Competition law, markets' governance, and legal roles: ontological insights from Colombia

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ABSTRACT

This thesis explores the way in which, in Colombian competition law, whereas some market agents have been empowered, others have been disempowered. Moreover, it delves into the reasons and mechanisms that may support and provoke an inversion of these dynamics of empowerment and disempowerment in order that those market agents that have resulted disempowered may become empowered. The main goal that this document aims to accomplish, then, is examining the rationale that compels law to create a sort of legal hierarchy among market agents and, consequently, to place some of these market agents in a better position with respect to other market agents when competition law is operated or enforced. In such an attempt, thus, and using a propositional logic structure to do so, this document tries to outline the reasoning under which these hierarchical structures that emerge in law and that produce such dynamics of empowerment and disempowerment are set in motion. This is what this thesis calls the classical approach, which is basically a propositional reasoning compounded by three premises, namely, (i) competition is a general value, (ii) market agents are formally equal, and (iii) winning competition must be on merits. Now, having done so, it is argued that, to invert hierarchies and legal dynamics, there is need for deconstructing the classical approach. With this in mind, a deconstructive approach is structured grounding it in three counter-premises (i) all market agents have the right to compete, (ii) market agents are different, and (iii) merits must consider possibilities. Subsequently, we explore the ways in which two market agents in particular may wind up benefited, i.e. victims of anticompetition and potential but excluded actors of the market.

Cette mémoire vise à déterminer pourquoi dans le droit de la concurrence en Colombie, quelques agents du marché ont le pouvoir de produire un effet juridique à leur avantage tandis que d'autres agents du marché n'ont pas ce pouvoir. Par ailleurs, on explore des raisons et des mécanismes avec lesquels l'inversion de ces dynamiques de pouvoir sera probable afin que ceux qui ont provenu sans le pouvoir juridique de produire un effet légal puissent l'avoir. C'est pour cela que l'objectif principale de ce document est d'examiner le raisonnement qui force la loi à créer une sorte d'hiérarchie juridique parmi des agents du marché et, par conséquent, à situer quelques agents du marché dans une position d'avantage par rapport à d'autres agents du marché quand la loi de la concurrence est opérée ou appliquée. Dans ce but, et en utilisant une structure propre de logique propositionnelle, dans le présent document on essaye d'esquisser les arguments avec lesquels les structures hiérarchiques qu'émergent dans le droit de la concurrence et qu'ils

produisent des dynamiques de pouvoir mise-en-marche. C'est ce que cette mémoire appelle l'approximation classique au droit de la concurrence, et celle-ci est fondamentalement structurée sur un argument propositionnel qui est formé à partir de trois prémisses, à savoir, (i) la concurrence est une valeur générale, (ii) tous les agents du marché sont formellement égaux, et (iii) la victoire dans le marché doit être méritée. Après que cela soit fait, il est soutenu que, afin d'inverser des hiérarchies et des dynamiques de pouvoir, il est nécessaire à déconstruire cette approximation classique structurée sur trois contre-prémisses; (i) tous les agents du marché ont le droit à la concurrence, (ii) tous les agents du marché sont différents, et (iii) quand on évoque la méritocratie, on doit considérer dorénavant des possibilités. Subséquemment, on explore des mécanismes pour lesquels deux agents de marché en particulier peuvent conséquemment bénéficier de cette structure déconstructive qu'on propose, c'est-à-dire, des victimes de comportements anticoncurrentiels et des acteurs potentiels du marché qui ont été exclus.

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INTRODUCTION

This thesis revolves around market agents to whom competition law in Colombia has awarded active legal roles, passive legal roles, or no role at all.[1] It discusses therefore the reasons for which those roles exist as well as the reasons why Colombian competition law should recognize active legal roles for some market agents who have been placed either in passive legal roles or who have none role at all. Bearing this in mind, I wish to bring forward in this introduction which the central concern of this thesis is, the approach that proposes for the study of competition law, and the main elements that it develops (i.e. the hypotheses that proposes, the research problem that addresses, and the work plan that follows).

Proposing an ontological approach

By and large, competition law structures a set of values to determine if market behaviours should be deemed anticompetitive in order to protect markets and market agents.[2] This very preliminary stand briefly summarizes what competition regulations consist of and what studies of competition law are mainly about. And taking it precisely as reference for delving into studies of competition laws, one can say that the studies of these laws can be encapsulated into three categories: studies of set of values, studies of anticompetitive market behaviours, and studies of market agents.

The first category deals with a set of values in which a collection of prepositions, constructs, and goals are embodied.[3] Propositions are axioms that develop the constructs over

[1] By "role" I mean the degree of legal empowerment that allows someone to participate effectively in the enforcement of competition law. Thereby, a market agent has an "active role" because s/he is able to provoke a legal outcome by her/his own means. Conversely, a market agent has a "passive role" because s/he depends either on the intervention of somebody else or because her/his claim is restricted in form or in context. For "no role" I mean that the market agent is absent in both the configuration of law and law enforcement; in other words, a market agent that is out of law's radar.

[2] Regarding similar definitions of competition law see John Shenefield & Irwin Stelzer, *The Antitrust Laws: A Primer* 4ed (Washington: American Enterprise Institute, 2001) at 7-8 and 10-12; see also Alison Jones & Brenda Sufrin, *EC Competition law. Text, Cases, and Materials* 3d ed, (New York: Oxford University Press, 2001) at 1-2; see also Philip Bloom, "What is antitrust?" (1963) 9 NYLF 5 at 29 [Bloom]; see also Eleanor Fox, "Linked-In: Antitrust and the Virtues of a Virtual Network" (2009) 43 International Lawyer 151 at 152, 153; see also William Boyes & Michael Melvin, *Fundamentals of Economics* 5d ed, (Mason: South-Western, Cengage Learning, 2012) at 132 [Boyes & Melvin]; see also Eleanor Fox, "Antitrust and Regulatory Federalism: Races up, down, and sideways" (2000) 75 NYUL 1781 at 1782; see also Edwin Rockefeller, *The Antitrust Religion* (Washington: Cato Institute, 2007) at 3-6; see also Robert Lande, "Professor Waller's Un-American approach to antitrust" (2000-2001) 32 Loy U Chi LJ 137 at 142-143; see also Pinkas Flint Blanck, *Tratado de Defensa de la Libre Competencia: Estudio Exegético del Decreto Legislativo 701* (Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2002) at 27-28 [Pinkas]; see also P.A. Geroski, "Competition in markets and competition for markets" (2003) 3:3 JICT 151 at 271-279 [Geroski].

[3] Regarding analysis related to the word "set of values" in antitrust and administrative and criminal law see Karen Yeung, *Securing compliance: A principled approach* (Portland: Hart Publishing, 2004) at 52-55. For "*legal and political values*" in antitrust see Robert Pitofsky, "The political content of Antitrust" (1979) 4 Penn St L Rev 127. As regards the concept of values (as such) see Georgina Born & Tony Prosser, "Culture and Consumerism: Citizenship, Public Service Broadcasting and BBC's Fair Trading

which competition laws are grounded.[4] Goals are the ends that competition laws pursue.[5] The concept set of values, thus, inquires into the object as well as into the raison d'être of competition laws. For, studies of this first category deal with the purpose of competition laws and the extent to which goals are coherent with prepositions and constructs. As a result, these studies undertake a kind of objective dimension as they ultimately look for the scope of competition law.

The second is a subjective category since deals with the studies of market behaviours that are (or should be) deemed anticompetitive. Anticompetition is, consequently, the centerpiece.[6] Now, anticompetition is the result of a set of prohibitions through which law seeks the concretion of competition in order to make certain and coherent the set of values. To do so, law is based on formulas structured over universal negatives that aim to prevent anticompetition and ensure that competition happens.[7] Moreover, formulas that seem consistent with the very nature and context

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Obligations" (2001) 64:5 MLR 657; see also Shyaman Khemani, *Applications of Competition law: Exemptions and Exceptions* UNCTAD, n.d. UNCTAD/DITC/CLP/Misc.25 (2002) at 7 [UNCTAD].

[4] Consider, for example, price fixing. Price fixing is usually seen as anticompetitive chiefly because it alters pricing provoking an erroneous valuation of goods and multiple harms. So, while from a systemic point of view, price fixing blocks and distorts consumers' freedom and, in so doing, jeopardizes economic aggregates, from an individual perspective, it might produce (undue) restrains to other competitors provoking damages as a result. Thus, in order to protect markets and market agents, competition law forbids price fixing. The content of this prohibition stems from an axiom (e.g. artificial pricing distorts markets affecting consumers and other competitors) and such an axiom, in turn, stems from a construct (e.g. [inartificial] pricing is essential to determine market forces and competition dynamics in market economy). On this regard and particularly with respect to price fixing and cartels see Joseph Harrington, *How Do Cartels Operate?* (Hannover: Now Publishers, 2006) at 5; see also Peter Grossman, *How Cartels Endure and How They Fail. Studies of Industrial Collusion* (Northampton: Edward Elgar Publishing, 2004) at 1; see also, Report, OECD, Directorate for Financial, Fiscal, and Enterprise Affairs, Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition laws*, Doc No DAFE/COMP(2002)7 (2002); see also Michael Utton, *Cartels and Economic Collusion. The persistence of corporate conspiracies* (Northampton: Edward Elgar Publishing, 2011) at 3-6 and 65-69; see also Jonathan Jacobson, *Antitrust Law Developments* (Chicago: American Bar Association, 2007) at 81 [Jacobson].

[5] Examples of goals are consumer welfare, market efficiency, decentralization of market power, innovation, etc. See on this point and specially with respect to goals in competiton law Robert Atkinson & David Audretsch, "Economic doctrines and approaches to antitrust" (Paper delivered at ITIF - The Information Technology & Innovation Foundation, 28 January 2011) (2011) online: <http://www.itif.org> [Atkinson]; see also Laura Parret, "The multiple personalities of EU competition law: time for a comprehensive debate on its objectives" in Daniel Zimmer ed., *The Goals of competition Law* (Northampton: Edward Elgar Publishing, 2012) 61 at 63-66; see also, John Kirkwood & Robert Lande, "The fundamental goal of antitrust: protecting consumers not increasing efficiency" (2008) 84 Notre Dame L Rev 191; see also Maurice Stucke, "Reconsidering Antitrust Goals" (2012) 53 BCL Rev 551 [Stucke]. For the evolution of the notion of competition and the need of its protection see, Oliver Budzinski, *An Evolutionary Theory of Competition* (2004) [unpublished] online: Social Science Research Network <http://www.ssrn.com/> [Budzinski Evolutionary Theory]. For a historical review of the goals of EU competition law see David Gerber, *Law and Competition in Twentieth-Century Europe. Protecting Prometheus* (New York: Oxford University Press, 1998) at 1 [Gerber]; see also Oliver Budzinski "Monoculture versus diversity in competition economics" (2008) 32 Camb J Econ 295 [Budzinski monoculture].

[6] On this point as well as on the concept of anticompetition see Edward Synder & Thomas Kauper, "Misuse of the Antitrust Laws: The Competitor Plaintiff" (1991) 90 Mich L Rev 551 at 596; see also Ignacio de Leon, *An Institutional Assessment of Antitrust Policy: The Latin American Experience* (Frederick: Kluwer Law International, 2009) at 37 and 40-44; see also William Baumol & Alan Blinder, *Economics Principles & Policy* 12th ed. (Matson: South-Western, 2012) at 268; see also, Walter Adams & James Brock, "Antitrust Ideology, and the Arabesques of Economic Theory" (1995) 66:2 U Colo L Rev 257 at 277 and 278-280; see also Jonathan Baker, "Exclusion as a core of competition concern", Faculty of Law, American University - Washington College of Law, Research Paper, 2012.

[7] Either the syllogism of competition law or the reasoning of market authorities or judges when enforcing law is structured over these universal negatives. Indeed, rather than emphasizing on the importance of competition as a positive statement (e.g. "you can compete and let compete"), what competition law does is impede that anticompetition occurs making in that way that competition happens. Law, thus, reproduces prohibitions around negative statements (e.g. "you cannot be prevented from competing" or "you cannot impede others from competing"). In other words, law's underpinning seems to be: "inasmuch as anticompetition is prevented, competition dynamics may happen naturally and spontaneously". Such reasoning is precisely what allows that both (constructs and propositions) self reproduce throughout competition law. About competition law and the protection of competition see Herbert Hovenkamp, *The Antitrust Enterprise. Principle and Execution* (n.d.: Harvard University Press, 2005) at 12-15 and 31; see also T Hemphill "Antitrust, Dynamic competition and Business Ethics" (2004) 50:2 J. Bus. Ethics 127 at 128-129 [Hemphill]; see also Edward Rock "Antitrust and the Market for Corporate Control", (1989) 77:6 S Cal L Rev 1365. Regarding universal negatives see

from which these laws emerge as they are, ultimately, liberal constructs, and, therefore, rather than restricting commerce or obstructing market dynamics, they seek to remove obstacles in markets that can threaten the natural (and perhaps logical) flow of competition.[8]

Behind this protection of markets from anticompetition, however, it is clear that law is actually attempting to look after the aggregate effects of markets that benefit (an abstract and wide) "all" in lieu of the individual effects that create benefits for (a particular and reduced) "few". So, in a way, the reason for banning anticompetition is because anticompetition has the potential to imbalance the system favouring the private will of some in detriment of the system itself and of the rest of the market.[9] The prohibition becomes in this way an antithesis to counterbalance anticompetition and to ensure the self-reproduction of the set of values and of competition itself.[10] What is assessed by this category is therefore the inappropriateness of both anticompetitive market behaviours and anticompetitive outcomes. So, when one is referring to studies of this category, what is at the core of the analysis are the system's minimums and maximums of toleration of wrongdoers' actions and of their private will (hence the connotation of subjective category).

The third category refers to market agents. It deals with studies focused on a sort of ontological dimension as it inquires into the relationship of law and market agents. In other words, it looks into the reasons for which market agents occupy certain positions or have certain roles before competition law. But, what or who are market agents? One can say that, as competition regulations are liberal constructs of market economy and inasmuch as market economy is essentially composed by demand and supply, market agents are consumers and competitors.[11] A different stand, however, can perhaps suggest that government agencies

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William Kneale & Martha Kneale, *The Development of Logic* (New York: Oxford University Press, 1962) at 54-59; see also Antoine Arnauld & Pierre Nicole, *Logic or the Art of Thinking* (New York: Press Syndicate of the University of Cambridge, 1996) at 131-134.

[8] An example of a liberal construct is freedom of contract. Now, protecting these constructs for competition law does not lead to structuring a sort of decalogues of, for instance, "what people can do in markets". Law, instead, structures a reasoning of what "people are prevented from doing". So, prohibiting anticompetition is closer to a reasoning of "what law would never agree on to happen" rather than a reasoning of "what law is willing to accept". Regarding business ethics and competition law see Ibid Hemphill; see also Jules Coleman, *Markets, Morals and the Law* (New York: Cambridge University Press, 1988) at 290 and 311 [Coleman]. Regarding competition law as a liberal construct see Gerber, supra note 5; see also Giuliano Amato, *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market* (Evanston: Northwestern University Press, 1997) at 2 and 7.

[9] This protection of the system and of the rest of the market is translated in competition law terms in the protection of competition as a systemic value as we will explain below. Regarding the protection of competition see, for instance, Eleanor Fox, "We protect competition, you protect competitors" (2003) 26:2 World Competition 149 [Fox Competition/Competitors]; see also Eleanor Fox & Lawrence Sullivan, "Antitrust - Retrospective and Prospective: Where Are We Coming From? Where Are We Going?" (1987) 62 N Y U L 936 [Fox & Sullivan]; see also, Luís Vélez, "Los objetivos de las normas antimonopolísticas: planteamientos para un debate" (1992) 10 Revista de Derecho Privado Universidad de Los Andes 123.

