Medicamentos v Pfizer*,[503] the Brazilian Tribunal, studying the pharmaceutical market, defined abuse of dominance as the systems used by a dominant undertaking to implement practices or conducts that, without such unilateral behaviour, would not exist.[504] This, as was stated by the Brazilian Competition Tribunal, does not mean that just because a monopolist is pricing products there will be abuse. Monopoly pricing is considered an expression of market power, not the illegal exercise of such power.

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501 Ibid., §4.

502 Ibid., §5.

503 *CPI dos Medicamentos v Labóratorios Pfiser Ltda* Prosesso Admnistrativo 08012.000966/2000-01 Conselho Administrativo de Defesa Econômica, Brazil.

504 Ibid., pp. 2–3.

That was the case in *SDE v White Martins.*[505] White Martins participated in the industrial gases industry in Brazil and was accused of excessive pricing in the production and commercialization of cylindered oxygen. The Tribunal, concurrently with the Brazilian *Secretaría*, found there was dominance since the company had a large market share. In addition, there was market power, and it was found that the investigated undertaking had exercised such power through prices. However, such facts were not enough to find abuse of dominance.[506] The Tribunal stated then that

> in the case of the company holding market power, its relevance is such that a variation of its production is able to affect prices. As a result, there are incentives for such firm to produce less than it is socially desirable [and] be paid higher prices than those would be observed under conditions of competition.[507]

The Tribunal confirmed the statute considers that the exercise of such market power by pricing should not be punished by the law. The Tribunal stated,

> the market power held by an enterprise is often legitimate. This is the case of dominant positions acquired through major efficiency, better quality of products, and/or innovation . . . Thus, it is economically desirable that the exercise of market power obtained legitimately be regarded as lawful, since it is the base of the incentive for firms to compete on cost reduction, increase of quality and innovation.[508]

The Mexican statute is clear that not only market power or the power to price, but also a set of statutory elements, are required. The Mexican Supreme Court stated

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505 *CPI dos Medicamentos v Virtu's Industria e Comercio Ltd.* Prosesso Admnistrativo 08012000980/2000-23 Conselho Administrativo de Defesa Econômica, Brazil, p. 4.

506 *SDE v White Martins Gases Industriais do Nordeste S.A.* Processo Administrativo 08000.11084/1994-08 Conselho Administrativo de Defensa Economica, p. 2.

507 Ibíd., p. 2.

508 Ibíd., p. 3.

that 'market power is the capacity to influence the market prices'.[509] Then, according to Mexican competition law, the detonator of sanctions is finding the 'existence of the power to influence over the market',[510] not 'the power to influence prices'.[511] However, the Mexican Federal Competition Commission has followed such a definition in cases such as *Telmex I*[512] and *Gas de Oxaca,*[513] where substantial market power was considered a certain degree of pricing independence. In the *Warner Lambert* case, the Mexican Competition Commission stated,

> Regarding the literal i of article 13 of the LFCE [price predation], it was established that the substantial market power exists when an undertaking can have above-normal profits in prolonged periods of time. An enterprise has substantial market power if it is possible for such enterprise to price above economic cost (economic cost includes the opportunity costs of all factors) without losing an important part of sales. [514]

The Chilean Tribunal for the Defence of Free Competition several times has defined market power as a concept equivalent to dominance, never considering the economic meaning of market power, or the power to profitably raise prices.

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509 *Wagner Lambert* Recurso de Amparo en Revisión No. 2589/96 Supreme Court of the Nation, Mexico, p. 340.

510 *Comisión Federal de Competencia v Gas de Oaxaca, S.A. de C.V. and Gas,del Trópico, S.Á.de C.V.* Recurso de reconsideración, Expediente No. RA-013-2008 Comisión Federal de Competencia, Mexico, p. 49.

511 Ibíd., p. 49.

512 *Comisión Federal de Competencia v. Grupo de Telecomunicaciones Mexicanas S.A. de C.V.* Recurso de reconsideración, Expediente No. RA-014-2011 Comisión Federal de Competencia, Mexico, p. 12.

513 *Comisión Federal de Competencia v Gas de Oaxaca, S.A. de C.V. and Gas,del Trópico, S.Á.de C.V.,* p. 51.

514 *Comisión Federal de Competencia v Grupo Warner Lambert México* Expediente No. RA-06-96 Comisión Federal de Competencia, Mexico, p. 11.

This use of language appears in several cases such as *Demarco v Coinca*,[515] *FNE v Empresa de Electricidad de Magallanes*,[516] and *Comercial y Agrícola v Cooperativa Agrícola Pisquera Elqui*,[517] among others. The Chilean Tribunal had imprecisely considered market power as holding a dominant position, considering (unlike in the Brazilian cases) that market power goes beyond the mere ability to profitably set monopoly prices. This use of the concept of market power only shows the lack of economic grounds in the analysis of certain decisions regarding unilateral conduct but does not disqualify the broader use of the concept of dominance in unilateral conduct cases as shown in the following section.

Similarly, Colombian and Peruvian case law have used the term *market power* to refer to dominance. For example, in *SIC v Cadbury Adams*,[518] the Colombian competition authority concluded that Adams had market power in the market for chewing gum due to the competitive advantage of the excess of installed capacity grants in order to respond to any demand increase without any investment.[519] Similarly, in *Ambev v Backus*,[520] the Peruvian Competition Commission considered the fact that Backus had in its favour large and perdurable barriers to entry from new competition, and such a market character granted the

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515 *Demarco S.A. v Coinca S.A. y Municipalidad de San Bernardo* Sentencia 37/2006 Tribunal de Defensa de la Libre Competencia, Chile.

516 *Fiscalía Nacional Económica v Empresa de Electricidad de Magallanes S.A.* Sentencia 73/2008 Tribunal de Defensa de la Libre Competencia, Chile.

517 *Comercial y Agrícola S.A. v Cooperativa Agrícola Pisquera Elqui Ltda.* Sentencia 99/2010 Tribunal de Defensa de la Libre Competencia, Chile.

518 *Superintendencia de Industria y Comercio v Cadbury Adams S.A.* Resolución 22624 de 2005 Superintendencia de Industria y Comercio, Colombia.

519 Ibíd., §4.2.5.

520 *Ambev Perú S.A.A. v Unión de Cervecerías Peruanas Backus y Johnston S.A.A.* Expediente N° 001-2004-CLC Comisión de Libre Competencia, Perú.

company the opportunity to exercise its market power.[521] In both cases, structural factors were considered sources of 'market power' and therefore sources of dominance. However, the authorities have not consistently considered that dominance is equivalent to the exercise of market power. In fact, in the *Gloria S.A.*[522] case, the Peruvian Competition Commission clearly states that market power is the ability of an undertaking to unilaterally influence market prices, as distinguished from dominance. [523]

### (2) Dominance as the ability to behave independently

Most of the jurisdictions studied have considered that dominance is something beyond mere economic market power and have found that dominance is certain independency from market forces. Behavioural independence from other market forces, as studied in Section 3 of this chapter, is the European case law influence on Latin American competition law.[524] The legal perspective on dominance in European law has determined dominance as an undertaking's immunity from the forces of rivals and consumers, allowing such an enterprise the power 'to behave

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521 Ibíd., §142.

522 *Asociación de Ganaderos Lecheros del Perú y Fondo de Fomento para la Ganadería Lechera de la Cuenca de Lima v Gloria S.A.* Expediente 013-2007/CLC Comisión de Libre Competencia, Perú.

523 Ibid., p. 10.

524 See Adriaan Ten Kate and Gunnar Niels, 'Mexico's Competition Law: North American Origins, European Practice' in Philip Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar 2006) (showing Mexican cases where European case law had more influence over statute's interpretation than US case law).

to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[525]

Peru is probably the jurisdiction that has most consistently stated that having a large market share and the power to price is not enough to consider an undertaking dominant under their legal system. The Peruvian statute, as stated above, has probably considered dominance as 'the power to exclude', but the interpretation given by Peruvian Competition Authority has been closer to the European standard regarding independent behaviour from other market forces. This can be seen in several decisions where the authority consistently used the same standard to determine a dominant position.

In *Ambev v Backus*,[526] Ambev accused Backus of blocking Ambev's entry to the Peruvian beer market by excluding Ambev's subsidiaries in Peru to participate in a beer bottle interchange programme[527] administered by the Beer Producers Committee at the National Industries Association, controlled by Backus.[528] The Peruvian Competition Commission considered that in order to find

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525 See O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, p. 107, citing *United Brands Company and United Brands Continental B.V. v Commission of the European Communities*, and *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, §38.

526 *Ambev Perú S.A.A. v Unión de Cervecerías Peruanas Backus y Johnston S.A.A.*.

527 According to the case description, the Peruvian 'beer bottles interchangeability system' emerged as a means to facilitate the commercialization of beer on the market. It was a natural development to which various businessmen arrived to increase efficiency in the industry by operating cost savings. The system allowed consumers to exchange their empty containers for a brand of beer X and buy containers full of a brand Y and/or Z. Thus the consumer could access products of different brands and business origins. The system thus reduces costs to consumers and companies. See Ibid., §5.iv.

528 See Ibid., §5.

Backus dominant, evidence of a 'high and stable market share at the time'[529] was not enough to hold that Backus was dominant, since it was also required to show what 'the conditions of access to the market, the characteristics of production, the existence of excess capacity, the situation on the market (stable or growing), the legal barriers at the entrance' were at the time.[530] The Peruvian Commission concluded that in addition to the large market share held by Backus and the control of such a system and of production plants decentralized in different parts of the country, installed capacity excess and consumer loyalty to Backus's brands 'represent advantages for the incumbent in the domestic beer market and represent prima facie case that it is dominant in that market'.[531]

This standard has been followed in several decisions by the Peruvian authorities. For example, in *Group Multipurpose et al. v Clorox*[532] the Commission considered that the methodology regularly used for assessing dominance requires the calculation of market shares and the contrast of such shares with several market indicators such as the factors defined in article 7 of the statute in order to make an inference regarding the extent of such dominance.[533] The Commission also found that in regards to the monopolistic position of Clorox in the market and the fact that no enterprise had entered the hypochlorite market in the previous years, the financial and other entry barriers—in addition to the fact

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529 Ibid., §130.

530 Ibid., §129.

531 Ibid., §145.

532 *Group Multipurpose S.R.L. y Gromul y Dispra E.I.R.L. v Quimpac S.A. y Clorox Perú S.A.* Expediente N° 005-2001/CLC Comisión de Libre Competencia, Perú.

533 Ibíd., §34.

that Clorox price discriminates[534]—reinforced the conclusion that Clorox was dominant in the market. Identical wording was used in other decisions such as *Indecopi v Backus*,[535] where the Peruvian Commission found Backus again dominant in all the beer market segments due to the large barriers to entry.[536] Similarly in *El Palacio de la Decoración v Productos Paraíso*,[537] the Commission found that Productos Paraiso was dominant in the Peruvian mattresses market due to its large market share and several other factors that increased barriers to entry of new competitors.[538]

Mexico, Chile, and Colombia have also advocated for an approach where dominance goes beyond pricing and requires an undertaking's market independence. In *Comercial Agrícola et al. v Capel*,[539] the Chilean Tribunal held that in order to determine whether there is market power, it is required to make special considerations about the industry's structure, particularly the degree of market concentration, vertical concentration, distribution structures, and entry costs.[540] Having the latter in mind, the Chilean Tribunal concluded that Capel, who participated as a buyer in the grape market, had enough market power to behave

534 Ibíd., §34–35.

535 *Indecopi v Grupo Backus* Expediente Preliminar 007-2009/CLC Comisión de Libre Competencia, Perú.

536 Ibíd., §104–5.

537 *El Palacio de la Decoración S.R.L. v Productos Paraíso del Perú S.A.C.* Expediente 007-2010/CLC Comisión de Libre Competencia, Perú.

538 Ibíd., §52, §61.

539 *Comercial y Agrícola S.A. v Cooperativa Agrícola Pisquera Elqui Ltda*..

540 Ibíd., §25.

independently and to control the regional market.[541] The Mexican Commission has also stated that, according to the statute's provisions, not only the ability to price is considered as a determinant in dominance cases, but also the ability to price independently. For example, in *Sepsa*,[542] the Commission held that it is required, in addition to substantial market power, to evidence the existence of barriers to entry and imports' lack of access to the market.

The Colombian Authority also considered that elements beyond market shares and prices should be taken into account when determining whether an undertaking holds a dominant position. In *SIC v Induga*[543] the authority explicitly considered that to evidence a dominant position, it is necessary to have regard for the industry studied, first by determining the allegedly dominant company's share in the market,[544] then by estimating the undertaking's installed and used capacity,[545] and the general infrastructure of such an undertaking.[546] The next step is to study the market's barriers to entry and its concentration, and the competitors' and consumers' likely reaction to the undertaking's decisions.[547] Only then, the Authority concludes, is it possible to consider that there is market

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541 Ibíd., §26.

542 *Transportes Matoh v Sepsa Custodia de Valores* Expediente No. DE-44-2006 Comisión Federal de Competencia, Mexico, p. 16.

543 *Superintendencia de Industria y Comercio v Industria de Alimentos la Galleta S.A.* Resolución 15653 de 2001 Superintendencia de Industria y Comercio, Colombia.

544 Ibid., §3.

545 Ibid., §3.1.

546 Ibid., §3.1.

547 Ibid., §3.5–3.6.

power.[548] This view was first presented in *SIC v Colanta*,[549] where the Authority was studying whether Colanta was dominant as buyer of raw milk. The Colombian Competition Authority held that the company was dominant because it had not only a large market share but there were also factors such as barriers to entry.[550] This view of dominance as the likelihood of having certain market independence was followed in several subsequent cases such as *SIC v Empresas Públicas de Medellín*,[551] where, studying the market for Internet access, the Colombian Competition Authority held that the fact that the company had a large market share, in addition to difficult and slow entry of competitors, granted the incumbent the ability to behave without regard to competitors. Also in *SIC v Cadbury-Adams*,[552] Adams was considered dominant in the chewing gum market since in addition to its large market share, its distribution network and its brand portfolio granted such undertaking the ability to make decisions disregarding customers' and competitors' actions.[553] Similarly, in *Condomínio Shopping Center Iguatemi v Participações Morro Velho Ltda*,[554] the Brazilian authority also made reference to the independence of the undertaking as the determinant factor of market power.[555]

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548 Ibid., §3.3.