[10] See Maureen Bunt, *Economic Essays on Australian and New Zealand Competition Law. International Competition Law Series Volume 8* (Frederick: Kluwer Law International, 2003) at 105; see also Frederick Weaver, *Economic Literacy: Basic Economics with an Attitude* (Plymouth: Rowman & Littlefield, 2007) at 61; see also Frank Machovec, *Perfect Competition and the Transformation of Economics. Foundations of the Market Economy* (New York: Routledge, 1995) at 331; see also Stucke, supra note 5 at 611.

[11] See Maurice Stucke, "Reconsidering Competition" (2008) 81:2 Miss L J 108 at 120, 122, 130, 162; see also Ronald Coase, "The Nature of the Firm (1937)" in Oliver Williamson & Sidney Winter, *The Nature of the Firm. Origins, Evolution, and Development* (New York: Oxford Universit y Press, 1993) [Coase]; see also Joshua Wright, "The Antitrust/Consumer protection paradox: Two policies at war with each other" Yale L J [forthcoming in 2012] [Wright]; see also Oles Andriychuk, "Can we protect

empowered as market authorities or regulators can also be seen as market agents as they represent the abstract and general interest that a particular State or organization has over markets and competition in certain jurisdiction.[12]

Pushing even more the definition of market agents, one can also analyse it from more complex and perhaps ethereal insights. Just as other entities became, over time, superstructures with their own personhood (e.g. States after Westphalia or firms after mercantilism),[13] there are certain elements that suggest that markets can be in a similar transit. As Budzinski suggests, markets are no longer just places where one simply trades or spaces ruled only by supply and demand. Today markets feel, think, fear, decide, etc.[14] It seems as though they were reaching almost a new condition that is outrunning commodity fetishism or simple semantics of (post)modern capitalism.[15]

Thus, although debatable, one can think of markets today as new entities in the same way as States or firms have become seen as such. But if one does not agree with this sort of personification of markets (as Budzinski calls it), one at least could agree on the importance that markets have before social dynamics, human development, environmental conflicts, cultural interactions, and other domains. Markets cannot be for this very same reason completely decoupled from other phenomena; for instance, from social fabric, cultural dynamics, or environmental concerns. Indeed, markets seem to be arriving to a broader definition and by the same token notions of market agents should begin to be seen in wider senses beyond firms, States, competitors, and even consumers.[16]

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competition without protecting consumers?" (2009) 6:1 Comp L Rev 77 [Andriychuk Competition/Consumers]; see also Ronald Coase, "The Problem of Social Cost" (1960) 3 J L & Econ 1.

[12] See Mattia Guidi, *Does Independence affect regulatory performance? The case of national competition authorities in the European Union* (2011) [unpublished] online: European University Institute - Robert Schuman Centre for Advanced Studies <http://cadmus.eui.eu//>; see also Daniel Crane & Giuliano Amato, *The Institutional Structure of Antitrust Enforcement* (New York: Oxford University Press, 2011) at 94-ff; see also Bruce Scott, *The Concept of Capitalism* (New York: Harvard University Press, 2009) at 39-ff; see also Thomas Kauper, "The Justice Department and the antitrust laws: law enforcer or regulator?" (1990) 35 Antitrust Bull 83 at 90.

[13] Regarding the Westphalia Treaty and States see Joseph Camilleri, "Sovereignty Discourse and Practice - Past and Future" in Trudy Jacobsen, Charles Sampford & Ramesh Thakur eds., *Re-envisioning Sovereignty. The end of Westphalia?* (Burlington: Ashgate, 2008) at 33-ff; see also Tanja Aalberts, *Constructing Sovereignty between Politics and Law* (New York: Routledge, 2012) at 125-ff; see also John Agnew, *Globalization and Sovereignty* (Plymouth: Routledge, 2009) at 102; see also Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World" (2000) 110:4 Ethics 697. Regarding firms see Robert Ekelund & Robert Tollison, "Mercantilism origins of the Corporation" (1980) 11:2 Bell J Econ 715; see also James Edwards, "Mercantilism, Corporations, and Liberty: The Fallacies of "Lochnerian" Antitrust" (2009) 1:30 Libertarian Papers online: Libertarian Papers <http://libertarianpapers.org>.

[14] See Budzinski monoculture, supra note 5 at 298; see also Philippe Carrard, "Essay: When Wall Street Sighs: Narratives of the market and personification" (2009) 4 Mich St L Rev 1083; see also Jones Campbell, "What kind of subject is the market" (2001) 72 New Formations 131; see also Thomas Joo, "Narrative, Myth, and Morality in Corporate Legal Theory" (2009) 4 Mich St L Rev 1091.

[15] For commodity fetishism see Michael Taussing, "The genesis of Capitalism amongst South American Peasantry: Devil's Labor and Baptism of Money"(1977) 19 CSSH 130 at 132; see also, Joel Kalm, "Demons, Commodities and the History of Antropology" in James Carrier, *Meanings of the Market. The free market in western culture* (New York: Berg, 1997) 69 [Carrier]. For semantics in postmodern capitalism see Rosemary Coombe, "Legal Claims to Culture In and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference" (2005) 1 Law, Culture and the Humanities Journal 35.

[16] Regarding Antitrust, public policies, and interest groups see John Cobin, *A primer on Modern Themes in Free Market Economics and Policy* 2d ed, (Boca Raton: Universal-Publishers, 2009) at 6-9, 16-20, 29-30, and 32-36; see also, Stephen Weymouth, "Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries" (4th Annual Conference on

The thematic axis of this thesis is this third category precisely. Hence, I do not seek to explore set of values of competition laws or go in-depth on the analysis of certain kind of anticompetitive behaviours. The analysis that I propose takes a different approach. My goal is not determining which goals are currently or should be pursued by competition law, nor the coherence that this or that school has before a particular insight. I do not aim to present why certain market behaviour fit better in this or that analysis either, or if exclusionary conducts can be approached in a different way. None of these concerns are part of this study. Rather, this document undertakes an ontological approach that inquires into who the market agents with active legal roles in Colombian competition law are, should be, and why.

Hypotheses, research problem, and work plan

Having explained the scope of this thesis and briefly introduced the main elements and reasoning of the approach that it explores, below I lay out the claims, research problem, and work plan. I argue that competition law in Colombia does not award to all market agents the same legal role and thus that, while there are market agents with active roles, there are others with passive roles and others that are not even a concern to competition law. Therefore, my first claim is that this disparity of roles is explained and sustained through a set of fundamentals and premises, which is nothing different than an attempt to explain the rationale that seems to oblige competition law in Colombia to analyze the role of market agents in a dissimilar way awarding them as a result different stands before law. My second claim is that, as consequence, only two market agents have been empowered with active legal roles; i.e. market authority and wrongdoers. Finally, my third claim is that, by awarding this differential treatment between market agents, Colombian competition law has construed a dimension of otherness that impedes others to enter in law's reasoning, blocking their effective defence from anticompetition or their effective insertion into markets.

As noted, however, speaking of market agents can be wide and even vague; more so when looking at market agents who have passive roles or to those market agents to whom law has not given any role at all. For this reason, I center the analysis in two market agents: competitors that are victims of anticompetition (victims)[17] and potential but excluded actors in the market

Empirical Legal Studies, delivered at University of Southern California, November 20 2009) [unpublished] online: Social Science Research Network <http://www.ssrn.com/> [Weymouth]; see also Debra Satz, *Why some things should not be for sale* (Oxford: Oxford University Press, 2010) at 17, 65, and 91-95 [Satz].

[17] In Colombia, victims of anticompetition can enforce competition law in different ways. However, they all do so because of the very existence of a market behaviour considered anticompetitive. And this is precisely the scope given in this document to the word "anticompetition" and more so to the word "victims", namely, encapsulating all forms and regimes through which victims can enforce their rights (again, from a competition law perspective). So, although I do acknowledge that there are profound differences

(PBE).[18] I seek to demonstrate that, whereas victims have been placed in passive legal roles, PBE are not even part of law's reasoning. Likewise, that these two roles have profound consequences in both the enforcement and operability of Colombian competition law as well as in the coherence and consistency of the set of values of country's market economy model and country's legal system. In this way, the research problem that I will try to address is: Why do victims and PBE not have active legal roles in Colombian competition law and how can they be empowered?

Answering this question implies, in my opinion, a confrontation of two approaches to fundamentals and premises that we claim sustain this ontological rationale in Colombia: on one hand, the current and dominant approach and, on the other, what this thesis calls a deconstructive approach. Both differ on premises but do not on fundamentals. The reason is that, whereas fundamentals ground all kind of competition regulations (as without them competition law as a legal phenomenon would not exist), premises are the particular shift that each jurisdiction takes and are, therefore, what determines who the addresses of law in a particular jurisdiction are or should be. Considering the former, this document is divided into two parts. The first part explains fundamentals and the two different approaches to premises (i.e. the classical approach and the deconstructive approach). Then, taking as reference the deconstructive approach, the second part addresses both the problems that arise from having given to victims a passive role, as well as the problems of having placed PBE in a non-existent one. Furthermore, the second part delves, briefly, into the ways and mechanism to overcome the passiveness of victims and PBE's invisibility.

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between the mechanisms of enforcement that exist in Colombia on this respect (e.g. public litigation [i.e. restrains of competition and mechanisms to promote competition] private litigation [i.e. unfair competition and extra-contractual or contractual claims], or class actions and constitutional actions), my goal is focusing on this document on the underlying context that brings about these mechanisms of enforcement; in brief, in the very existence of anticompetitive market behaviours that affects victims' rights. Consequently, for this document victims are all kind of competitors that because anticompetition have been prevented from exercising their right to compete in markets.

[18] PBE takes a completely different stand than that of victims. If victims were affected because of (let's say) market reasons, PBE are affected by non-market reasons. For this document, PBE are groups of people that have been prevented from taking an active economic role and therefore from markets as a result of external and extraneous artificial barriers such as (but not limited to) systemic discrimination (e.g. because of their skin colour, gender, social position, etc.). Although in the first part of this document the role of PBE is analyzed as a general phenomenon and always in tandem with that of victims to demonstrate the existence of dynamics of legal disempowerment, in the second part we will explore PBE in Colombia using Afrocolombians as example. Moreover, PBE replicates, to a certain extent, the concept of historical disadvantage groups of South African law and particularly of South African competition law. See on this respect Eleanor Fox, "Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia" (2000) 41 Harv Int L J 579 at 583-588 [Fox South Africa]; see also Candice Hittler, "*Evolution of Economic Policy in Post-Apartheid South Africa"* (Honours Students' Projects, Rhodes University Department of Economic and Economic History, 2009) [unpublished] at 4-7; see also Okechukwu Iheduru, "Black economic power and nation building in post-apartheid South Africa" (2004) 42 J of Modern African Studies 1 at 15-23; see also *South Africa's Economic Transformation. A Strategy for Broad-Based Black Economic Empowerment,* South African Department of Trade and Industry (2003) at 16.

PART 1:
FUNDAMENTALS AND PREMISES

Taking perhaps a positivistic stand, one can say that whenever law is deemed to govern certain phenomenon, it is self-restricted to what that phenomenon entails. Competition law seems to be no the exception and thus one can at first think that it is restricted to what governs and, in that way, is selective with the issues with which it deals: markets and competition.[19] But the problem is precisely what is at stake in competition law. Markets are complex superstructures on which almost everything depends. Competition is deployed everywhere as it is the sole way to participate in markets. And market agents can be anybody and nobody; from consumers, to competitors, the State, and even markets themselves.[20] Thus saying that competition law must restrict itself when dealing with a superstructure like markets, with a wide concept such as competition, or with a broad notion such as market agents, it is not as easy as it might seem.

Let's see how this reasoning of selectiveness goes with market agents, for instance. One can say that anticompetition is the axis of competition law as it is what most notably affects markets and competition. So, only those market agents involved in anticompetition or affected by it are entitled to set in motion law or to be inquired by it. But, competition and anticompetition affect many facets and involve multiple issues. That being the case, one must ask oneself how to explain that not everything that emerges from markets and competition is part of the competition law reasoning? Moreover, that although markets currently affect almost all dimensions of everyday life, in some jurisdictions not all market agents can autonomously set in motion these laws? An example of this in Colombia includes victims and PBE; however, let's reserve examples for later. For the time being, let me just focus on the logic that lies behind competition law with respect to market agents and this idea of selectiveness.

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[19] This idea of selectiveness of competition law reproduces what Hart calls rule of recognition and particularly the notion of law as a mechanism to govern specific situations and institutions that stem from social and economic interactions. See on this regard Leslie Green, "Legal Positivism" in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2009) (Stanford Encyclopedia of Philosophy); see also H L A Hart, *The concept of law* 2nd ed. (Oxford: Oxford University Press, 1994) at 50-55, and 100-ff; see also Candance Groudine, "Authority: H L A Hart and the Problem with Legal Positivism" (1980) 4:3 JLS 273 at 276-279; see also Neil MacCormick *Herbert Lionel Adolphus Hart* (Stanford: Stanford University Press, 2008) at 136-141. Regarding competition law and the ruling of markets and competition see Bloom, supra note 2; see also Alfonso Miranda & Juan Gutierrez, "Fundamentos económicos del derecho de la competencia: Los beneficios del monopolio vs. los beneficios de la competencia" (2006) 2:2 Rev Derecho Competencia 269 at 271-279 [Miranda & Gutierrez]; see also Jorge Witker & Angélica Varela, *Derecho de la Competencia en México* (Ciudad de México: Universidad Nacional Autónoma de México, 2003) at 1-10; see also Wilhelm Röpke, *A Human Economy. The Social Framework of the Free Market* 2nd Ed. (Chicago: The Institute for Philosophical and Historical Studies, 1961) at 137-139 [W.Röpke]; see also Weymouth, supra note 16; see also Geroski, supra note 2.

[20] See Geroski, supra note 2; see also Louis Makowski & Joseph Ostroy, "Perfect Competition and the Creativity of the Market" (2001) 39:2 JEL 479 at 271-279; see also Satz, supra note 16 at 3-6 and 15-18; see also W.Röpke, Ibid at 20-22 and 127-29; see also Erik Kimbrough, Vernon Smith & Bart Wilson, "Building a Market: from personal to impersonal exchange" in Paul Zak ed., *Moral Markets. The critical role of values in the economy* 2nd Ed. (Woodstock: Princeton University Press, 2008) 280.

For this thesis, the reason that, in a jurisdiction like Colombia, not all situations or market agents are in law's radar in the same degree of legal involvement is because of a differential treatment that makes that some market agents have active legal roles while others wind up having passive and even nonexistant roles. For that to happen, there should be some sort of reasoning that lead to conclude that not everyone is entitled to be placed in the same situation; even more, when considering that competition law deals with superstructures, wide concepts, and broad notions. A reasoning that, furthermore, allows law to differentiate between market agents and that make competition law selective by definition. As noted, this first part explains that such reasoning is found in a collection of fundamentals and premises.