549 *Superintendencia de Industria y Comercio v COLANTA S.A.* Resolución 588 de 2003 Superintendencia de Industria y Comercio, Colombia.

550 Ibíd., §3.6.

551 *Superintendencia de Industria y Comercio v EPM S.A.* Resolución 8328 de 2003 Superintendencia de Industria y Comercio, Colombia.

552 *Superintendencia de Industria y Comercio v Cadbury Adams S.A.*.

553 *Superintendencia de Industria y Comercio v EPM S.A.*, §4.2, §4.2.8.

554 *Condomínio Shopping Center Iguatemi v Participações Morro Velho Ltda.* Administrative Process Nº 08012.006636/1997-43 CADE, Brazil.

555 See Ibid. The relevant market was defined as the shopping centres of the region of Alto Padrão in the western, south, and eastern sections of the Central Zone of São Paulo. Market power was inferred from the differential character of Iguatemi's Shopping Centre,

Finally, one of the few cases on abuse of dominance decided by the Argentinean Commission was *CNDC v YPF*,[556] where YPF was considered to be holding and abusing of its dominant position in the market of liquid petroleum gas, LPG. The Argentinean Competition Commission considered that beyond mere pricing power and the fact that YPF had a large market share, the undertaking was the only LGP producer with presence in the whole country and the largest exporter, its competitors were small and had no plans to expand, barriers to entry due to initial investments were high and importing was not feasible option due to the large trade barriers and importing costs.[557] All those elements were considered in order to find YPF dominant.

### (3) Dominance as the ability to exclude

Finally, some case law has suggested that dominance is not only independence in the market but also the ability to exclude. If an undertaking is dominant in the market, it will have the power to exclude competitors, customers, or consumers without incurring substantial losses. Not much case law in Latin America has had this approach, but a few cases, mostly related to exclusionary abuses, have determined dominance as such power.

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its likelihood to impose higher prices in such a locality, and its participation in the relevant market.

556 *Comisión Nacional de Defensa de la Libre Competencia v YPF S.A.* Resolución Nº189/99 CNDC Comisión Nacional de Defensa de la Competencia, Argentina

557 Ibíd., §5.3

For example, the Chilean Tribunal in *OPS Ingeniería et al. v Telefónica Móviles de Chile*[558] found that Telefónica Móviles was dominant in the market for mobile telecommunication for the termination of calls in Telefónica's network. This, according to the Chilean Competition Tribunal, granted Telefónica a dominant position that allowed it to behave independently without regard for competition. Therefore, it had the power to exclude. And such power, added the Tribunal, was larger the larger the mobile operator network was.[559]

Similarly, in *Ambev v Backus*,[560] Ambev accused Backus of blocking Ambev's entry to the Peruvian beer market by excluding Ambev's subsidiaries in Peru to participate in a beer bottle interchange programme[561] administered by the Beer Producers Committee at the National Industries Association, controlled by Backus.[562] The Peruvian Competition Commission considered that in order to find Backus dominant, evidence of a 'high and stable market share at the time'[563] was not enough, since it was also required to show what 'the conditions of access to the market, the characteristics of production, the existence of excess capacity, the

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558 *OPS Ingeniería Ltda., ETCOM S.A., Interlink Global Chile Ltda. y Sistek Ltda. v Telefónica Móviles de Chile S.A.* Sentencia 88/2009 Tribunal de Defensa de la Libre Competencia, Chile.

559 *OPS Ingeniería Ltda., ETCOM S.A., Interlink Global Chile Ltda. y Sistek Ltda. v Telefónica Móviles de Chile S.A.* Sentencia 88/2009 Tribunal de Defensa de la Libre Competencia, Chile.

560 *Ambev Perú S.A.A. v Unión de Cervecerías Peruanas Backus y Johnston S.A.A.*.

561 According to the case description, the Peruvian 'beer bottles interchangeability system' emerged as a means to facilitate the commercialization of beer on the market. It was a natural development to which various businessmen arrived to increase efficiency in the industry by operating cost savings. The system allowed consumers to exchange their empty containers for a brand of beer X and buy containers full of a brand Y and/or Z. Thus the consumer could access products of different brands and business origins. The system thus reduces costs to consumers and companies. See Ibid., §5.iv.

562 See Ibid., §5.

563 Ibid., §130.

situation on the market (stable or growing), the legal barriers at the entrance' were at the time.[564] The Peruvian Commission concluded that in addition to the large market share held by Backus and the control of such a system and the ownership of production plants decentralized in different parts of the country, installed capacity excess and consumer loyalty to Backus' brands 'represent advantages for the incumbent in the domestic beer market and represent prima facie case that it is dominant in that market'.[565]

### ii) The Standards regarding Measuring Dominance in Emerging Latin American Economies

In the previous section, it was established that, just like market power, dominance is regularly considered a matter of degree. This leads to the question regarding what is regularly considered as dominance by emerging economies. Dominance is regularly found by the use of market shares, market concentration measures, and other quantitative functions that allow the authority to determine whether there is dominance. In this section, the quantitative mechanisms and the systems to measure and find dominance in Latin American emerging economies will be reviewed. First, the use of market shares as an indicator of dominance will be studied. Then, other measures of dominance will be analysed in order to find the different perspectives regarding the measures and indicators of dominance used by emerging Latin American economies competition authorities.

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564 Ibid., §129.

565 Ibid., §145.

### (1) Market shares and dominance

Latin American competition authorities have used market shares as factors to determine whether there is dominance. However, no clear rules have been determined to determine a safe harbour or a threshold simple to identify dominant undertakings.

Authorities in the region, for example, have considered that market shares below 50 percent are, in some cases, enough to determine dominance. For example, in *Condomínio Shopping Center Iguatemi v Participações Morro Velho,*[566] the Brazilian Competition Tribunal had to determine whether a clause restricting competition in a certain distance radius imposed by the Iguatemi Shopping Centre was anticompetitive and whether a market share in the high luxury regional shopping mall's relevant market between 29 and 31 percent granted Iguatemi a dominant position. Brazilian Competition Tribunal found that in the luxury regional shopping mall's market, a market share of 29 to 31 percent was enough to consider the shopping mall dominant, finding the radius clause imposed by the mall to its stores anticompetitive since it 'significantly increases the market power and the prices charged by Iguatemi's shops'.[567]

Also, lack of a market share above 50 percent is also considered a strong determinant of the inexistence of dominance in most cases. In *Andersen S.A. v*

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566 *Condomínio Shopping Center Iguatemi v Participações Morro Velho Ltda.*.