These fundamentals are two: (i) cohabitation of public and private interests (cohabitation of interests) and (ii) market competition. These are the mainstays of competition laws (at least from and for an ontological approach) as, without them, neither competition law could exist, nor could any market agent be part of its reasoning. This is why we call them fundamentals, because not only they set the grounds to understand why market agents take part of the legal and economic system, but also because they are (virtually) inalterable and therefore more or less the same for a great number of jurisdictions.[21]

But there should be some premises through which fundamentals could be linked to the specific regulatory framework and to the market agents to whom law is addressed. My point is that, without premises, law would remain inoperative as it would not be possible to link fundamentals with market agents and therefore determine who the addressees of competition law should be. Premises, thus, create a bond to understand why someone is entitled to ask for something (e.g. to compete on markets) or why someone ought to respond for something (e.g. to compensate for damages).[22] But, contrary to fundamentals, premises seem to be local constructs.

[21] What surrounds this idea of "fundamentals" is the need to have a competition regulation. With fundamentals, nonetheless, the purpose is not universalizing markets and markets' reality and much less denying the importance of culture, idiosyncrasy, worldviews or difference in competition law. What this notion of fundamental seeks, instead, is contradistinguishing "why is competition law needed?" with "how competition law is particularly shaped?" So, while the first ("the need" or "the why") is explained through fundamentals, the second ("the shape" or "the how") is explained through premises. The purpose with fundamentals, thus, is exploring the reasons (from the ontological stand here proposed) of "why" it is necessary to structure a competition regulation in a market economy.

[22] The concept "premise" (or proposition) exceeds the connotation of legal principle. According to Klement, premises (or propositions) are, from a propositional logic point of view, autonomous statements that, if connected with other premise (or premises), will produce *complex* conclusions. Consider, for instance, the following example proposed by Klement: (1.)["*Bush was a President of US"*] (2.)["*Bush is a son of a President of US"*]. Considering (1.) and (2.) alone, each is a truth bearer. However, depending on how one compounds them, one can arrive (in words of Klement) to more *complex* or even different conclusions to what each stands for. In his example, Klement arrives to the following: IF ["*Bush was a President of US*"] AND ["*Bush is a son of a President of US*"] THEREFORE ["*someone is the President of US and the son of a President of the US"*]. Now, the purpose in this document is precisely using premises on such a propositional logic context (so to speak). Therefore, we seek to structure each premise as a truth bearer of Colombian competition law and then (progressively) compound them to arrive to a different and perhaps more complex conclusion that exceeds the information that each one alone involves. Specifically, the purpose is structuring the following: competition law is designed for market authority and wrongdoers excluding as a result other market agents (victims and PBE for this document). Regarding propositional logic and premises (or propositions) see Kevin Klement, *Propositional Logic,* in James Fieser & Bradley Dowden eds., *Internet Encyclopedia of Philosophy* (2005) (Internet Encyclopedia of Philosophy); see also Hugh Gauch, *Scientific Method in Practice* (New York: Cambridge University Press, 2003) at 165-167; see also Giovanni Sartor "Legal Reasoning. A

For, while fundamentals can eventually be seen as a source of convergence of competition laws, premises can perhaps be the reason of divergence.[23] As this work is addressed to Colombian competition law, the premises and reasoning that will be explained here apply firstly in that jurisdiction only. Premises of the current and dominant insight of Colombian competition law are: (a) competition is a general value (competition as general value), (b) market agents are formally equal (formal equality), (c) and winning competition must be based on merits (competition on the merits).[24]

The first chapter of this first part draws upon fundamentals whilst the second goes into premises. The purpose of chapter two, however, is threefold: it first explains the extent of the former three premises, framing them within what this document refers to as classical (ontological) approach. But, as premises of this classical approach are precisely the reason of the differential treatment between market agents, the second goal of chapter two will explain how, by compounding premises, the classical approach winds up constructing logics of empowerment and disempowerment among market agents. Finally, chapter two proposes a deconstructive approach for classical premises to redress the differential treatment from which other market agents (victims and PBE for this document) have been excluded from active legal roles.

Cognitive Approach to the law" Volume 5 in Enrico Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence* (New York: Springer, 2005) at 405-425 [Sartor].

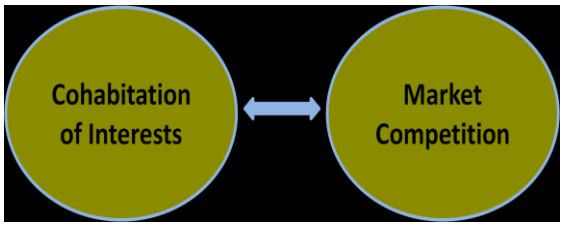
[23] "Convergence" and "divergence" refer in competition law terms to the fact that in some cases common features link jurisdictions (convergence) while in others different features divide the understanding that jurisdictions have about competition law (divergence). See on this regard Fox Competition/Competitors, supra note 9; see also Thomas Cheng, "Convergence and its discontents: A reconsideration of the merits of convergence of Global Competition law", Faculty of Law, University of Hong Kong, Research Paper, 2012/003; see also Chris Noonan, *The Emerging Principles of International Competition Law* (New York: Oxford University Press, 2008) at 59-ff; see also Okeoghene Odudu, "The wider concerns of Competition Law" (2010) 30:3 OJL S 599 [Okeoghene]; see also Mor Bakhoum, "A Dual Language in Modern Competition Law? - Efficiency Approach versus Development Approach and Implications for Developing Countries" (2011) 34:3 World Competition 495 [Bakhoum Dual Language].

[24] There is an important element to highlight on the role that premises play in a jurisdiction. Even though they work as a liaison between fundamentals/market-agents/law, premises are far from simply transmitting fundamentals to the local milieu. Their role instead is closer to that of a translator. Indeed, when one translates from one language to another, what one does is basically receiving information and adapting it to the codes of other language. There is involved, thus, something more complex than just assigning equivalencies to the other language. Translation implies a process of reflection and decision making over the appropriate means for giving the message as well as over the particularities and specificities of the environments from which the message is received and in which will be delivered. Well, this is precisely what premises do. They decode fundamentals adapting them into local worldviews (and needs) of jurisdictions. Putting it differently, premises adapt what at first is a common understanding of markets and competition law into particular understandings of the local system. In this way, translating fundamentals entails for premises a process of adaptation. So, as it happens when one translates, premises take decisions and choose between options. This is why, as it will be noted later on, premises are (sort of) vernacular or idyosincartic manifestations. Moreover, this is why they could be the source of divergence of competition laws. Think, for example, in market dominance. Jurisdiction *X* can see dominance as problematic and, consequently, it would try to restrain it or redress it. Yet, for jurisdiction *Y* the problem could perhaps be quite different. Instead, *Y* can see that what is problematic is impeding that efficient competitors conquer markets; in other words, not dominance as such but the abuse of dominance. So, the solution for jurisdiction *Y* would perhaps be channelling dominance instead of restricting it. These differences are essentially a manifestation of divergent worldviews of what markets entail and what markets bring about. Regarding cultural differences in competition law see Wolfgang Pape, "Socio-cultural Differences and International Competition Law" (1999) 5 ELJ 438 [Pape]; see also Ki Jong Lee, "Cultures and cartels, cross-cultural psychology for antitrust policies", Institute for Consumer Antitrust Studies, Loyola University Chicago, Working Papers, 2003 [Jong Cultures and Cartels]; Ki Jong Lee, Culture and Competition: National and Regional Levels (2008-2009) 21 Loy Consumer L 33; see also A.E. Rodriguez, "Does legal tradition affect competition policy performance?" (2007) 21:4 The International Trade Journal 417. Regarding law, culture, and this idea of translation see Jurgen Habermas, *Legitimation Crisis* (n.d.: Beacon,1973) at 10; see also James Boyd, *Justice as Translation: An Essay in Cultural and Legal Criticism,* (Chicago: The University of Chicago Press, 1994) at 7-9, 48-50, 89-93, and 229-234; see also Valerie Pellatt & Eric Liu, *Thinking Chinese Translation. A course in translation method: Chinese to English* (New York: Routledge, 2010) at 11-12, 15, and 86.

Now, this first section aims to reach the following conclusions: first, that as consequence of the classical approach, market authority and wrongdoers are the two market agents with active legal roles in Colombia and therefore the sole self-sufficient to shape and enforce competition law. Second, that understanding law from classical premises would irremediable construct around other market agents (i.e. victims and PBE) a dimension of otherness, which prevents them from having active legal roles. Third, that in order to award to these others with active legal roles (to make them part fully of the competition law matrix), classical premises must be deconstructed.

CHAPTER 1: FUNDAMENTALS

This chapter explores the two fundamentals or at least those that ground competition law when they are analyzed from and for an ontological approach. As noted, their very nature makes them the reason for competition law to exist and thus the main feature that jurisdictions share. They are: (i) cohabitation of interests and (ii) market competition.



* Figure 1 points out not only the equidistance of both fundamentals, but also the correlation that seems to exist between them (hence the bidirectional arrow at the centre of the diagram).

1.1.1. Cohabitation of interests

In competition law an economic system based on markets and awareness for the need of economic exchange converge and in both, public and private interests cohabit.[25] The first can be encapsulated on the assumption that competition regulations can only exist if the economic

[25] For market economy and similar notions to this of need of economic exchange in competition law see Budzinski Evolutionary Theory, supra note 5; see also Christopher Sagers, "Legal Boundaries as Political Economy: The Scope of Antitrust and a General Theory of the Regulation-Competition Dichotomy", Cleveland -Marshal Legal Studies, Cleveland Marshal College of Law, Cleveland State University, Paper, 12-239, 2012 [Sagers]; see also Michael Lewis-Black, "Maintaining Economic Competition: The Causes and Consequences of Antitrust" (1979) 41:1 The Journal of Politics 169 [Lewis-Black]; see also, Maurice Stucke, "Money, is that what I want?: Competition policy & the Role of Behavioral Economics" (2010) 50 Santa Clara L Rev 101; see also, William Page, "The Ideological Origins and Evolution of US Antitrust" in American Bar Association ed., *Issues in Competition law and Policy* (Chicago: ABA Section of Antitrust Law, 2008) at 1-5; see also Maurice Stucke, "Occupy Wall Street and Antitrust" S Cal L Rev [forthcoming in 2012] [Stucke Occupy Wall Street].

system relies on markets; i.e. if it is a market economy.[26] And the reason for this is (as simple as it may sound) because only in market economies competition is unfolded and thus the conflicts to regulate pertain to competition as such. Let's develop this a little further. Think on the classical representation of markets, that is, a place or superstructure wherein people allocate and distribute resources.

The reason this happens is simply because some people have what others have not. Well this is what markets allow people to do: to handle scarcity. Now, letting people do this means to let them communicate what they want or need to others who are in turn ready to provide. This entails, thus, that markets are ready to accept multiple people demanding from multiple people offering (after all, avoiding scarcity implies more than two sources interacting with each other). This is the point where competition becomes the backbone of such an act of communication as it triggers the interaction of multiple sources demanding and supplying. But it is precisely such a communication what makes that competition be the cause of conflicts since, at certain point, people collide and when that happens, people, looking for their own interests/benefits, (may) cheat, take unduly advantages, press for artificial outcomes, etc. These sort of abnormalities, of which only a few are listed, are precisely the core of competition law and, as they pertain to the individual will or action of market agents, private interests end up becoming competition law issues.[27]

One must ask, then, what happen with public interests, though. Market economy is not limited to a private construct of competition and it cannot be limitted either to the abnormalities of the private will. A market economy entails that all economic relations pass throughout and within

[26] The starting point of a competition regulation is not (it should not be I dare to say) free markets. It is rather the mere existence of an economic system that relies on markets and that acknowledges a degree of interaction between market agents (be this greater or lesser). Usually one (me at least) takes for granted that competition law exists because the economic system is a free market assuming (somehow) that awarding free access to markets is the sole presupposition for competition and therefore for competition law. But such an assumption only misleads the real meaning of market economy and consequently the real scope of free markets. Free markets are just but one of many ways in which the economic system can be a market economy. What is more, approaching to free markets can take different stands. For instance, a purist stand will suggest that free markets exist only when the control of economic transactions is left (exclusively) to market dynamics. A less purist and more flexible stand, on the contrary, will suggest that free markets can exist even with some degree of intervention. Regarding market economy and free markets see Vivek Suneja *Understanding business: Markets. A multidimensional approach to the market economy* (New York: Routledge, 2000) at 245-251; see also Patrick Welch & Gerry Welch, *Economics. Theory & Practice* 9th Ed. (n.d.: John Wiley & Sons, 2009) at 39-41 [Welch & Welch]; see also Irvin Tucker, *Economics for Today* (n.d.: Cengage Learning, 2010) at 792-793. Regarding competition regulations in non-free market economies and in social market economies see Tibor Varady, "The emergence of competition law in (Former) Socialist Countries" (1999) 47:2 Am J Comp L 229; see also Christian Jorges & Florian Rödl, "Social market economy as Europe's Social Model?", Department of Law, European University Institute, Research Paper 2004/8, 2004; see also Gerber, supra note 5 at 233, 265; see also Carolyn Gates, "Enterprise reform and Vietnam's Transformation to a Market-Oriented Economy" (1995) 12:1 ASEAN Economic Bulletin 29; see also Shue Tuck Wong & Sun Sheng Han, "China's Market Economy? The Case of Lijin Zhen" (1998) 88:1 Geographical Review 29; see also Franz Bohm, "Left-Wing and Right-Wing Approaches to the Market Economy" (Paper delivered at Symposium Currency and Economic Reform: West Germany After World War II, September 1979), (1979) Bd.150 H3 JITE 442.

[27] See Welch & Welch, Ibid at 5-9 and 39, see also Alain Anderton, *Economics* 3d Ed. (New Delhi: Longman, 2006) at 96-98; see also Steven Landsburg, *Price Theory and aplications* 7th ed. (Mason: Thomson Higher Education, 2008) at 263-ff; see also Nicholas Mercuro & Steven Medema *Economics and the Law. From Posner to Post-modernism* (Princeton: Princeton University Press, 1997) at 14-16 [Mercuro & Medema]; see also Tuna Baskoy, "Thorstein Veblen's Theory of Business Competition" (2008-2009) 77:4 JEI 1121 at 1122 [Baskoy]; see also Maurice Stucke, "What is Competition?" in Daniel Zimmer ed., *The Goals of Competition Law*, (Northampton: Edward Elgar Publishing, 2012) 27 at 30.

markets.[28] In other words, as needs and desires are satisfied and transmitted in markets and as markets are the sole places to do so, then everything is obtained throughout markets; from survivorship, to ownership, and wealth. For, if someone is prevented from accessing markets, that someone would neither reach the means to survive, nor acquire property, and would be unable to gain wealth. Thus, markets provide people with the means to make a living and to reach a socioeconomic advancement.[29] Now, at certain point all these multiple private interests in markets end up provoking collective outcomes, resulting in not just benefits to individuals but to society as well.

If this is so, then, an additional interest emerges: an abstract and general public interest whose beneficiary is the economic system.[30] In a sense, this public interest (obtained from the sum of individual efforts) provokes the emergence of a systemic interest (in a word, Smith's characterization of invisible hand). As a result, if people are prevented from accessing markets, competition ends up being restricted and then no (or less) collective and individual positive outcomes can be expected. As this might create a systemic failure that needs to be redressed, the mechanism to do so would be letting competition work again. Therefore, the need that collective positive outcomes of markets derive in a systemic outcome is what explains that the public interest also becomes part of competition law's rationale.[31]

Regarding the awareness of economic exchange, this is what causes competition to ultimately take place in markets and, therefore, what makes that competition law exist. People in markets must be willing to interchange goods and services and, by the same token, to engage in multiple roles (sometimes as suppliers and other times as consumers) to let market logics of

[28] See Milton Friedman & Rose Friedman *Free To Choose. A persona Statement* (New York: Harcourt Brace Jovanovich, 1980) at 9-11 [Friedman]; see also Mark Harvey, "Competition as instituted economic process" in Stan Metcalfe & Alan Warde eds. *Market Relations and the competitive process* (Manchester: Manchester University Press, 2002) 73 at 74-76.

[29] See Bettina Greaves, *Free Market Economics. A Syllabus* (Auburn: The Ludwig von Mises Institute, 2007) at 23-25; see also David Levine, *Wealth and Freedom. An Introduction to Political Economy* (New York: Cambridge University Press, 1995) at 37-42; see also Robin Malloy, *Law and Market Economy. Reinterpreting the Values of Law and Economics* (New York: Cambridge University Press, 2000) at 78-80; see also James Caporaso, *Theories of Political Economy* (New York: Cambridge University Press, 1992) at 165-171; see also also Coleman, supra note 8 at 106-ff; see also Andriychuk Competition/Consumers, supra note 11, at 80-82.

[30] See Friedman, supra note 28 at 2-5, 11, and 22-24; see also Carrier, supra note 15 at 112-116; see also F.A. Hayek, *The Constitution of Liberty: The Definitive Edition* (Chicago: The University of Chicago Press, 2011) at 84-88; see also Coleman, supra note 8 at 142-143; see also W.Röpke, supra note 19 at 20 and 31-33; see also Gary Madison, *The Political Economy of Civil Society and Human Rights* (New York: Routledge, 1998) at 178-181; see also Dominick Armentano, *Antitrust. The case of repeal* 2nd ed. (Auburn: Ludwig Von Mises Institute, 2001) at 22-24; see also Keith Hylton, *Antitrust Law. Economic Theory & Common law Evolution* (New York: Cambridge University Press, 2003) at 37-42.

[31] See Wim Dubbink, *Assisting the Invisible Hand. Contested Relations between Market, State, and Civil Society* (Norwell: Kluwer, 2003) at 46-48; see also 33-34 John Malcom, *Modern developments in behavioral economics: social science perspectives on choice and decision making* (New York: World Scientific Publishing, 2007) at 12-15, 19-23, and 33-32; see also Andriychuk Competition/Consumers, supra note 11; see also Wilhelm Röpke, *Economics of the Free Society* (Chicago: Henry Regnery, 1963) at 1-3, 13, 20-22, 118-125, 137-139, 166-167, and 183-187; see also David Hart, "The Political Theory of the Firm" in David Coen, Wyn Grant, & Graham Wilson eds., *The Oxford Handbook of Business and Government* (New York: Oxford University Press, 2010) at 6-7 [Hart]; see also Spencer Weber, "In Search of Economic Justice: Considering Competition and Consumer Protection Law" (2005) 36 Loy U Chi L J 631; see also Donald Dewey, "The Economic Theory of Antitrust: Science or Religion? (1964) 50:3 Va L Rev 413 [Dewey]; see also Eleanor Fox, "The Efficiency Paradox", in Robert Pitofsky ed., *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrus* (New York: Oxford University Press, 2008) 77 [Fox Efficiency Paradox]; Edwin Hughes, "The Left Side of Antitrust: What Fairness Means and Why It Matters" (1994) 77 Marq L Rev 265 [Hughes]; see also Lewis-Black, supra note 25.

exchange flow. Thus, in order for competition dynamics to unfold, people must agree to pass on things throughout markets otherwise market economy could not exist.[32] Putting it differently, people do not acquire goods just to hoard them. They acquire goods either to consume or to give to others. In this vein, people always end up as either a consumer or supplier and hence end up always either consuming or competing.[33]

However, roles in markets are interchangeable. For, people who consume supply and people who supply consume. Such interchangeability stimulates competition and thus catalyzes conflicts. Why? Inasmuch as people interchange more goods and therefore interchange more their position in markets, more conflicts can emerge and thus more intervention from law is needed. So, if people are aware of or prepared for competing and interchanging their position in markets, conflicts are more prone to occur. Again, this is explained by the private will and by the need of people to enter in economic exchange.[34] As mentioned previously, when dealing with market economy, the implications of this awareness are more profound and go beyond private interests. If there is no awareness, there is no economic exchange and without it there would not be

[32] See Andriychuk Competition/Consumers, supra note 11 at 83. Contending the idea of competition as a process, Andriychuk makes an interesting assertion (in a behavioural economics context) saying that, what matters to assess competition is the willingness to compete rather than the mere intention to access the market. Although there are (in my view) differences between "willingness" and the notion of "awareness" that we use here, there is nevertheless a closed interaction between the "will to enter in markets" and the "awareness to participate in economic transactions". Regarding "willingness" as the intention to access markets Andriychuk says:

> "[...] The level of competition does not depend on the conditions of accessing the market. Competition can exist in both formats: opened for external competitors and closed for them. In terms of behavioural economics, the main criterion for measuring competition is the willingness of potential competitors to enter this market (not, as it is traditionally suggested, a lack of barriers to entry) and vice versa unwillingness of existing competitors to leave the market (not, as it appears to be with closed markets, the reluctance to block the entrance for the newcomers). It is not to say that a closed model is more desirable for society than an open one, but rather to point out their 'relative irrelevance' for competition. It is not the *structure* of the markets, which is detrimental for measuring competition as a process, but rather their *attractiveness*." [Footnotes omitted]

Similar insights to this concept of "awareness" can be found in Paul Cantor, *The Invisible Hand in Popular Culture: Liberty Vs. Authority in American Film and TV* (Lexington: The University Press of Kentucky, 2012) at 186; see also in Adrian Kunzler, "Economic content of Competition Law: the point of regulating preferences" in Daniel Zimmer ed., *The Goals of Competition law* (Northampton: Edward Elgar Publishing ,2012) 182 at 204-207.

[33] See Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (London: Cohen & West, 1966) at 65, 71, and 76 [Mauss]; see also Boyes & Melvin, supra note 2 at 32-33, 35-36, 42, 47-49, 78-81, and 107-110; see also Robert Sexton, *Exploring Macroeconomics* 5ed. (Mason: Cengage Learning, 2008) at 92-97 and 121-126.

[34] This document assumes competition as a (let's say) Maussian process of rivalry and contention. One of the ways in which Mauss explains this idea of competition is through the concept of Potlatch. Potlatch was a traditional fest performed by North American tribes. After collecting and preparing gifts and presents during the year, tribes and clans met in winter to exchange gifts in acts of reciprocity. These Potlatches could at first be seen just as acts of generosity. But, according to Mauss, they were not. In a sense, Potlatches were instead a kind of market infrastructure to allocate resources and distribute wealth and proprietorship alongside with castes and social and political hierarchies. The system (one can say) was not intended to work as a zero-sum game. Over reciprocation meant reaching a better position within the tribe and therefore a better possibility to advance in ones tribe and clan; under reciprocation, on the other hand, implied losing power and prestige. A rational actor, thus, was always compelled to reciprocate and being disposed thereby under reciprocation and hoard just did not make sense. This sort of social and economic construction of reciprocity and dispossession that surrounded Potlatches ensured a constant flux of exchanges each winter allowing people in that way to distribute and allocate resources. Similar patterns are indeed followed by today's market economy that now expresses a similar construct (in terms of supply and demand and other narratives of similar kind). Moreover, as it happened in Potlatches, an essential fact on today's market economies (even more in today's construction of markets) is that people agree to engage in competition. One can even say that, not competing in markets or not passing on things today in them is as senseless, irrational, and inefficient as it were not participating in Potlatches or choosing to under reciprocate on them. It just does not (as it did not in Porlaches) make any sense at all. See Mauss, Ibid at 3, 6, 14, 36 and 38; see also Mac Marshall, *Beliefs, Behaviors, & Alcoholic Beverages. A cross-cultural survery* (np: University of Michigan, 1979) at 183; see also Gunter Leypoldt, *Cultural Authority in the Age of Whitman* (Edinburgh: Edinburgh University Press, 2009) at 56; see also Maurice Godeller, *The Enigma of the Gift,* (n.d.: University of Chicago Press, 1999) at 155-157; see also Serena Nanda & Richard Warms, *Cultural Anthropology* (Belmont: Cengage Learning, 2011) at 156; see also Pauline Vaillancourt, *The Competition Paradigm: America's Romance with conflict, contest, and commerce* (Oxford: Rowman & Littlefield Publishers, 2003) at 1-15; see also Baskoy, supra note 27 at 1122.

competition and thus no market economy. And without all these, there would be no need for competition regulations, as there would be no conflicts to govern. Then, one can say that (one of) the primary concern(s) for competition law is that such awareness for economic exchange remains inalterable as it is the innerforce that at the end makes market economy works. This is the point where awareness becomes a systemic interest, as without it, what has been said thus far would simply not exist.

Markets are thus not composed by private interests solely, nor can they be explained from public interest exclusively. Competition, and hence competition law (at least from and for an ontological approach), cannot be understood without the essential fact of the cohabitation of public and private interests in markets. But this is not to say that public and private interests must coexist in markets, which happens all the time. For instance, when governments buy goods from people or when people pay for services to governments. This fundamental does not refer to a simple act of exchange between public and private market agents or just to a simple fact of public and private interests coinciding in markets. What I mean by cohabitation is that there are dimensions or scopes that relates to the private interests of market agents (whoever they may be) and to public interests of the legal and economic system. More importantly that these interests do not just coexist, as it is the continual intersection of both that reproduces the need for overseeing and ruling competition; in other words, for having competition laws.[35]

1.1.2. Market competition

The approach proposed for this second fundamental is Thorstein Veblen's theory of business or market competition. As Baskoy notes, Veblen (influenced by Darwin's evolutionary theory) depicts capitalism as a cyclical process that begins with (times of) exaltation in which multiple agents participate in deconcentrated markets where ownership and wealth are by the same token decentralized. As free markets govern in this first stage, the main forces at stake are supply and demand and thus everything is ruled by pricing. Government's intervention is hence out of reason. In fact, it is seen as harmful. As a result, markets and competition find for

[35] See Javier Caramés, "The Intervention of the Administrative Competition Authorities in the Private Enforcement of Competition Law" in Luis Velasco, Carmen Alonso, Joseba Echebarría et al. eds., *Private Enforcement of Competition Law* (Valladolid: Lex Nova, 2011) 245 at 252; see also Katalin Cseres, "Governance design for European private law: lessons from the Europeanization of competition law in Central and Eastern Europe" in Fabrizio Cafaggi & Horatia Muir-Watt eds., *Making European Private Law. Governance Design* (Northampton: Edward Elgar Publishing, 2008) at 16 and 143; see also Robin Malloy, *Law in a Market Context. An Introduction to Market Concepts in Legal Reasoning* (New York: Cambridge University Press, 2004) at 62; see also Israel Kirzner, *The meaning of the market process. Essays in the development of modern Austrian Economics* (New York: Routledge, 1992) at 38-46; see also Jürgen Basedow, "The State's Private Law and the Economy: Commercial law as an Amalgam of Public and Private Rule-Making" (2008) 56:3 Am J Comp L 703 [Basedow].

themselves a way for self-reproduction and thus for self-regulation.[36]

Baskoy continues saying that, for Veblen, exaltation nevertheless leads irremediably to times of crisis and depression in modern (and more so in post modern) capitalism.[37] The reason seems to be that, at the end, exaltation confronts an innercontradiction: efficiency.[38] Indeed, in modernity (as well as, in postmodernity), free markets find in exaltation that their most perfect allies are technology and innovation as they help to produce more at a better quality and at a lesser price. This implies, in turn, that both can assure that the most efficient market agent conquers markets more easily, more effectively, and more rapidly. But for Veblen this encompasses a predicament: technology is expensive so that conquering markets is a matter of who can afford it.[39] Industrialists then must find the means to fund technological and efficient processes precipitating in such a way the emergence of a new agent and factor: capitalist and capital.[40]

According to Baskoy, for Veblen, this new dimension of industrialization preceded by the exacerbation of the role of capital seems to give way to an economic process that distorts the theoretical (perhaps purist) framework of supply and demand into patterns of over/under supply and irrationalconsumerism. And the reason for this is that capitalists and capital are not governed by similar codes of those of industrialists and industry. Their goal is not just producing goods at a lesser cost and the highest quality. The force that drives capitalist and capital and now industry and industrialist is profits (at whatever cost). A force that is called to intensify competition, making it voracious and brutal otherwise market agents would be prevented from efficiency,

[36] See Baskoy, supra note 27 at 1132; see also Thorstein Veblen, *The Theory of Business Enterprise* (New York: Cosimo, 2005) at 89-91 [Veblen]; see also David Reisman, *The Social Economics of Thorstein Veblen* (Northampton: Edward Elgar Publishing, 2012) at 10, 71-73, and 75-77; see also Eric Harke, "Capital and the Modern Corporation" in Janet Knoedler, Robert Prasch & Dell Champlin eds., *Thorstein Veblen and the revival of free market capitalism* (Northampton: Edward Elgar Publishing, 2007) 31 at 56-58 [Harke].

[37] For postmodernism, capitalism, and markets see Frederic Jameson, *Postmodernism or the Cultural Logic of Late Capitalism* (n.d.: Duke Unviersity Press, 2003) at 258-ff; see also Max Miller, *Worlds of Capitalism: Institutions, governance and economic change in the era of globalization* (New York: Routledge, 2005) at 8.

[38] As we will cover later on in this same section, efficiency works in Veblen as a catalyser of a (let's say) predatory capitalism that, as such, has the potential to outshine free markets and push market economy into oligopolistic or monopolistic structures. The reason is precisely what efficiency can at some point provoke, namely, that some market agents become better-positioned not only to win but to overturn the rest of the market. Interesting enough, speaking of this (let's say) Veblen efficiency may at certain point replicate similar logics to those defended by some schools or lines of thought of competition law (particularly when following Chicago School) insofar this refers to the possibility that efficient market agents can legally and legitimately get and keep positions of dominance even when that may affect rivals or markets and competition dynamics. For the notion of "efficiency" in competition law see Coleman, supra note 8 at 96-105; see also Fox Efficiency Paradox, supra note 31; see Bruce Kobayashi, "Chicago, Post-Chicago, and beyond: Time to let go of the 20th Century" Antitrust L J [forthcoming in 2012]; see also Robert Pitofsky, "Chicago, Post-Chicago and Neo-Chicago" (2009) 76:4 U Chi L Rev 1911; see also Fox Competition/Competitors, supra note 9; see also Herbert Hovenkamp, "Antitrust Policy after Chicago" (2009) 84 Mich L Rev 214; see also Dewey supra note 31.

[39] This Veblian formula of technology/efficiencies in markets has been (to a certain extent) re-channeled in what is known today as the innovation approach for competition law. See on this respect Atkinson, supra note 5; see also Thomas Jorde & David Teece, "Innovation and Cooperation: Implications for Competition and Antitrust" (1990) 4:3 JEP 75; see also Joseph Brodley, "Antitrust Law and Innovation Cooperation" (1990) 4:3 JEP 97; see also Herbert Hovenkamp, "Antitrust and Innovation: Where we are and where we should be going" (2011) 77 Antitrust L J 749; see also Herbert Hovenkamp, "Innovation and the domain of competition policy" (2008) 60:103 Ala L Rev 103; see also John Lopatka & William Page, "Monopolization, Innovation, and Consumer Welfare" (2001) 69:367 Geo Wash L Rev 367.