567 Ibíd.

*Emaresa S.A.*[568] the Chilean Tribunal disregarded the existence of dominance, determined by using market share, by determining how many times the bidder, Andersen, bid using the brand Sithl. The Chilean Tribunal found that in 12 percent of the contracts, it used the brand that was allegedly dominated by the defendant Emaresa, disregarding therefore the existence of a dominant position by Andersen.[569] Also in *Will v Claro Chile*,[570] the Chilean Tribunal considered that the market share by the defendant, Claro, was 16.1 percent in the market for fixed telephony, which was large compared to the 0.3 percent market share by the defendant. However, the Tribunal disregarded Claro's dominant position by comparing Claro's shares with those of Movistar and Entel, which for the year in question were respectively 44 and 32 percent.[571] Similarly, in the Mexican case *Aerolinea Azteca v Volaris*,[572] the Mexican Federal Competition Commission found that Volaris participated in several markets with shares that were below 50 percent, and therefore, in addition to having a larger competitor in all the markets it participated in, such shares were not considered enough to find substantial market power.[573]

Some authorities in the region have considered that market shares above 50 percent are enough to deem an undertaking to have dominant position. For

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568 *Andersen S.A. v Emaresa S.A.* Sentencia 101/2010 Tribunal de Defensa de la Libre Competencia, Chile.

569 Ibíd., §17.

570 *Will S.A. v Claro Chile S.A.* Sentencia 110 de 2011 Tribunal de Defensa de la Libre Competencia, Chile.

571 Ibíd., §§17–18.

572 *Líneas Aéreas Azteca v. Volaris y Avolar* Expediente No. DE-31-2006 Comisión Federal de Competencia, Mexico.

573 Ibíd., pp. 14–15.

example, in *FNE v Integramédica S.A.*,[574] the Chilean Tribunal for Competition considered that a 79 percent market share by FALMED-MAPFRE in the market for the service of specialized advisory and professional responsibility insurance was enough evidence to consider MAPFRE the dominant undertaking in the market.[575] Similarly, in *FNE v Lan Airlines and Lan Cargo*,[576] the Chilean Tribunal found, following the Chilean prosecutor findings, that LAN was dominant in the market for international air cargo. The Tribunal found that LAN's competitors only performed four international air cargo operations during the years 2003 and 2007, and therefore LAN barely had 100 percent market share. Similarly, in the market for international cargo transport, LAN's airlines had more than 90 percent of international routes other than Miami–Santiago, in which LAN was also the principal and therefore the dominant agent in such cargo transport routes.[577]

The Colombian Competition Authority has followed the same pattern. In *SIC v Satena*,[578] the Colombian Authority investigated whether Satena, the state's airline, was abusing its dominant position in several markets for air transportation. The Authority found that in the sixty-two routes investigated, Satena had between 90 and 100 percent market share; therefore the Authority held the airline was

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574 *Fiscalía Nacional Económica v Integramédica S.A.* Sentencia 42/2006 Tribunal de Defensa de la Libre Competencia, Chile.

575 Ibíd.

576 *Fiscalía Nacional Económica v Lan Airlines S.A. y Lan Cargo S.A.* Sentencia 55/2007 Tribunal de Defensa de la Libre Competencia, Chile.

577 Ibíd., §§30–31.

578 *Superintendencia de Industria y Comercio v SATENA S.A.* Resolución 4285 de 2002 Superintendencia de Industria y Comercio, Colombia.

dominant in such markets.[579] Also, in *SIC v COLTEL*,[580] the Colombian Authority found that COLTEL was the dominant undertaking in the market for data and cross-connection through submarine cable. The Authority found that position just by looking at the market structure and considering the fact that there was a single operator with, therefore, a 100 percent market share, giving such an undertaking the ability to independently and unilaterally determine prices and other market conditions.[581]

Similarly, in *SIC v Vijagual*,[582] Vijagual was a high-quality abattoir in the Santander region that was found to have 100 percent market share in the market of high-quality cattle slaughtering.[583] According to the Colombian Competition Authority, the fact that there were no other slaughterhouses in the region granted Vijagual advantages over other market participants that, in addition to high barriers to entry and no competitive pressure, made the company dominant.[584] Finally, in *SIC v Bavaria*,[585] the Colombian Competition Authority investigated if Bavaria, a beer brewery, designed an exclusionary and exclusive contract with the distributors of bottled beer in the Hotels, Restaurants and Cabarets channel

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579 Ibíd., §2.1.2.2.

580 *Superintendencia de Industria y Comercio v Colombia Telecomunicaciones COLTEL S. A. E.S.P.* Resolución 60145 de 2009 Superintendencia de Industria y Comercio, Colombia.

581 Ibíd., §§7.1–7.8.

582 *Superintendencia de Industria y Comercio v Frigorífico Vijagual* Resolución No. 37790 de 2011 Superintendencia de Industria y Comercio, Colombia.

583 Ibíd., §8.5.1.

584 Ibíd., §8.5.4.

585 *Superintendencia de Industria y Comercio v Cervecería Bavaria S.A.* Resolución 33361 de 2011 Superintendencia de Industria y Comercio, Colombia.

(HORECA) in order to exclude other participants in the beer market.[586] The Colombian Competition Authority found that Bavaria was dominant in the market with regard to the company's market share in the premium beers market, where Bavaria had 98 percent market share in national market.[587]

In *LaFalla v Minetti,*[588] the Argentinean Competition Commission held that the Juan Minetti had a dominant position in the cement market in the region of Mendoza. The Commission studied Minetti's market share in the region concluding that such company had more than 90% of the market, condition that granted the company a privileged position. As well, in *CNDC v YPF*[589] the Argentinean Commission found YPF dominant in several markets related with LPG. The Commission, in addition to other factors, considered that YPF had market shares large enough to sustain a dominant position in several markets such as natural gas, whet YPF had 62% of the national market, gas transport, where it had 65% of the national market, 78% of the storage facilities market and control of two out the three Ports used to export LGP.[590] The CNDC then held that YPF's competitors not only have significantly smaller shares, but also it is not convenient and have no plans to expand.[591]

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586 Ibíd., §6.6.2.1.

587 Ibíd., §6.6.2.1.

588 *Arturo Lafalla v Juan Minetti S.A.* Dictamen 341 del 2000 Comisión Nacional de Defensa de la Competencia, Argentina

589 *Comisión Nacional de Defensa de la Libre Competencia v YPF S.A.*

590 Ibid., §5.2

591 Ibid., §5.2

Some authorities in the region have stated that having a market share above 50 percent is not enough evidence to find an undertaking dominant. In fact, Peruvian authorities have stated that even in the case where a firm is proven to be the market leader in terms of market share, it is not necessarily considered dominant.[592] In *Almacenes y Logística S.A. v Talma Menzies,*[593] Talma was found by the Tribunal to be the market leader in the storage terminals market, a fact that, for the Peruvian Tribunal, is not by itself evidence of the existence of a dominant position.[594] In *Ambev Perú v Backus,*[595] the Peruvian Competition Commission considered that a high and stable market share is, as well, not by itself evidence of the existence of a dominant position. [596] In the case, however, Backus had a market share near 100 percent in the national market of beer, and therefore, unlike in other markets, industry concentration was measured with the HHI of 10,000.[597] Also in *Group Multipurpose et al. v Clorox Perú et al.,*[598] the Peruvian Commission defined the relevant market in order to find that Clorox Perú, had a market share of

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592 However, the Peruvian authority had to regard market shares in two cases. In *El Palacio de la Decoración v Productos Paraíso del Perú* (*El Palacio de la Decoración S.R.L. v Productos Paraíso del Perú S.A.C.* ), it found that Paraíso had a market share of 71 percent in the Peruvian market of mattresses (*El Palacio de la Decoración S.R.L. v Productos Paraíso del Perú S.A.C.,* §54). This sole market share, in addition to the deposition given by the company before the Commission, was enough evidence to consider Paraiso dominant in the Peruvian market of mattresses (*El Palacio de la Decoración S.R.L. v Productos Paraíso del Perú S.A.C.,* §55). Similar statements were given to the Commission in *Indecopi v Grupo Backus* (*Indecopi v Grupo Backus* ), where, investigating whether the Backus group had a dominant position, the Commission stated that a market share of 100 percent is the first evidence of the existence of a dominant position in the Peruvian beer market (*Indecopi v Grupo Backus,* §98).