[40] See Baskoy, supra note 27 at 1123 and 1127; see also Tuna Baskoy, "Karl Marx's Theory of Market competition" (Paper delivered at Labour Theory of Value and Its Epistemological and Historical Significance, York University, 9 March 2002) (2002) online: York University < http://www.yorku.ca> [Baskoy2]; see also Veblen, supra note 36 at 7 and 49-ff.

which means in crisis and depression, even in exaltation, to be excluded from markets and therefore condemned to the peripheries of economic power.[41]

Efficiency imposes in such a way a burden on market agents wherein the predicament of "those who can pay can corner the market" ends up being the new dimension of competition that Veblen calls market competition. Therefore, competition that was initially conceived as a beneficial process ruled by reason and necessity (i.e. by supply and demand) in exaltation becomes the pinnacle of rivalry and destruction. The response for all this is the markets' concentration. With it, market agents can seek efficiencies in order to obtain profits and thus persuade capitalist to fund industry's technological needs ensuring in turn the means to corner other competitors and therefore to dominate markets.[42]

In the middle remain small firms and consumers. The firsts are subdued by efficient combinations that create over/under supply (e.g. monopolies or oligopolies) whereas the second are controlled through irrational consumerism.[43] For Veblen, thus, this dynamic process of capitalism (i.e. technology/innovation/efficiency) leads the economic system and its market agents to always pursue profits irrespective of any other consideration. It would be fair saying then that, for Veblen, market agents are in some way doomed in (post)modernity to pursue market competition, which all in all can be seen as a supreme desire for deploying rivalry and contention for obtaining profits and consequently for defeating competitors to gain as much market power and wealth as possible.[44]

Veblen reproduces, above all, a fallible system that cannot control itself and much less let it alone to its own forces. A system far from the classical even optimistic idea of perfect competition and that is ruled by the need of producing profits, which, by the same token, acts as markets' new driving force.[45] A system that, further, relies on a pitiless competition process of rivalry and contention where what is at stake is simply a matter of economic power.[46] Likewise, a

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[41] See Baskoy, supra note 27 at 1126-1127, and 1131; see also Baskoy2, Ibid; see also Veblen, supra note 36 at 68-ff. Regarding efficiency as a goal of competition law see Coleman, supra note 8 at 96-105; see also Fox "Efficiency Paradox", supra note 31.

[42] See Baskoy, supra note 27 at 1125, 1128, and 1130-1132; see Baskoy2, supra note 40; see Veblen, supra note 36 at 16-ff.

[43] See Baskoy, supra note 27 at 1126 and 1128; see also Baskoy2, supra note 40; see also Veblen, supra note 36 9-ff.

[44] See Baskoy, supra note 27 at 1126, 1130-1131, and 1135; see also Baskoy2, supra note 40; see also Veblen, supra note 36 16-ff.; see also David Peña, *Economic Barbarism and Managerialism* (Westport: Greenwood Publishing Group, 1966) at 1-6 and 20; see also Sidney Plotkin & Rick Tilman, *The political ideas of Thorstein Veblen* (n.d.: Yale University Press, 2011) at 80-85; see also John Weeks, "The fallacy of competition: markets and the movement of capital" in James Moudud, Cyrus Bing & Patrick Mason eds., *Alternative Theories of Competition. Challenges to the orthodoxy* (New York: Routledge, 2012) 13 at 25; see also Harke, supra note 36 at 40 and 44.

[45] Veblen, moreover, framed the earliest developments of other concepts such as "imperfect competition" influencing in such a way other authors like Schumpeter. See, on this regard, D A Walker, "New Light on Veblen's Work and Influence", in John Cunningham ed., *Thorstein Veblen Critical Assessments* (London: Routledge, 1993) 219 at 224. Regarding imperfect competition see R F Harrod, "Doctrines of Imperfect Competition" (1934) 48:3 Q J E 442 [Harrod]; see also Oles Andriychuk, "The Concept of Perfect Competition and the Law of Economics: Addressing the Homonymy Problem" (2011) 62:4 N I L Q 523. As regards Schumpeter see Antonella Laino, *Innovation and Monopoly: the position of Shumpeter* (2011) [unpublished] online: Munich Personal RePEc Archive <http://www. mpra.ub.uni-muenchen.de> [Laino].

[46] Regarding profits as an inner force of markets see Baskoy, supra note 27 at 1124 and 1127; see also Baskoy2, supra note 40; see also Sampat Mukherjee, *Modern Economic Theory* 4th Ed (New Delhi: New Age International, 2005) at 338-341; see also

scenario in which market agents would never agree on to renounce to their almost absolute need of conquering markets and in which, as a result, their rational decisions will always aim to unfold market competition as it is the sole way to survive. Therefore, trusts and combinations are not just exceptions or manifestations of market failure. They are, rather, the very same expression of this supreme desire of market competition for conquering markets.[47]

Now, the fact that competition regulations exist necessarily entails that market agents can be inquired for what they have done or will do in markets. But, as Veblen acutely points out, free markets are far from being subdued by regulations or anything else apart from supply and demand. This leads one to think that, by saying that a particular jurisdiction has a competition regulation (even considering these laws as universal negatives framed within liberal constructs of free markets), implies that both (law and system) regard markets imperfectly and hence as catalysers of risks and harms.[48] In a way, one might even say that the purpose of competition law is ensuring that the Veblian stage of exaltation never ends (maybe a populist stand)[49] or ensuring that efficiency be appropriately channeled (perhaps a Chicagoan stand).[50] In any case, though, the fact that a jurisdiction has a competition law entails for itself that it is acknowledged (by the legal system) that in competition exists either the potential for distorting markets or the possibility for destroying market economy.

But, moreover, there is an additional element at stake on this Veblian fundamental: the irremediably presence of market concentration. This is not to say that monopolies and oligopolies must be the main target of competition laws. What this means is that, by taking the Veblian stand of market competition as one of the fundamentals of competition law, combinations and market concentration should necessarily be in the radar of law. Not because they are anticompetitive, per se, but because they are the most perfect manifestation that Veblian's market competition is happening and thus that the end of exaltation may have already begun.

Ludwig von Mises, *Human Action. A treatise on economics* (Auburn: Ludwig von Mises Institute, 1998) at 291, 804-805 [von Mises]; see also Rob Dransfield, *Business for Foundation Degrees and Higher Awards* (Oxford: Hinemann, 2004) at 254-256.

[47] See Baskoy, supra note 27 at 1122, 1126, 1128, 1130-1131, and 1134-1135; see also Baskoy2, supra note 40; see also Veblen, supra note 36 16-ff; see also Laino, supra note 45; see also R Tilman & J L Smith "On the Use and Abuse of Thorstein Veblen in Modern American Sociology - II. Daniel Bell and the "Utopianizing" of Veblen's Contribution and its Integration By Robert Merton and CW Mills" in John Cunningham ed., *Thorstein Vablen Critical Assessments* (London: Routledge, 1993) 478 at 484-486; see also Willard Mueller, "Antitrust in a Planned Economy: Anachronism or an Essential Complement?, in Marc Tool & Warren Samuels eds., *State, Society and Corporate Power: selected papers from the Journal of Economic Issues* (New Jersey: Transaction, 1989) at 286-288.

[48] For the concept of "imperfect competition" see Harrod, supra note 45; see also Camelia Bejan, "The Objective of a Privately Owned Firm under Imperfect Competition" (2008) 37:1 Economic Theory 99; see also Edward Chamberlein, "Monopolistic or Imperfect Competition?" (1937) 51:4 Q J E 557.

[49] See Atkinson, supra note 5; see also Herbert Hovenkamp, "The Harvard and Chicago School and the Dominant Firm", College of Law, University of Iowa, Research Paper 07-19, 2010; see also Wright, supra note 11; see also Barak Orbach, "The Antitrust Consumer Welfare Paradox" (2010) 7:1 J C L & E 133; see also Spencer Weber, "Antitrust as Consumer Choice: Comments on the New Paradigm" (2001) 62:535 U Pitt L Rev; see also Herbert Hovenkamp, "Distributive Justice and Consumer Welfare in Antitrust", College of Law, University of Iowa, Research Paper, 2011 [Hovenkamp].

[50] See Atkinson, supra note 5; see also Ronald Coase, "Law and economics at Chicago" (1993) 36:1 J L E 239; see also Hovenkamp, Ibid; see also I Schmidt & J B Rittaler, *Critical Evaluation of the Chicago School of Antitrust Analysis* (Norwell: Springer, 1989) at 1, 3-5, 17-19, 33-37, and 69-ff.

CHAPTER 2: PREMISES

This second chapter explores premises of Colombian competition law, which, as noted, are the communicating vessels that link fundamentals to market agents and, in turn, these to law. More importantly, premises determine legal roles and, in that vein, make that, while some market agents have active legal roles, others have passive and even nonexistant roles. But to speak of premises and to inquire into their rationale, one must see to different angles to those that we looked at when exploring fundamentals. Premises are not simply responses of the legal and economic system. They are vernacular manifestations of the jurisdiction linking competition law with local insights and worldviews.[51] Premises reflect thus specificities of the legal and economic system as well as particularities of society and even culture's idiosyncrasy. Thereby, they mirror responses in such a wide sense that analyzing premises can go from law and economics to society and culture. This would explain why, although a number of jurisdictions heavily rely on the two main streams of US Antitrust and EU competition law, the institutional and systemic frame in which jurisdictions ascribe their competition laws obliges to transform the initial influence (even legal transplantation) into these native responses.

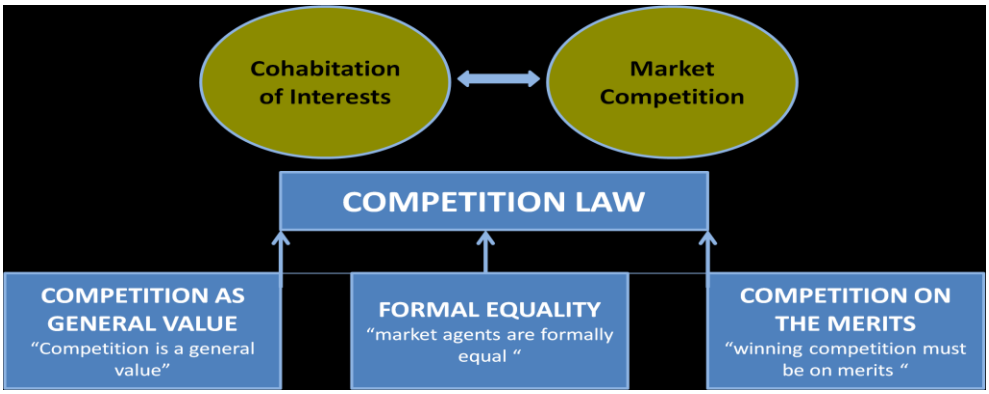
This chapter goes into two different insights or ways to approach premises in Colombia. First, a classical and current dominant insight that, grounded on traditional elements and constructs of the Colombian legal system, winds up empowering two market agents with active legal roles: market authority and wrongdoers. Second, a deconstructive approach that, using law as proxy, seeks to deconstruct competition law's hierarchies to provoke a response in the legal system. Likewise, this deconstructive approach appeals to local elements of the jurisdiction aiming to build bridges with other market agents (like victims and PBE) to empower them into the law's matrix. In other words, to let them take active legal roles alongside with market authority and wrongdoers.

Hence, while the first section of this second chapter delves into premises of the classical approach, the second discusses how such an approach has empowered market authority and wrongdoers producing a correlative disempowerment of others (i.e. of victims and PBE). The third and last section presents the first steps for a deconstructive approach seeking to ground the elements that the second part will use to explore, briefly, mechanisms to overcome victims' passiveness and PBEs' invisibility.

[51] For culture and competition law see Pape, supra note 24; see also Jong Cultures and Cartels, supra note 24; see also Jong "Culture and Competition", supra note 24; see also UNCTAD, supra note 3 at 7; see also Mor Bakhoum, "Reflections on the concepts of 'economic freedom', 'free competition' and 'efficiency' from the perspective of developing countries" in, Zimmer, Daniel ed., *The Goals of Competition Law* (Northampton: Edward Elgar Publishing ,2012) 408 [Bakhoum Economic Freedom].

1.2.1. Premises of a classical approach

This first section maps out the premises of the current dominant insight in Colombia; namely, (a) competition as general value, (b) formal equality, and (c) competition on the merits. It presents thus what the rationale of each premise consist of generally, and how each premise is structured in Colombian competition law in particular.



** Figure 2 shows the diagram of the classical approach with fundamentals composing the superstructure that grounds competition law and each classical premise supporting competition law as a construct.

(a) Competition as general value

Fundamentals show that a myriad of individual and collective interests/benefits are at stake in markets. Individual interests/benefits of market agents precipitating market competition to gain as much ownership and wealth as possible and systemic or collective interests/benefits that, containing or channelling market competition, seek as much aggregate positive outcomes as possible.[52] Such interplay of interests/benefits between market agents and the system precipitates the dilemma of protecting competitors for market agents' sake or competition for system's sake. Protecting competitors would imply that law sets individual interests/benefits above collective interests/benefits; therefore, preventing others from competing would be anticompetitive, as it would restrict the materialization of individual interests/benefits in markets.

Conversely, if protecting competition, law would focus on markets and competition so

[52] By "system" I mean a legal abstraction that comprises everybody and nobody. It is therefore what encompasses collective and impersonal representations such as society, State, (unknown) consumers, (unknown) rivals, and so forth. In sum, expressions of common and collective interests/benefits in which (again) everybody and nobody is gathered and to whom law (market authority, in the case of Colombia) is deemed to represent before market economy. See on this regard Elizabeth Mertz, *The Language of Law School. Learning to "Think like a Lawyer"* (New York: Oxford University Press, 2007) at 132-133; see also Emilios Christodoulidis, *Law and Reflexive Politics* (Norwell: Kluwer, 1998) at 124-126; see also Keith Hart, "The Financial Crisis and the History of Money" in James Carrier ed., *A Handbook of Economic Anthropology* 2nd ed. (Northampton: Edward Elgar Publishing, 2012) at 629; see also Robert Kuttner, *Everything For Sale. The Virtues and Limits of Markets* (n.d.: University of Chicago Press, 2012) at 159-161.

that the legally protected right becomes the protection of collective interests/benefits.[53] Consequently, impeding others to compete would be anticompetitive whenever blocking individual interests/benefits affects the natural course of competition (thwarting as a result the aggregate positive outcomes of markets and competition). Colombia seems to choose competition over competitors heightening in that way competition as a supreme and absolute value in itself.[54] One must ask, however, how can one assert so? For three native reasons: first, whether intentionally or not, because of the prevailing macroeconomic meaning of competition law; second, for how law enforcement is framed; and third, because of the value given to law in the jurisdiction.

Regarding law's macroeconomic meaning; at first (and generally speaking) competition law oversees individual transactions impeding in such a way that anticompetitive market behaviours distort competition and market forces. So, one can think (once again, at first) that the core of competition law is nearer to microeconomics rather than to macroeconomics. The sum of transactions certainly produces aggregate effects and in that way there is a macroeconomic concern at stake. But this remains nevertheless a side effect. In the end, what matters are the individual transactions as they are what bring about the anticompetitive effect that impact individual and collective interests/benefits altogether. A microeconomic dimension therefore seems to be what should dominate competition law assessments (even when law is designed). So, one can think that the institutional framework of competition law, as well as the assessments that this makes, are closer to microeconomics than to macroeconomics.[55]

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[53] Regarding the dilemma between protecting competition or competitors see Fox Competition/Competitors, supra note 9; Fox sees two types of understandings. One is that of the US stand of protecting efficiency and, in that way, of protecting competition, and the other is what Fox (as well as some other authors) call the EU stand in which the primary goal is defending the competition process through consumer welfare (nuanced today with the so-called more economic approach). Finally, in Fox own words, there is a third stand (or second considering the resemblance that at the end the former two have between each other in protecting competition), namely, that of developing countries that, sacrificing competition, gives way to an approach that defends competitors. As is going to be mentioned below, Colombia is nevertheless closer to the first two streams of defending competition but not competitors (although [at least in theory] more prone in certain aspects to the EU stand than to the US stand). Regarding the more economic approach see Werner Becker & André Schmidt, *The "more economic approach" in EU merger control - a critical assessment,* Deutsche Bank, Working Paper Series - Research notes 21; see also Nicholas Forwood, ""The Commission's More Economic Approach" - Implications for the Role of the EU Courts, The Treatment of Economic Evidence and the Scope of Judicial Review", in Claus-Dieter Ehlermann & Mel Marquis eds., *European Competition law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford: Hart Publishing, 2011) 255. As regards the protection of competition instead of competitors in Colombia see Alfonso Miranda, "El Derecho de la Competencia en la Constitución de 1991" (2011) 7:7 Rev Derecho Competencia 43; see also Miranda & Gutierrez, supra note 19. Regarding examples of decisions issued by market authority on this regard (SIC by its initials in Spanish for Superintendence of Commerce and Industry - *Superintendencia de Industria y Comercio*) or of case law in general see SIC, 28 January 2002, Resuelve Recurso (2002) Resolución 01558; see SIC, n.d., Concepto 02065979; see also SIC, n.d., Concepto 02115366; see also Corte Constitucional, 24 March 2010, Acción de Inconstitucionalidad (2010) C-228-10 [C-228-10].

[54] See, for instance, SIC, 22 November 2004, Resuelve Recurso (2004) Resolución 28350 [SIC28350]; see also Consejo de Estado, 19 November 2009, Acción de Nulidad (2009) 2001-01261 [Consejo de Estado 2001-01261]; see also Consejo de Estado, 7 April 2011, Acción de Grupo (2011) 2000-00016 [Consejo de Estado 2000-00016]; see also Alfonso Miranda, "Origen y Evolución del Derecho de la Competencia en Colombia" (2011) 6:6 Rev Derecho Competencia 65[Miranda]; see also Miranda & Gutierrez, supra note 19.

[55] See Alan Devlin, "Antitrust in an Era of Market Failure" (2010) 33 Harv L & Pol'y Rev 1 [Devlin]; see also Kevin Marshall, "The Tension between Jurisprudential Economics and Microeconomics" in Kevin Marshall ed., *The Economics of Antitrust Injury and Firm-Specific Damages* (Tucson: Lawyers & Judges, 2008) 307 at 307, 310 and 315; see also William McEachern, *Microeconomics. A Contemporary Introduction* (South-Western, Cengage Learning, 2012) at 337-340.

In Colombia, however, there is an interesting coincidence from which one can perhaps infer an opposite trend and thus part of the reasoning of this premise. Laws addressing competition law issues have historically emerged during (or soon after) there have been structural macroeconomic reforms or dire macroeconomic junctures. This explains, for instance, why macroeconomic rhetoric usually dominates Congress when discussing competition law reforms and, similarly, why there is little (not saying no) evidence or tracks of microeconomic considerations when that happens. It seems as though Colombian competition law would not respond to the typical microeconomic concern of addressing competition and conflicts between competitors as an individual fact, but to waves of macroeconomic policy reforms in which microeconomics, although present, are not central.[56]

The importance of this is that conceiving competition law from macroeconomics or making it coincide at least with macroeconomic reforms reveals how embedded the function of law is with the need to protect aggregate outcomes of competition. The jurisdiction, in other words, appears to be seeking more the development of competition as a macroeconomic (and collective) aggregate than the deployment of competition as a microeconomic (individual)

[56] There is evidence in the federalist Colombia of mid-19th Century that prohibition of cartels were part of the police codes of some states or provinces (e.g. Cundinamarca and Antioquia) where there was an express prohibition of these kinds of associations in local marketplaces. This could have been a late reaction of what was called at the time as the *Landinazo*, which was, a massive bankruptcy that shocked Colombian economy affecting the country monetarily and leading to a grave inflationary crisis that could have triggered as a result a great number of cartelization processes. Later on, during 1888, Colombia enacted law 27 in what can be seen as the first direct prohibition of private monopolies in Colombia. Interesting enough, there were also at the time monetary concerns caused by the difficulties that the country was experiencing with its balance of payments. What is more, this contemporaneousness of macroeconomic crises (particularly of monetary nature) and legal developments addressing competition law issues continued during 20th and 21th Century. The first comprehensive competition regulation in Colombia, for instance, was enacted in 1959 (i.e. Law 155) and, as the government stated when was proposing it to the Congress, one of its goals was the development of protectionist measures through which local industry could be empowered before foreign corporations. Decades later, in 1992, the country transformed its economic model letting aside the protectionist Cepalian one for one of trade liberalization. One of the many measures taken at the time was what is considered today as the backbone of Colombian competition law: to wit, Decree 2153 of 1992 [D2153]. Later on, in 1996, aiming to promote the local industry and struggling with an outdated exchange rate band, Congress enacted Law 256 (L256) to update colombian private litigation regime of the Commercial Code. Quite recently, in 2008, in a period of exchange rate fluctuation and high speculation, the government passed a law introducing substantial reforms to D2153 with which it aimed to strength the control over corporate concentration and anticompetition empowering SIC as market authority. See on this regard Confederación Granadina, Estado de Cundinamarca, Tomo I, Imprenta de Echeverría Hermanos, at 98, (1859); see also Ley 27 21 February 1888 Art. 6; see also Mario Arango, *Judas Tadeo Landinez y la Primera Bancarrota Colombiana (1842)* (Medellín: Hombre Nuevo, 1981); see also Luis Wiesner, "Los Códigos Mercantiles en la Colombia decimonónica: la migración de un ideal igualitario" (1990) 7 Revista de Derecho Privado Universidad de Los Andes 77; see also Robert Means, "Codification in Latin America: The Colombian Commercial Code of 1853" (1973) 52:18 Tex L Rev 19; see also Juan Villamizar, "Alberto Lleras Camargo y el Proyecto Económico del Frente Nacional", (Paper delivered at 1er Congreso de Ciencia Política - Universidad de los Andes 2008), (2008) [unpublished] online: Congreso Ciencia Política Universidad de los Andes <http://congresocienciapolitica.uniandes.edu.co/>; see also Tomás Quevedo, *Crisis Económica en Colombia. Segundo Opúsculo* (Medellín: Imprenta del Departamento, 1888); see also Miranda, supra note 54; see also Carlos Diaz-Alejandro, *Foreign Trade Regimes and Economic Development: Colombia*, (New York: National Bureau of Economic Research, 1976) at 184; see also Esperanza Gomez, "La Encrucijada del Desarrollo Económico" (2006) 11 Revista Prospectiva 83; see also Hernando Agudelo, "Panorama de la Economía Colombiana" (1943) 5:15 Estudios de Derecho 359; see also Rudolf Hommes, "Regulation, Deregulation and Modernization in Colombia", Interamerican Development Bank - Working Paper 316, n.d. [Hommes]; see also, Peer Review, OECD-IDB, Competition Division, *Colombia - Peer Review of Competition Law and Policy*, n.d. (2009) at 7-9 [OECD Colombia]; see also Colombia, Congreso de la República, "Exposición de Motivos - Ley 155 de 1959" Anales No.311 (19 December 1959) [L155 Motives]; see also Colombia, Congreso de la República, "Exposición de Motivos - Proyecto de Ley 44 de 1994" Gaceta del Congreso No.144 (9 September 1994) [Exposición Motivos L256]; see also Colombia, Congreso de la República - Senado, "Exposición de Motivos - Proyecto de Ley 195 de 2007" Gaceta del Congreso No.169 (23 April 2008); see also Colombia, Congreso de la República - Cámara de Representantes, "Exposición de Motivos - Proyecto de Ley 195 de 1994" Gaceta del Congreso No.865 (26 November 2008); see also Ramón Madrinan, "De la Ley del Foro a los efectos: La aplicación de la Ley 1340 de 2009 en el espacio" (2010) 32 Con-Texto 48; see also Jorge Jaeckel & Claudia Montoya, "La nueva legislación de prácticas restrictivas de la competencia en Colombia - Consecuencias, derogatorias y nueva arquitectura procesal", Jaeckel & Montoya Abogados - Working Paper, n.d. [Jaeckel & Montoya].

phenomenon in which competitors could perhaps play a more relevant part shaping law.[57]

Regarding law enforcement; Colombia has two mechanisms of enforcement:[58] public litigation, that is, a set of administrative law rules which, enforced by market authority, aim to protect markets from anticompetition.[59] And private litigation, a set of commercial law rules that allow competitors affected by anticompetition to ask for compensation or remedies.[60] Although it seems as though both pursue different goals (i.e. public litigation protecting competition and private litigation protecting competitors), the fact is that both end up protecting competition whereas competitors' defence remains somewhat subordinated. The reason for this to happen is because of the boundaries over which both mechanisms have been framed.

In public litigation, for instance, market authority is entitled to enforce law to ban restrains of free competition or abuse of dominance. Either considering each one alone or together

[57] In addition, this excessive reliance on this (sort of) macroeconomic concern (or approach) may explain why, despite that Colombia has historically had competition law regimes or at least laws addressing competition law issues (dating back as mentioned to mid 19th Century), the institutional and legal development has begun just quite recently. What is more, the former can also explain why evidence of interests groups pressing for the existence of competition laws (or even for their enforcement I dare to say) was almost inexistent until recent years contrary to what happened in other jurisdictions (e.g. US or EU). This, once more, reinforces the idea that competition law in Colombia seems to be more a sort of inertial political commitment of Governments in an effort to make consistent the economic system with a liberal market economy than a claim or need of the market or of the industrial or private sector to shape or defend its position in markets. Hommes (former Minister of Finance who, as member of 1990 Colombian government, introduced a set of economic reforms to liberalize Colombian economy) gives an interesting recount on the circumstances that surrounded the enactment of D2153 explaining how its existence was more the result of the efforts of government technocrats and politicians of the time than of claims coming from interests groups in the market. According to Hommes, when the government was attempting to enact the current legal framework, corporations with monopolistic and oligopolistic interests in the economy did not opposed as fiercely as the government was expecting. The reason for such quietism (Hommes claims) was not because they agreed on the content of such reforms and much less because other groups were pushing for its enactment. It was, rather, because most of these conglomerates were more focused on the monetary and tax reforms that the Government was also proposing at the time than to the other reforms that were being introduced such as this of the D2153. In Fact, for Hommes, this was the main reason for which the law that was going to allow the Government to control conglomerates and market dominance went almost unnoticed and without so much criticism. See Hommes, Ibid. Regarding the role of interests groups in the configuration of competition law in EU see Gerber, supra note 5. Regarding interests groups and US antitrust see Sally Simpson, Cycles of Illegality: "Antitrust Violations in Corporate America" (1987) 65:4 Social Forces 943; see also William Page, "Ideological Conflicts and the Origins of Antitrust Policy" (1991) 66:1 Tul L Rev 1 [Page]; see also Thomas Dilorenzo, "The Origins of Antitrust: An Interest-Group Perspective" (1985) 5:1 Int'l Rev L & Econ 73.

[58] Although, as noted, there are other mechanisms of enforcement, I do not include them in this document because they have emerged with the time more as alternative ways to the official two (i.e. public and private litigation) than as authentic or direct means within Colombian competition law. The reason for the emergence of these alternative mechanisms, as I explain latter on, stems precisely from the lack of empowerment of other market agents within Colombian competition law.

[59] I will go over the role of market authority in the second section of this chapter, but, for the nonce, it is important to consider the following two things: first, market authority in Colombia had a diffused power till 2009 reforms in the sense that the enforcement and operability of the law depended more on the type of industry than on the fact of the enforcement as such. Consequently, Colombia had (again, before 2009) as many market authorities as sectors or industries regulated under the scheme proposed by 1991 Constitution (e.g. banking, health, public utilities, aviation, etc.). With the time (after 2009 Reforms) SIC has been empowered more and more to act as a market authority in most of the industries and economic sectors. Second, public litigation law has a special status in the jurisdiction (quite sui generis indeed). So, although D2153 was enacted by the government and in such a way it could be seen at first as a norm with a lower rank in the jurisdiction (if one is going to compare it with a law enacted by the Congress, for instance), its enactment was made through a special faculty given to the government by the Constitution in Art.20 Provisional. As a result, D2153 has, from a practical point of view, a particular nature in the jurisdiction. For, although not being a law and not being a decree, it has nevertheless the same status of a law enacted by the Congress. Regarding D2153's nature see Corte Constitucional, 19 March 1993, Acción de Inconstitucionalidad (1993) Auto A-001-93; see also Consejo de Estado, 7 December 1993, Acción de Nulidad (1993) 1993-N2335; see also Consejo de Estado, 15 April 2010, Conflicto de Competencias (2010) 2010-00018; see al so OECD, Ibid, at 7-9. Regarding the 2009 reforms see Jaeckel & Montoya, supra note 56; see also Emilio Archila, "Novedades de la Ley 1340 de 2009 para el Régimen de la Protección de la Competencia" (2010) 32 Con-texto 7 [Archila].

[60] The legal framework of private litigation is essentially L256. In private litigation, however, the narrative of anticompetition is unfair competition following, in part, Paris Covenant and, in some way, EU competition law, particularly Spanish competition law. See Miranda, supra note 54 at 130. On unfair competition and an interesting historical track on this regard see also Charles Grove, "Efforts to Define Unfair Competition" (1919) 29:1 Y L J 1.

as a single mandate, both make the jurisdiction protect competition but not competitors.[61] Now, in private litigation, anticompetition happens whenever market behaviours break values such as commercial mores, good faith, and honest practices, but, more importantly, when they distort freedom of buyers and consumers and markets' functionality.[62] Taking the first values solely, one might think that law is just framing business ethics (i.e. creating behavioural standards for market agents to protect markets and competition). Yet, articulating these with the last two (i.e. freedom of buyers/consumers and markets' functionality), one could arrive at a different conclusion. The law is actually saying that, in tandem with standards of good behaviour and business ethics, anticompetition happens whenever competition (as a systemic outcome but not as an individual entitlement) is threatened. From this, one can venture to say that perhaps law does not defend the right to compete of market agents (individually), but defends it as part of what is truly the main concern of law; i.e. the collective interests/benefits that (systemically) underpin markets and competition.