593 *Almacenes y Logística S.A. v Talma Menzies S.R.L.* Expediente N° 005-2001/CLC Comisión de Libre Competencia, Perú.

594 Ibíd., §§3.ii, 7.ii.

595 *Ambev Perú S.A.A. v Unión de Cervecerías Peruanas Backus y Johnston S.A.A.*.

596 Ibíd., §130.

597 Ibíd., §138.

598 *Group Multipurpose S.R.L. y Gromul y Dispra E.I.R.L. v Quimpac S.A. y Clorox Perú S.A.*.

80 percent in the sodium hypochlorite market,[599] market share that was considered by the Commission as a relatively high market share that granted Clorox market power. However, the Commission stated not only that despite the large market share and the likely market power, dominance was a measure of market shares but also such a 100 percent share might lead the authority to find, in most of the cases, dominance.[600] Finally, in *Indecopi v CICISA*,[601] the Peruvian Competition Commission determined that CICISA was not dominant in the market of Cement Portland Type I in the city of Iquitos despite its large market share.[602] In fact, the Authority referenced the market shares of the largest distributors of cement and the instability of such shares to determine that there was no evidence of dominance by CICISA.[603] Similarly, Mexico's Competition Commission, in some cases, has found that not even a market share of 98 percent is enough to define dominance or 'substantial market power'. In the *Teléfonos de Mexico*[604] case, the Commission found that Telmex had 98 percent of fixed (land) lines in the telephony services market.[605] However, such a fact was not enough, and the Commission went further to determine the barriers to entry in the subservices in which Telmex had pricing power in order to find the company dominant.[606] Also, in *Volaris*,[607] the

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599 Ibíd., §53.

600 Ibíd., §54.

601 *Indecopi v Compañía Industrial y Comercial Iquitos S.A.* Expediente Preliminar 009-2008/CLC Comisión de Libre Competencia, Perú.

602 Ibíd., §93.

603 Ibíd., §94.

604 *Comisión Federal de Competencia v Teléfonos de México* Expediente No. DE-45-2000 Comisión Federal de Competencia, Mexico.

605 Ibíd., p. 11.

606 Ibíd.

Commission found that there was no market power by Volaris in the passenger air transportation markets studied, but it was important to regard entry barriers in the air transport market.[608] This case followed what was stated in *Warner Lambert*,[609] where the Mexican Competition Commission found that Warner had a market share of 72 percent and therefore, in addition to having large entry barriers, its market share was considered an indication of dominance.[610]

In summary, as can be seen in this Section, authorities in Latin American emerging economies have different criteria regarding markets hares and its value to find an undertaking dominant. It ranges from cases such as the Brazilian where an undertaking might be deemed to have a dominant position even with a market share below 30 percent, or cases such as the Peruvian where a market share above 50 percent, and in some cases, of 100 percent, are not enough to conclude that there is dominance.

### (2) Other measures of dominance

Few competition authorities in Latin America have used other measures to determine whether there is dominance. As seen before, the literature considers that numerical approaches to the definition of dominance might grant the competition authorities sound and robust approaches to determine whether an undertaking is dominant in a certain market. This quantitative analysis reduces the likelihood of

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607 See *Líneas Aéreas Azteca v. Volaris y Avolar.*

608 Ibíd., pp. 12–13.

609 *Comisión Federal de Competencia v Grupo Warner Lambert México*, p. 11.

610 Ibíd., p. 11.

Type I errors and may provide the authority a system to prioritize only certain cases.

Market concentration measures and other dominance measures have not been regularly used in abuse of dominance cases by Latin American competition authorities. The Mexican Competition Authority defined the García–Alba Dominance Index,[611] which was developed by Mexican commissioner Pascual García de Alba, who modified the HHI in order to consider highly concentrated industries and to measure dominance in merger analysis. Thus, the dominance index indicates how a market changes by the relative changes in individual concentrations. García de Alba's Index was later on introduced by the Mexican Competition Authority regulation.[612] The index has been regularly used in merger cases; however, it has not been used for competition cases, privileging the market shares as indicators of market power.[613]

The Colombian Competition authority is the single competition authority in emerging Latin American economies that has relied on quantitative measures of dominance. For example, in *Colanta*,[614] the Colombian competition authority was determining whether Colanta had a dominant position in the diary market in the region of Antioquia. In order to determine Colanta's position, the authority used

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611 See Resolución sobre el Método para el Cálculo de los Índices de Concentración, 1998, (Diario Oficial, México).

612 Ibid., article 1.

613 See *Líneas Aéreas Azteca v. Volaris y Avolar.*

614 *Superintendencia de Industria y Comercio v COLANTA S.A.*.

García de Alba's index.[615] Such an index is based on the HHI and determines the relative dominance of an undertaking in a certain market. The authority found, using such index, that Colanta concentrates more than 95 percent of the supply, followed by Parmalat with 4 percent.[616] This measure indicates that Colanta not only has a large market share but also a large participation in the market concentration relative to other market participants. The same test was used in *Setas Colombianas,*[617] where the Colombian Competition Authority found that Setas Colombians was not only the largest in the raw mushroom market but also the undertaking with the largest participation in the industry concentration index. Similarly, in *SIC v Cadbury-Adams,*[618] the competition authority found that Adams had a participation of 82 percent in the industry's concentration, ahead of a participation of 12 percent of its next competitor in the candies and chewing gums industry.[619]

The Colombian Authority has also used other quantitative methods to confirm or reject the existence of dominance. For example, in *SIC v Partmo,*[620] Partmo was accused of predatory pricing in the market for motor vehicle filters.[621] The Authority, after defining the relevant market for light automobile filters, used a measure of dominance to determine that competitors had enough participation in

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615 See Resolución sobre el Método para el Cálculo de los Índices de Concentración,.

616 *Superintendencia de Industria y Comercio v COLANTA S.A.,* §3.4.

617 *Superintendencia de Industria y Comercio v Setas Colombianas S.A.* Resolución 30835 de 2004 SIC Superintendencia de Industria y Comercio, Colombia.

618 *Superintendencia de Industria y Comercio v Cadbury Adams S.A.*

619 Ibid., §4.2.6.b.

620 *Superintendencia de Industria y Comercio v Partmo* Resolución No. 17294 de 2011 Superintendencia de Industria y Comercio, Colombia.