The last is the value of law.[63] Law in Colombia is a historical by-product in which a (civilian) binarism and a (Spanish) legalism converge.[64] Thus, law embodies rationality and a

[61] These boundaries through which law frames the intervention of market authority work in tandem with the goals of Colombian competition law in public litigation: i.e. ensuring the free participation in markets, consumer's welfare, and economic efficiency (D2153 Art2.1 and 44). Now, before 2009 reforms, public litigation was considered to be articulated through L155 where it was specifically stated that the purpose of market authority was banning market behaviours aiming to limit competition or distorting pricing (L155 Art.1). It is quite debatable today if L155 remains indeed in force in Colombia after 2009 reforms. But, even if one assumes that L155 is still in effect, the conclusion would be the same as, by preventing the limitation of competition or the distortion of pricing, public litigation would end up irremediably conditioned to defend competition and not competitors. This is so because in such a case (i.e. if the boundaries of public litigation are still those of L155) anticompetition would be understood either as a mechanism to impede that unknown competitors be prevented from entering in markets (i.e., in terms of L155, "limiting competition") or as a way to affect the configuration of prices in the economy for the sake of (again) unknown consumers and even of unknown competitors (which is framed by L155 as "distortion of pricing"). Regarding the boundaries of market authority and the protection of competition see Decreto 2153, Diario Oficial 40.704, 21 December 1992 [D2153] Arts. 2.1. and 44; see also Ley 155, Diario Oficial 30.138, 24 December 1960 [L155] at Art.1; see also Consejo de Estado 2001-01261, supra note 54; see also SIC, 2000, Concepto 15958; see also SIC, 2002, Concepto 2048515; see also SIC, 30 December 2003, Apertura de Investigación (2003) Resolución 37348 [SIC37348]; see also SIC, 15 November 2002, Apertura de Investigación (2002) Resolución 36191 [SIC36191]; see also SIC, 4 December 2008, Imponer sanción (2008) Resolución 51694 [SIC51694]. As regards L155 and 2009 reforms see Jaeckel & Montoya, supra note 56.

[62] See Ley 256, Diario Oficial 42.692, 18 January 1996 [L256] Art.7.

[63] As it happens in French with *droit* and *loi,* there is in Spanish the same distinction between *derecho* and *ley*. When referring to law here, I am referring thus to the French *loi*, that is, to the Spanish *ley*.

[64] Tracking back the most probable influences that explain the existence of this binary/legalistic insight, one could venture to think on two possible sources: first, a cultural and social construct shaped by a legalistic tradition of Colonial Spain in which law is seen as the supreme authority that must support almost every aspect of social and cultural life thereby everything becomes explained through the boundaries of what law sees as socially and culturally acceptable (with no possibility of interpretation or nuance whatsoever). Second, a legal and institutional construct determined by the influence of 19th Century French civil code and administrative law. In this way, the legal system and the institutional framework within which law operates (e.g. the attitudes, concerns, decision making, and behaviours of law enforcers) are determined by a mix of insights between the binarism of the Colonial Spanish legal tradition (a relationship of domination expressed in terms of dominator/dominated) and the binarism of French Civil tradition (a relationship of rationality and materialized in a confrontation of rationality/irrationality). Now, the reason for having Colombia such a mixture is (in short) because after its independence from Spain (in the first half of 19th Century) and during the consolidation of its institutional building (which took part in late 19th Century), Colombia continued being socially and culturally ascribed in the Spanish Colony's insight and legally and institutionally framed within the French-Civil-Code/Administrative-Law's insight. Consequently, while society and culture have been structured from a relationship of domination (in some instances even of acculturation), law and its institutional framework have been empowered through rationality (in some cases taking form through rationality/formality and irrationality/informality). For civilian binarism in Colombia see Fernando Betancourt-Serna, *La Recepción del Derecho Romano en Colombia. SAEC XVIII. Fuentes Codicológicas Jurídicas* (Salamanca, Universidad de Sevilla, 2007) at 450-453; see also David Alfaro, Nelson Hernández, Adelaida Ibarra, et al, "La legitimidad en el derecho colombiano" (2007-2009) 8 Justicia Juris 51 at 57. Regarding Spanish Legalism see Miguel Malagón, *La Ciencia de la Policía: Una Introducción Histórica al*

supreme source of authority in which, as a result, nuance cannot exist whatsoever. Competition law (in public and private litigation) for this reason becomes a single body of norms in which everything that is within which law entails is rational and therefore an absolute mandate. Consequently, everything that is out of it is irrational and ruled by disobedience. Law becomes, in this way, the main force that governs markets and therefore in the main reason for avoiding favouritism or special treatment.

Now, with this last I do not mean that Colombian competition law is not structured over the universal negative formula mentioned in the introduction, nor that law instructs markets and market agents over what to do. Of course, from a markets' perspective, the driving force is supply and demand and that is precisely what law defends when heightening competition as an absolute value in itself. What I mean, instead, is that from a legal and institutional perspective, law enforcers are always bounded by what law says is anticompetitive and, by default, to what law assumes should be competitive.

This binary understanding of anticompetition/competition entails an additional effect in practice. Law enforcers are always obliged to keep objective stands (as opposed to subjective ones) when grappling with individual interests/benefits and more so when deciding conflicts between them. In a way, what law says is anticompetitive cannot become competitive. It is, as such, a legal construction (extraneous and distant from individuality and from peculiarities of individual interaction and market's interplay) that ultimately reinforces the protection of collective interests/benefits as opposed to individual ones (hence the need of placing competition over competitors).

Now, considering this binary/legalistic formula, the former leads one to an additional reflection; third categories cannot exist and, if they do, they must entail a transgression of logics or a disobedience of authority. In other words, the excluded third is nonexistent or irrelevant as markets pertain either to all or to its parts, to collective interests/benefits or to individual ones, to the system or to markets agents, to competition or to non-competition. What is more, adding into this binary/legalistic matrix a macroeconomic perspective such as the one mentioned, the idea that anticompetition is an irrational manifestation in markets and even a subversive one (as it jeopardizes countries macroeconomic stability and thus collective interests/benefits) would be just reinforced. In fact, one could even say that the protection of competitors is explained not from the need of protecting individual rights as such (e.g. the right to compete) but from the need to protect

Derecho Administrativo Colombiano (Doctorate Thesis, Universidad Complutense de Madrid, 2006) [unpublished] [Malagón]; see also Rafael Gómez, "Fundamentos históricos del espíritu legalista colombiano" (1964) 187 Revista de la Academia Colombiana de Jurisprudencia 30; see also Ernesto Pinilla, "Estado Social de Derecho y debido proceso sustantivo integral. Su viabilidad jurídico-política" (2010) 27 Pensamiento Jurídico 15; see also Ana Benito, "Poder Judicial, responsabilidad legal y transición a la democracia en España" (2009) 49:1 Foro Internacional 163. See as well on similar thoughts for binarism and legalism Niklas Luhmann, *Poder* (México: Universidad Iberoamericana, 2005) at 45, 47-49, and 60-67.

the system that is what eventually gives shape to individual rights of market agents.[65]

(b) Formal equality

The competition/competitor dilemma is not the sole quandary that competition law faces because of fundamentals. There is an additional predicament at stake: clashes in market competition make some competitors win and others lose. In other words, whilst some become rich, others become poor. So, albeit market competition produces wealth, it also brings inequalities and disparities.[66] Then, how can people be willing to compete if they can lose? Paradoxically enough, the answer is how much uncertainty competition law can produce.[67] And what I mean by uncertainty is that competition law must assure that knowing who the loser will be remains unknown and at market agents peril. Winning or losing should therefore be a matter of possibility but not of certainty. Hence, due to competition law, market agents are forced to believe that everybody can win as nobody knows who can lose (for sure). But, how is this achieved? By obliging everybody to have the same status, at first, structuring law around a formal dimension of equality wherein everyone is deemed to be quantitatively equal in markets before law.[68]

The implications of this are somehow evident. There cannot be differences among competitors so that everyone can access markets to compete. In this way, law legitimizes the fact that differential treatments and subjective stands are out of markets' logics, out of law's logics, and by the same token prohibited. An assumption that can perhaps not be so difficult for other disciplines but that is nonetheless challenging for law as it would entail that in post modernity

[65] Regarding the importance of collective interests/benefits in markets (although with a non-implicit and perhaps indirect reference of this secondary role of individual rights) see SIC, 2011, Concepto 03018195; see also SIC, 2011, Concepto 03010862; see also SIC, 2011, Concepto 02082489; see also SIC, 2002, Concepto 02037355; see also Consejo de Estado, 17 February 2011, Acción de Nulidad (2011) 2006-00231; see also Consejo de Estado, 25 August 2010, Acción de Nulidad (2010) 2006-00184.

[66] See David Brady, *Rich Democracies, poor people: How politics explain poverty* (New York: Oxford university Press, 2009) at 94-98 and 121-126; see also Cass Sunstein, *Legal Reasoning and Politica Conflict* (New York: Oxford University Press, 1996) at 118-119; see also Susan Grant & Chris Vidler, *Economics in Context* (Oxford: Heinemann, 2000) at 103-105.

[67] See Alexander Fluckiger, "The Ambiguous Principle of the Clarity of Law", in Anne Wagner & Sophie Cacciaguidi-Fahy eds. *Obscuirity and Clarity in the Law. Prospects and Challenges* (Burlington: Ashgate, 2008) 9 at 9-11; see also Deborah Cao, "Is the Chinese Legal Language more Ambiguous and Vaguer?" in Anne Wagner & Sophie Cacciaguidi-Fahy eds. *Obscuirity and Clarity in the Law. Prospects and Challenges* (Burlington: Ashgate, 2008)109 at 124; see also Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (n.d.: Harvard University Press, 2006) at 5; see also von Mises, supra note 46 at 291.

[68] See Hughes, supra note 31 at 282-291; in refernce to US Antitrust, Hughes gives an interesting account with respect to competition law (or antitrust laws) and formal equality saying the following:

> "The traditional view prevailed. Both the Sherman Act and the legislation of 1914 represent victories for those who saw business rivalry as an unpredictable contest among formally equal competitors and defeat for those who saw in the results of competition the inevitable outcome of an evolutionary process. As a result, the antitrust laws define fair competition as the touchstone of legality and seek to preserve formal equality among competitors as the means by which fair competition may be preserved." [Footnotes ommited]

See also Spencer Weber, "Market Talk: Competition Policy in America" (1997) 22:2 Law & Soc Inquiry 435 [Weber]; see also SIC, 2002, Concepto 05099410; see also Gerber, supra note 5 at 37; see also Carmen Cerda, "Los principios constitucionales de igualdad de trato y de prohibición de la discriminación: un intento de delimitación" (2005) Cuadernos 50-51 Constitucionales 193 at 196.

only similarity can be a source of rights.[69] Moreover, this sort of people's formal equalization in markets implies that the system (i.e. collective interests/benefits) must become the sole beneficiary of market competition (at large and at least in theory). Which all in all entails that this second premise ends up embedded with competition as general value making the system as a result exclusively addressed to protect competition but not competitors. But, again, Colombian law does not seem to expressly acknowledge this second premise. So, how can one conclude that is in fact part of the jurisdiction? As previously mentioned, one can conclude this based on three native reasons: first, because of the logics that the first premise imposes, second for a particular concern of pricing, and third for the connotation that the binary/legalistic understanding gives to enforcement of law in Colombia.

The first is because formal equality seems to be the necessary step after structuring the first premise; indeed, competition as a general value is built upon the idea that if competition follows its natural course, it will consequentially end up favouring collective interests/benefits and by default individual interests/benefits. For, if markets keep their natural course, the sum of individual efforts would provoke aggregate positive outcomes. Conversely, if distorting markets (not only allowing anticompetition but also awarding differential treatments that unbalance competitors), aggregate outcomes would not happen or at least they would not as the system visualizes they should (i.e. because of the natural and inartificial flow of markets and competition). Hence, law is intended not only to impede anticompetition, but also to avoid any sort of difference among competitors. In other words, law ought to impede differences coming from anticompetition and similarly restrain itself from becoming the source of differentiation. In fact, one can even state that the sole role of law is acknowledging and perhaps monitoring to ensure that differences arising in markets be the result of competition's natural flow and not of artificiality or favouritisms.

The second is that competition law in Colombia seems articulated around a prevailing concern for pricing.[70] From its set of values to market-authority/market-agents boundaries, the legal framework is addressed to letting pricing acting upon the economic system. The importance

[69] See, for instance, Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a "Post socialist" Age" online: (1995) 1:212 New Left Review <http://newleftreview.org/> [Fraser].

[70] There are two different ways to approach this notion of pricing as the central concern of competition law. One way is to understand it from the perspective of anticompetition in the sense that anticompetitive market behaviours can only revolve around pricing. In other words, that anticompetition only happens when market behaviours affect pricing. This of course does not happen in Colombia and it is not the approach or understanding that we want to give to this notion of pricing. There are indeed in Colombia law different ways to understand anticompetition and to bring an action for anticompetition and, of course, not all of them focus on pricing (e.g. affectation of business reputation, misleading clientele through acts of confusion or imitation, unilateral refusals to deal, and so forth [all these of course depending if one is before public or private litigation]). Now, a completely different way to understand pricing is saying that law has a concern for pricing as a structural element of market economy. Moreover, that is because of the existence of this pricing concern that law has been pushed into a formal dimension of equality. In this second premise, when I say that law is structured around pricing, my goal is not referring to anticompetition but emphasising over the importance that competition law in Colombia seems to give to price as the sole mechanism to justify unbalances in a market economy and, therefore, as the sole mechanism that can justify the emergence of difference among market agents.

of this is that placing pricing as a (and in some instances "the") main reason suggests that distortions provoked either by market agents or by the law (these last as a result of differential treatments) would create inner contradictions in markets that, for the same reason, should be avoided. Why? Because artificiality or differential treatments, whether legal or illegal, produce individual advantages that end up affecting pricing and, if that happens, the competition process is prevented from reflecting what markets are really demanding for or rejecting from (i.e. demand and supply), which furthermore impedes that collective interests/benefits end up favoured (the core of these first two premises). So, in Colombia, competition cannot be distorted in benefit of individual interests/benefits as pricing cannot be diverted through special treatments for system's coherence. Once again, law seems thus to be forced to impede that differences that do not come from markets' natural flow arise (i.e. from inartificial pricing).[71]

The third is (again) the binary/legalistic understanding of the jurisdiction and how this shapes law enforcement. Apart from explaining law's embodiment of rationality and authority in the first premise, the binary/legalistic approach also explains the immovable and almost static nature of Colombian competition law. In Colombia, due to this binarism/legalism of the jurisdiction, the system cannot shape law autonomously. For, one can say that the only one entitled to do so is the legislator as it is seen as a sort of truth bearer and therefore, in theory, the holder of rationality and authority. Consequently, neither market authority, nor judges, and much less competitors can actually shape competition law. This gives rise to a stagnant and changeless system in which nuance (again) cannot exist whatsoever. One might wonder, however, how such a binary/legalistic approach conditions Colombian law to seeing market agents as quantitatively equal?

As noted above, this is because it makes that competition law sees markets through the lens of either competition or anticompetition. Let me explain this a little bit. In Colombia, market behaviours are either competitive or anticompetitive. There is not a third category for competition/anticompetition. So, whilst competition mirrors law's rationality and authority (so it is deemed to produce competitive outcomes), anticompetition mirrors irrationality and disobedience (for it is deemed to impede beneficial [and appropriate] outcomes for markets and market agents). In binary terms, competition produces rational and legal similarity and equability whereas anticompetition induces to (irrational and illegal) dissimilarity and inequality.

[71] This idea of formal equality and the impediment for creating differences does not prevent law from restricting the entrance to a certain industries or economic activities (e.g. banking, social utilities, aviation, and so forth). Indeed, in Colombia, as it happens in other jurisdictions, most of these industries are subject to a previous compliance of legal, technical, and economic requirements that of course not all people can meet. What is interesting, however, is that the reason for treating people differently in such cases is precisely the same need of protecting collective interests/benefits of markets and society that underlies competition law when setting competition as general value. See, for instance, Corte Constitucional, 16 March 2011, Acción de Inconstitucionalidad (2011) C-186-11; Corte Constitucional, 6 April 2011, Acción de Inconstitucionalidad (2011) C-263-11 [C-263-11]; see also Corte Constitucional, 21 April 2009, Acción de Inconstitucionalidad (1997) C-287-09.