621 Ibid.

the market to reject the hypothesis that Partmo was the dominant market player. The authority used Melnik et al.'s dominance measure[622] and found that Partmo had only a dominance index of 34 percent and therefore, according to the index's interpretation, was not dominant.[623]

In a few cases, the authorities have used concentration measures to support their findings regarding dominance. For example, in several cases, the Peruvian Commission found the beer company Backus dominant in the national beer market in Peru and supported its findings by showing the large participation of Backus in the industry's concentration index.[624] However, other competition authorities have not used consistently used quantitative measures to determine whether there is dominance in a particular market.

In summary, competition authorities in the region have not regularly used quantitative measures other than market shares to determine whether an undertaking is dominant. These measures have been used by the Colombian competition authority and the Peruvian competition authority either to strengthen or reinforce their findings regarding market shares but not as tools to prioritize cases or directly consider an undertaking dominant.

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622 See Kwoka Jr., 'Large Firm Dominance and Price-Cost Margins in Manufacturing Industries'.

623 *Superintendencia de Industria y Comercio v Partmo.*

624 See *Indecopi v Grupo Backus; Alvaro Antonio Bustamante Quiroz et. al. v Grupo Backus* Expediente Nº 011-2008/CLC Comisión de Libre Competencia, Perú; *Ambev Perú S.A.A. v Unión de Cervecerías Peruanas Backus y Johnston S.A.A.*.

### iii) The Rules and Standards of Dominance in Latin American Emerging Economies

As seen above, the emerging Latin American economies analysed have developed multiple standards for determining what dominance is. Ranging from considering dominance as the possession, use, or exercise of market power to defining dominance as the ability to drive competitors from the market, the concept of dominance has had neither a single standard nor a clear cut approach. In addition, most of the emerging Latin American economies rely on market shares to determine, or at least to indicate, the existence of dominance; yet only a few economies use quantitative approaches to go beyond market shares and have a measurable standard of dominance.

As seen before with regard to dominance, just as market power is a matter of degree, a single policy to determine what dominance is has great advantages for emerging economies. The definition of a single policy to assess dominance, besides having other positive consequences such as the likely subsequent soft harmonisation, eliminates the existence of dissimilar enforcement and decisions in the same jurisdiction. This does not mean that individual industrial policies should not be taken into account in Latin American emerging economies' economic policy, but, that at least in regards to competition law, dominance should be the result of a consistent policy design and a single standard with predictable results that grants market participants the ability to determine how tolerant to dominance a particular jurisdiction is.

In the next section, having regard to economic growth as the policy's guiding principle, a single standard for determining dominance is proposed. In addition it is also examined whether this approach fits current emerging Latin American economies competition laws. In addition, an example of a quantitative prioritizing tool to select and enforce only certain cases is proposed.

## 5. The Assessment of Dominance in Latin American Emerging Economies: A Standard and a Proposal for a Case Prioritization Tool

There is consensus in the literature and the practice of competition authorities regarding two points: First, in economic terms, dominance is at least the possibility to exercise market power. Second, in legal terms, dominance is a 'position' in a market that puts certain behavioural constraints to those undertakings holding it.[625] These two parts talk about the economic problem—the structure of a particular market—and the legal problem—the limits of behaviour of a market participant who has the advantage of being dominant.

The question of this section is, in regards to Latin American emerging economies' characteristics and goals, whether there is a standard of dominance that should be enforced by most emerging economies? In this section, using economic growth as the guiding principle of policy design, a standard to determine dominance is assessed and a definition of dominance is proposed.

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625 See *United States v. Grinnell Corp.*; *United Brands Company and United Brands Continental B.V. v Commission of the European Communities.*

### i) A Definition of Dominance for Emerging Economies

As shown in the previous sections, the legal and economic literature has identified several standards to determine what dominance is. Ranging from market power to exclusionary power, competition authorities have not found a single approach to conclude what constitutes dominance, in fact, in their own practice, the Latin American competition authorities analysed seem to be reluctant to have a single principle to determine dominance.

Then, what standard should Latin American emerging economies implement? A few points regarding emerging economies' characteristics and goals should be highlighted before answering the question about the best standard. Often one of the economic goals of emerging economies is achieving sustained and accelerated growth. This feature, as shown in the previous and final chapters, transforms, or at least alters, the ways competition law and policy is designed. Competition law, as shown in the first Chapter, is generally aimed at protecting the process of competition and efficiency.[626] An emerging economy, regardless of the welfare standard protected, at some point, may want to primarily provide incentives for sustained economic growth.[627] Having considered that as long as the rule is efficient, it is indifferent what welfare standard is protected, it was shown that it is possible to choose among the range of rules those that aim at the

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626 See Christopher Townley, *Article 81 EC and Public Policy* (Oxford University Press 2010) Mor Bakhoum, 'Reflections on the Goals of Competition Law in Developing Countries' in ASCOLA (ed), *The Goals of Competition Law, Fifth Conference* (ASCOLA 2010) Maurice E. Stuke, 'Reconsidering Competition Law and The Goals of Competition Law' in ASCOLA (ed), *The Goals of Competition Law, Fifth ASCOLA Conference* (ASCOLA 2010).

627 See Chapter E.

protection of the rivalry process guided by economic growth. This particular feature of economic policy design, has the advantage of making economic growth a variable in institutional design. Therefore, for example, Latin American emerging economies should prefer false negatives of dominance over false positives if too much enforcement may impair economic growth.

In addition, Latin American emerging economies, in regards to their need for economic growth, are regularly looking for more investment and innovation and to open new markets.[628] In some cases, granting some power to entrants in new markets makes entry much more attractive to investors. Also, Latin American emerging economies require robust and sound institutions that grant legal certainty to incumbents, investors, and other entrants. This feature requires that a single stable standard for enforcing competition law and particularly dominant undertakings' behaviour be defined. Finally, emerging Latin American economies want to reduce the costs of enforcement administration. This feature gives emerging economies' competition authorities the need to determine administrable standards that set simple and easy enforcement patterns that simplify the emerging economy's processes and procedures.

With the latter elements in mind, and having regard to growth as the guiding principle of competition policy design, a definition of dominance should be related to the power to exclude that an undertaking may have. This standard has the ability to regard the need for sustained and accelerated growth and takes into account the highly concentrated market structures of emerging economies, since

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628 See Chapter E.

any exclusionary behaviour diminishes the incentives to entry and limits the economy's ability to reduce its concentrated market structures.

Then, dominance is a set of economic characteristics that grants an undertaking or a group of undertakings the power to price and exclude without having regard for other agents' conduct or exogenous factors in a particular market. This definition considers that only those undertakings that able to both, reduce consumer welfare, and second, it reduce productive efficiency should be deemed as dominant, due to their ability to reduce total output by the reduction of its own output, other undertakings' output, or the obstruction of the growth of total output.

The latter definition captures a few points developed afore:

First, dominance is an legal concept related to economic power. Indeed, dominance is economic power in a market and involves an industry that puts an undertaking in a position of power, which makes the dominant undertaking noticeable.

Second, pricing power is not enough to make a single firm dominant. As studied in the previous sections, dominance distinguishes itself from mere market power, as market power is regularly defined in the economic literature as the ability to price above a certain cost standard. Dominance is, however, beyond the power to price; a dominant undertaking has not only the power to set its own price but also the power to control total output. Therefore, the dominant undertaking

also has the power to exclude or drive other agents from the market—not only competitors but also clients and consumers.

Third, dominance is an economic term as much as it is a legal term. As seen before, dominance and market power are a matter of degree. This means that the elements to determine whether an undertaking is dominant, be it market power, market independence or the ability to reduce output, are anyway defined by law.

Fourth, being dominant sets legal restrictions on behaviour. Dominance puts several legal burdens and restrictions on an undertaking's behaviour. And such legal restrictions may chill the rivalry process or may indeed provide more incentives to compete.

Having the latter points in mind, it is therefore concluded that the best rule or standard for emerging economies in order to define dominance is such that considers that an undertaking is dominant not only based on the power to determine prices but also for having the power to exclude competitors from the market or reduce its own and other undertaking's output, without having regard for other agents' conduct or exogenous factors in a particular market. Having such a definition of dominance makes the authority to focus only on those undertakings that have the ability to exclude or discipline other undertakings from the market by reducing the market's total output. In the next section it will be shown whether such standard fits in Latin American emerging economies current policy.

### ii) The Dominance Rule in Latin American Emerging Economies

As was shown before, the statutes of the emerging Latin American economies have broad and asymmetric definitions of dominance. These definitions are, in some cases, filled or construed by enforcement agencies, and, in other cases, strictly defined by the law or the statute.

Regarding the jurisdictions where there are open concepts of dominance the definition above proposed may perfectly fit. For example, for the case of Chile, as the Law has no definitions regarding what a dominant position is, it is just a matter of defining in the enforcement guidelines that dominance will be found only in cases where an undertaking is able to or has the power to price and reduce other undertakings output, either by disciplining them or excluding them from the market. Similarly, is the case of Colombian statute, which defines dominance as the ability to determine market conditions,[629] leaving to the authority the interpretation and scope of the words *to determine* and *market conditions*. This definition grants the authority enough room in order to produce an enforcement standard that considers dominance as the power to price and exclude define afore, as such would consider that it is the only standard that, following the statutory language, indicates that an undertaking is definitively determining the conditions of a market, this is prices, quantities and agents or market participants.

The case of Brazil is somewhat different. As it was shown before, the former and the current Brazilian statute consider that there is dominance whenever an undertaking has a market share above 20 percent. However, as the statutory

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629 Decreto 2153, article 45.

language considers that it is also considered dominant the undertaking that is able to alter the market conditions. This definition, as in the case of Colombia, is not an impediment for the use of a standard that considers dominance as something more than the power to price, as it allows the authority to explain whether to alter the market conditions is equivalent to the power to define prices and the power to exclude competitors.

On the other hand, the Peruvian statute defines dominance following the open pattern of the Chilean, Colombian, and Brazilian laws, this is as the ability to 'restrict, affect or distort in a substantial form the demand and/or supply conditions in such market...'.[630] However, the Statute instructs the Peruvian competition authority regarding what to take into account when determining a dominant position, defining structural elements such as substantial market share;[631] the characteristics of demand and supply;[632] the technological development of the market;[633] the access to finance, inputs, and distribution networks;[634] the existence of legal, economic, or strategic barriers to entry;[635] and the existence of suppliers, clients, or competitors with bargaining power.[636]

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630 Decreto Ley 25868, article 7.1.

631 Ibid., article 7.1.a.

632 Ibid., article 7.1.b.

633 Ibid., article 7.1.c.

634 Ibid., article 7.1.d.

635 Ibid., article 7.1.e.

636 Ibid., article 7.1.f.

The Argentinean statute defines dominance in a structural manner, considering dominant any single supplier in a market or any undertaking that 'is not exposed to substantial competition' in the market or 'in conditions to determine the economic viability of a competitor participant in the market'.[637] The Argentinean Statute also instructs the authority in respect to what sort of analysis should it conduct in order to determine whether there is a dominant position. The Act says that the authority should determine the degree in which the good or service could be substituted,[638] the degree on which there are regulatory barriers[639] and the degree of influence on prices, access to inputs, market demand and countervailing market power.[640] As can be seen, the Argentinean Statute provides a lot of indicators to the authority in order to find whether there is a dominant position. The statutory language can fit with a standard of dominance based on the possibility to exclude other competitors mostly when it states that dominance is thee where an undertaking is able to define the 'economic viability of a competitor participant in the market' and also when it considers that it can be shown there is dominance depending on the 'degree of influence' on market conditions. Thus, concurrently with the Statute's language the considering dominance as the power to exclude is likely under the Argentinean competition policy regulations.

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637 Ley 25156, article 4

638 Ibid., article 5.a.

639 Ibid., article 5.b.

640 Ibid., article 5.c.

Finally, the Mexican Federal Competition Statute defines what dominance is, following a very strict language using the phrase 'substantial market power'.[641] The same statute in Article 13 of the Federal Competition Law considers that in order to determine whether an undertaking is in the capacity to exercise some influence over the market, it must have a market share and the possibility to fix prices.[642] This construction of the statute would make somewhat difficult to apply the definition of dominance above explained as the concept market power refers strictly to the power to price; the word 'substantial' used by the Statute is referred only to the degree of market power not to other features such as the power to exclude. It could be interpreted, however, that the word 'substantial' might mean more than the power to price and include the power to control other undertakings output, and indirectly, the power to set market prices.

As is shown, statutory language and parts of the black letter laws in emerging Latin American economies generally allow an interpretation of the concept of dominance as to include the power to price. It is however, much better if there are legal instruments that could clarify the meaning of dominance and grant a clear definition of dominance where no only the power to price independently but to control other undertakings' output to the extent to drive them from the market is adopted. Therefore, the use of economic growth as the guideline of policy design and the consequent definition of dominance, would not only grant legal certainty to the undertakings participating in the market by the legal coherence that in some cases the Latin American emerging economies lack

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641 Ley Federal de Competencia Económica, 1992, (Diario Oficial de la Federación, Mexico), article 11.i.

642 Ibíd., article 13.

but also, as a by-product, may also grant the policy in Latin American emerging economies certain unified path and certainly an harmonized policy regarding dominance.

### iii) Measuring Dominance in Latin American Emerging Economies: A Prioritizing tool for Abuse of Dominance Cases

According to the previous section, not only should economic elements be taken into account while defining whether an undertaking is dominant but also it is necessary to regard aggregate concentration and other policy considerations to determine what degree of dominance is tolerable. To regard endogenous and exogenous variables makes the definition of dominance a measure relative to the particular, and probably idiosyncratic, economic and policy characteristics of each economy. Measuring what level of dominance is tolerable with regard to such variables makes the measuring of dominance relative to the legal and economic structure of the market and/or the economy's economic policy. In this section, a concept of relative dominance is developed and a tool for the prioritization of cases in abuse of dominance proposed.

A few words are required in order to explain why there is a need for determining a quantitative measure of dominance for case prioritization. Dominance, as seen above, is a very ethereal concept. Neither economic literature nor legal scholars have had a single and clear-cut rule in order to determine with certainty what dominance is. Sometimes the literature seems to conclude that

dominance is what a dominant undertaking does.[643] This approach is highly prejudicial for the system's reliability and predictability.

In addition, a few more words are required in order to explain why a screening process for case prioritization greatly relies on a quantitative measure on a tolerable standard of dominance. Dominance is a matter of degree. In every competition, there are subjective tolerances to the dominion of other market participants, and the rules system allows some flexibility to the referees before they impose a behavioural restriction on market participants. A jurisdiction in some cases may want to tolerate a dominant undertaking in certain markets or industries.[644] And this tolerance may come from industrial policy that aims at advancing certain particular industries as a tool for economic policy.

**(1) How to measure dominance?**

Often market shares are considered a proxy of dominance. This is mostly due to the administrability of measuring dominance as a function of markets shares. In fact, the most administrable and simple standard for dominance analysis is a threshold of market shares. Undertakings in the market are better off when they have the certainty that under the current conditions of their market they are or are not considered dominant.

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643 Adapting the words of Forrest Gump, 'stupid is what stupid does'.

644 Intellectual property is a great example. Several developed economies' industrial policies are aimed at allowing highly concentrated market structures into the markets for ideas. This is based on the belief that protecting IP and granting monopoly rights to innovators will further develop new markets and ideas, and therefore (as absurd as it sounds) monopolies are precompetitive.

Market shares are the simplest screening tool. However, as shown in section 3, most measures of dominance do not internalize the variables mentioned above and leave to the authority some level of discretion regarding what level of market or economic power should be tolerated. The literature, in addition, has not questioned the means to measure dominance from the perspective of an emerging economy, where single firm dominance and highly concentrated industries are pervasive in the aggregate market structure. The lack of attention to such variables, as said before, has led to poor assessments of dominance that have resulted in several false positives.

The literature is poor in proposing a measure that incorporates the latter variables.[645] In this section, using a modified version of Kwoka's[646] and Melnik et al.'s[647] models, a new function for the measure of dominance is developed with regard to the characteristics and goals of emerging economies and with the sole aim of working as a case prioritization tool.

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645 A large set of measures of dominance have been proposed. See Azevedo and Walker's paper (Azevedo and Walker, 'Dominance: Meaning and Measurement'), where the CJEU definition of dominance is questioned and a few solutions are proposed. It is also important to highlight LaCour and Møllgaard's model to determine dominance (LaCour and Mollgaard, 'Meaningful and Measurable Market Domination'). Other authors have questioned the US approach and have highlighted the use of market shares as indicators of dominance (see George. B. Shepherd, Helen. S. Shepherd and William. G. Shepherd, 'Sharper Focus: Market Shares in the Merger Guidelines' [2000] 45 The Antitrust Bulletin; Shepherd, Shepherd and Shepherd, 'Antitrust and Market Dominance').

646 See Kwoka Jr., 'Large Firm Dominance and Price-Cost Margins in Manufacturing Industries'.

647 See Melnik, Shy and Stenbacka, 'Assessing Market Dominance', pp. 65–66.

As explained in a previous section, both Kwoka[648] and Melnik et al.[649] propose a mathematical function that, in order to define if there is dominance, points at the individual dominant undertaking but has no regard for the aggregate market or other exogenous variables indicating economic power to price or exclude. Other measures of dominance focus solely on the aggregate market shares and therefore define vacuum dominance thresholds.[650]

However, Melnik et al.'s model provides a framework that is helpful for introducing other variables that further indicate whether the economic power of an undertaking is presumably dominant. The model starts by comparing a firm's market share with the follower's market share in order to determine if there is a difference that makes the market share distance large enough to consider such a firm dominant.[651] The authors define an equation[652] that determines whether or not a single firm in a particular industry is surpassing a threshold of dominance.

The authors propose a measure of dominance that reflects the variables above, which in mathematical terms is

$$S^D = \frac{1}{2}[1 - \gamma(s_1 - s_2)\,(1 - \sum_{i=3}^{N} s_i)] \qquad (10)$$

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[648] See Kwoka Jr., 'Large Firm Dominance and Price-Cost Margins in Manufacturing Industries'.

[649] See Melnik, Shy and Stenbacka, 'Assessing Market Dominance', pp. 65–66.

[650] See Elhauge, 'Defining Better Monopolization Standards', p. 268-9.

[651] Melnik, Shy and Stenbacka, 'Assessing Market Dominance', p. 65.

[652] Ibid., p. 66.

The simplified form[653] states that dominance may be measured as a function of the largest undertaking's and its follower's market shares and two parameters. The functional form is based on two policy parameters and the market share variables, which result in the following equation:

$$S^D = \vartheta[1 - \gamma(s_1^2 - s_2^2)] \quad (11)$$

where $S^D$ is the market share that is considered to be the threshold that should not be surpassed in that particular industry; $\vartheta$, is the parameter determining the maximum market share defined to be tolerated by the competition authority and; $\gamma$, represents the policy parameter.

Having regard only to market shares, $s_1$ and $s_2$, the model proposed considers that the larger the distance between the largest firm and its follower the more likely it is the large firm is dominant, and determines a stricter dominance threshold the largest it is the joint market share of firms.[654] The authors also find very useful the administrability of this measure of dominance, as the competition authority requiring such a measure of dominance may only require the market share of the two largest firms in the market to determine whether the largest has a dominant position.[655]

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653 Departing from, $S^D = \frac{1}{2}[1 - \gamma(s_1 + s_2)(s_1 - s_2)]$. If $\gamma(s_1 - s_2)\,(1 - \sum_{i=3}^{N} s_i)$ then, substituting $[1 - \sum_{i=3}^{N} s_i]$, $(1 - s_3 - s_4 \ldots - s_i)$, is $(s_1 + s_2)$, then such term in the equation may be rewritten as $\gamma(s_1 - s_2)\,(s_1 + s_2)$, and this is equal to $\gamma(s_1^2 - s_2^2)$, which is the simplest form to calculate the dominance measure, $S^D$.

654 Melnik, Shy and Stenbacka, 'Assessing Market Dominance', p. 65.

655 Ibid., p. 66.

What is most important about the model is the parameters $\gamma$ and $\vartheta$. The model defines a $y$ parameter, which captures the 'constrain imposed by potential competition on firm 1's dominance'.[656] The parameter *y*, which is exogenously determined, is, according to the authors, a useful tool to determine 'the intensity of potential competition'.[657] The authors, however, state that the parameter was not included in the measure of dominance proposed by them, which was set at a value of 1; therefore if it is considered different from 1, it 'was made to allow the competition authority some flexibility in the application for this measure to different industries'.[658]

In addition, the model defines a parameter, $\vartheta$, that under the original model, Melnik at. al. it represents a measure of a maximum fixed market share of $\frac{1}{2}$, which, according to the authors, is consistent with most of the mainstream thresholds and most of developed economies' guidelines. A relative parameter, $\vartheta$, is used to distinguish Melnik et al.'s and the proposed approach from traditional approaches. First, dominance is defined with reference to a single firm in a particular market. Second, the level of tolerated dominance depends on a parameter exogenously determined. The construction of this parameter and its application to the measure of dominance in emerging economies is the subject of the following subsection.

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656 Ibid., p. 65.

657 Ibid., p. 65.

658 Ibid., p. 70.

### (2) Competition intensity, market structure, and economic policy as dominance tolerance determinants

The screening tool proposed above is different from other mainstream measures of dominance as it introduces endogenous variables in order to determine whether there is enough merits to preliminary conclude if an undertaking is dominant. It is indeed important to propose a set of parameters,

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