Consequently, if difference is seen as irrational and unlawful, what is not equal, regardless whether it represents competition or not, is either illegal or does not exist.[72]

Such a binary categorization of markets' reality is manifested in both mechanisms of enforcement. Indeed, the institutional framework in private and public litigation is structured in very similar ways: i.e. stating general prohibitions and then listing anticompetitive behaviours deducted from such general prohibitions. What Colombian law does through this general-prohibition/listing-prohibitions formula is no different than creating rigid hermeneutic borders so that market authority and judges cannot go beyond what law says should be deemed competitive or anticompetitive.[73] More revealing perhaps, case law seems to confirm that such borders are respected most of the times so that, in a great number of cases, market authority and judges (either in private or public litigation) have grounded their decisions explicitly on what law lists as anticompetitive.[74] As a matter of fact, one could even think that, in Colombian, if law does not say that a certain practice is anticompetitive, then it is competitive.[75]

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[72] Regarding similar thoughts on this binary understanding of competition/anticompetition see John Barry, *The politics of Actually Existing Unsustainability: Human Flourishing in a Climate-Changed, Carbon-Constrained World* (New York: Oxford University Press, 2012) at 124-125; see also Jacobson, supra note 4 at 287; see also Ralf Boscheck, "Competitive advantage and the regulation of dominant firms", in Ralf Boscheck, Christine Batruch, Stewart Hamilton, et al eds., *Strategies, Markets and Governance. Exploring commercial and regulatory agendas* (New York: Cambridge University Press, 2008) 35 at 40; see also Rudolph Peritz, "The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument" (1984) 6 Duke L J 1205; see also Tribunal Administrativo del Tolima, 22 January 2010, Acción de Nulidad (2010) 2008-00006; see also Corte Constitucional, 27 September 2007, Acción de Tutela (2007) T-798-07; see also SIC, 22 January 2010, Acción de Nulidad (2010) 2008-00006; see also SIC, 25 March 2008, Cierre de Investigación (2008) Resolución 8625; see also SIC, 27 February 2010, Imponer Sanción (2008) Resolución 6839 [SIC6839].

[73] Recent legal developments articulate a sort of rule of precedent (in part, taking as reference what Colombian Constitutional Court has called as "legitimate trust" [from the Spanish *Confianza Legitima*]). This legitimate trust derives from the principle of good faith and it obliges the State to decide similar cases in the same way as it decided in the past. This entails, in public litigation, that market authority is somewhat bounded to its previous decisions. One can perhaps think that such a mechanism will be enough to introduce in the country the possibility for market authority to shape competition law autonomously (i.e. without passing through the legislator). However, so far, it seems that the sole institution able to do so has been the Constitutional Court. Usually seen as the highest and most powerful Court of Colombian judiciary, the Constitutional Court has dared to challenge the binary/legalistic insight in many cases. Yet, what one at first could interpret as (a sort of) institutional audacity, it is at the end the same narrative of domination and rationality of the binary/legalistic approach since (emanating from the Constitution itself) the Constitutional Court is responsible for protecting and enforcing the Constitution. Thereby, despite the bewilderment and even the anger that for some its decisions may produce, the case law of the Court is nevertheless coated with the same constructs of authority and rationality that would certainly not protect a bureaucrat of the market authority, or a first instance judge, or even a lower court who are still bounded and embedded within the binary/legalistic logics of the jurisdiction (and even of society). It is in my view quite doubtful that this new tool empowers the institutional framework to adjust competition law without the need of legislator's intervention. Regarding this sort of rule of precedent for competition law see Ingrid Ortiz, "El precedente administrativo en el ámbito del derecho de la competencia: Comentario a la sentencia de la Corte Constitucional C-537 de 2010" (2010) 9:2 e-Mercatoria 1.

[74] For instance, see Consejo de Estado, 29 November 1947, Acción de Nulidad (1947) n.d.; see also Consejo de Estado, 1 November 1967, Acción de Nulidad (1967) 222; see also Consejo de Estado 2001-01261, supra note 54; see also SIC, 28 December 2007, Proceso Abreviado de Competencia Desleal (2007) Sentencia 11; see also SIC, 25 January 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 2; see also SIC, 3 March 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 3 [SIC sentencia 3]; see also SIC, 29 June 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 9; see also SIC, 13 April 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 7 [SIC Sentencia 7]; see also SIC, 6 April 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 5; see also SIC, 19 April 2011, Proceso Abreviado de Competencia Desleal (2011) Sentencia 19; see also SIC, 25 January2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 2; see also SIC, 1 April 2011, Proceso Abreviado de Competencia Desleal (2011) Sentencia 18; see also SIC, 23 March 2011, Proceso Abreviado de Competencia Desleal (2011) Sentencia 16 [SIC Sentencia 16]; see also SIC37348, supra note 61; see also SIC36191, supra note 61; see also SIC, 5 November 2009, Apertura de Investigación (2009) Resolución 56800; see also SIC6839, supra note 72; see also SIC, 30 December 2009, Resuelve Recurso (2009) Resolución 69716; see also SIC, 20 March 2002, Imponer Sanción (2002) Resolución 8732; see also SIC, 21 March 2001, Imponer Sanción (2001) Resolución 8233; see also SIC, 25 November 2009, Apertura de Investigación (2009) Resolución 60145; see also SIC, 28 March 2003, Imponer Sanción (2003) Resolución 8310; see also SIC, 5 April 2006, Resuelve Recurso (2006) Resolución 8454; see also SIC, 25 October 2001, Imponer Sanción (2001) Resolución 34397; see also SIC, 15 March 2002, Imponer Sanción (2002) Resolución 7950 [SIC Resolución 7950]; see also SIC, 15 May 2002, Resuelve Recurso

This point is nevertheless debatable in Colombia, particularly in public litigation. Some authors seem to suggest that Colombian law replicates logics of rule-of-reason/rule-per-se systems so that Colombian law creates a rule of reason system in the general prohibition and a rule per se system in the anticompetitive market behaviours list.[76] Other authors say that Colombia is only a rule of reason system and that the anticompetitive market behaviours list just guides market authority and judges.[77] The problem with both positions, however, is that they give to the jurisdiction and to Colombian competition law a nature and scope that none of them have and that they would hardly have if competition law continues to be seen in binary/legalistic terms.

Colombian competition law does not have a native rule-of-reason/rule-per-se system of any sort simply because the logics of the jurisdiction are not consistent with the logics of such a system. Rule-of-reason/rule-per-se implies flexible institutional frameworks in which market authority and judges are to some extent empowered to adapt law to the scope of competition or anticompetition.[78] But what happens in Colombia is quite the contrary. As previously noted, the jurisdiction lacks mechanisms for creating nuances for competition and still more for anticompetition.[79] The legal system itself is thus conditioned to always be understood within the

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(2002) Resolución 14540; see also SIC, 15 May 2002, Resuelve Recurso (2002) Resolución 14539; see also SIC, 6 August 2002, Imponer Sanción (2002) Resolución 25402; see also SIC51694, supra note 61; see also Camilo Vallejo, "La inconveniencia de la regla per se frente a la economía antropológica y la Constitución del 91" (2009) 6 Univ Estud 9 [Vallejo].

[75] See OECD Colombia, supra note 56 at 8. Regarding this rigidity in which Colombian competition law is embedded, one of the few cases in which judges attempted to challenge the legalistic approach (not even the binary one) caused quite a commotion in the country particularly amidst authors and lawyers who severely criticized the trial judge. The case is known in the local milieu as ANDEVIP. ANDEVIP was an organization that had unionized security companies. ANDEVIP and its affiliates decided to fix prices supporting their decision in what the Superintendence of Security (a government agency) had previously ordered to security companies the price for their services should be. SIC fined ANDEVIP as it considered that there was a price fixing agreement (market behaviour deemed anticompetitive by Colombian competition law). The trial judge (*Tribunal Administrativo de Cundinamarca*) overruled SIC's decision saying that market authority had not demonstrated whether ANDEVIP had had the intention of deploying the anticompetitive market behaviour. The decision of the trial judge was subsequently overruled by the State Council (*Consejo de Estado* in Spanish; i.e. the Administrative Court of Appeal) ruling that under Colombian competition law it is not necessary to demonstrate the intent of the wrongdoer but only the deployment of a market behaviour previously considered anticompetitive by the law (in other words, returning to the binary/legalistic approach of the jurisdiction). The decision of the trial judge has indeed some inconsistencies and errors of appreciation and interpretation, yet, reading the decision between lines, it is quite interesting seeing how the trial judge was actually trying to introduce a mechanism of adaptation to make flexible the rigid binary categorization of legality/illegality or competition/anticompetition. See Tribunal Administrativo de Cundinamarca, 27 November 2003, Acción de Nulidad (2003) 2001-00364; see also Consejo de Estado, 28 January 2010, Acción de Nulidad (2010) 2001-00364; see also Rafael Tamayo, "Fundamentos económicos para la aplicación de las normas de libre competencia y el caso ANDEVIP y la existencia de prácticas restrictivas absolutas en Colombia" (2010) 6:6 Rev Derecho Competencia 145 [Tamayo].

[76] See, for instance, Alfonso Miranda, "El Régimen General de la Libre Competencia", (Paper delivered at Symposium 2ndo Congreso Iberoamericano de Derecho Empresarial 1997), (1997) [unpublished] online: Cedec - Universidad Javeriana <http://www.javeriana.edu.co > [Miranda Régimen General de la Libre Competencia]; see also Miranda, supra note 54; see also Luis Toledo & Jaime Posada, "Un nuevo entendimiento de los sistemas de análisis del derecho de la competencia a la luz de una concepción jurisprudencial del derecho administrativo de policía" (2011) 8 Univ Estud 159 [Toledo & Posada]; see also OECD Colombia, supra note 56 at 19-20.

[77] See Toledo & Posada, Ibid; see also OECD Colombia, supra note 56 at 19-20.

[78] Regarding rule-of-reason/rule-per-se systems see Lawrence Hill, "Per Se Versus Rule of Reason: An Analysis" (1970) 28:2 Econ Soc Rev 207; see also Phillip Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* 4th ed. (New York: Kluwer, 2011) at 15.01-ff; see also Various, "The Antitrust Marathon" (2007) 20:2 Loy L Rev at 124, 125, 140, 160, 168, 174, and 181-183; see also Michelle Grillo, "The Theory and Practice of Antirust: A perspective in the History of Economic Ideas" in Piero Bini & Gianfranco Tusset eds., *Theory and Practice of Economic Policy. Tradition and Change* (Milan: Franco Angeli, 2008) at 58; see also, Report, OECD, Competition Committee-Policy Round Table, *Judicial Enforcement of Competition law*, Doc No OECD/GD(97)200 (1996) at 52, 115-116, 172, and 216.

[79] This is the case, for instance, of resale price maintenance and particularly of intra-band cases; see on this regard Alberto Zuleta, "La regulación sobre mantenimiento de precios de reventa: el próximo capítulo del derecho colombiano de la competencia"

same structure provided by the law. As mentioned, in a sense, anticompetition and competition happens in Colombia because the law says so but not because market authority or judges accommodate with the time the law in accordance with markets' reality.[80]

What I mean is that, contrary to other jurisdictions, there are in Colombia no mechanisms to adapt competition law to different insights or to allow other interpretations of what competition or anticompetition should legally be when market behaviours are in irremediable grey areas. Rather, competition law in Colombia seems to see markets (and thus market behaviours) in black or white. It is either competitive or anticompetitive. An effect that, as mentioned, is a direct consequence of binary forms and legalism that, acting upon the jurisdiction, condition the system to see only two possibilities, either as competitive (and therefore producing similarities that reinforce the fact that everybody is equal to compete and that what matters is the system not individuals), or anticompetitive and out of competition law's rationale (as it produces dissimilarities rejecting the equalization that law aims to reproduce in markets and market agents).

(c) Competition on the merits

A picture of this classical approach at this point would show a competition law regime that, although defending competition (not competitors), nevertheless needs to equate market agents indistinctively aiming that competition dynamics unfold naturally. A system that, furthermore, seeks to prevent that artificiality be deployed in detriment of markets (as an abstract "all") and of market agents (as a concrete "particle"). But the picture would nonetheless remain incomplete as favouring competition does not imply that all competitors are entitled for the same results just for competing, nor that can they expect to continue being equals during competition, and much less that they await for the same outcomes. The fact is that competition is and will always be a matter of winning or losing.[81] Thereby, there will always be people obtaining something and others being deprived from something. Indeed, it is inevitable that market competition ends up provoking difference and inequality. But, how to explain difference and inequality and, more so, the advantages that some obtained in markets and competition if for law

(2011) 7:7 Rev Derecho Competencia 71; see also Gabriel Ibarra, "De los precios de reventa y su aplicación en Colombia" (12 July 2012) online: Ambito Juridico <http://w ww.ambitojuridico.com>.

[80] Continuing on the flexibility of the judiciary as a presupposition for rule-of-reason/rule-per-se system and the shape of competition law by judges see Phillip Areeda, "Laws and Public Utility Regulation" (1972) 3:1 Bell J Econ 42 at 48; see also Richard Arnold, "The Supreme Court and the Antitrust laws 1953-1967" (1967) 34 Antitrust L J 2; see also Jerrold van Cise, "The future of per se in Antitrust Law" (1964) 50:7 Va L Rev 1165; see also Lee Loevinger, "The Rule of Reason in Antitrust Law" (1964) 50:1 Va L Rev 23.

[81] In a way, I bring here Filley's insight on winning/losing as a process of (absolute) rivalry and contention as opposed to problem/solving. See on Filley's insight and on critics towards this idea of winning/losing in competition Jay Newman, *Competition in Religious Life* (Waterloo: Wilfrid Laurier University Press, 1989) at 20-21; see also Andriychuk Competition/Consumers, supra note 11 at 80.

what matters is competition (not competitors) and everybody is (formally) equal?

It is in this point where competition law seems to appeal to common-sense.[82] Thus, if before contending in markets people did not know who the winner or loser would be and law ensured some degree of uncertainty by impeding that artificial favours exist, the fact that someone had won is either because s/he cheated or because s/he performed better than others. If it is for cheating, the conclusion is somehow evident. Victory will be bogus, as it was obtained through artificial advantages that distorted and imbalanced both markets and competition. The win will thus be unlawful and the legal system must outlaw it. Conversely, if the reason was because of a better performance, without the help of artificiality whatsoever, the victory would be deemed the result of markets dynamics (i.e. of markets' natural flow) and consequently the legal system should consider it fair and competitive.[83] So, in other words, the sole way for winning fairly and legally (i.e. without distorting or in any case unbalancing competition and markets' logics) is by performing better than others; to wit, by competing on the merits.[84]

Although this could be the reasoning behind this third premise and the idea of merits in market economy, the concept competition on the merits as such is nonetheless not commonly used in such a sense. It more generally refers to the mechanisms or ways of interpretation to

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[82] See Jacinda Swanson, "Economic Common Sense and the Depolitization of the Economic" (2008) 61:1 Polit Res Quart 56 at 57. The use of the word common-sense here has a closed connection with the way on how Gramsci uses it and that Swanson explains it as follows:

> "In their influential book The American Ethos, Herbert McClosky and John Zaller (1984) argued that Americans are committed to both democracy and capitalism and that these are the core values in American political culture. In addition to evidence provided by academic research and public opinion polls, public discourse and cultural representations constantly reveal that, for the vast majority of citizens, U.S.-style market capitalism is not only the best economic system in the world, but also an integral aspect, or even a precondition, of democracy. The virtues of market capitalism and its compatibility with democracy are thus clearly deeply embedded forms of what Gramsci (1997, 323-33, 419) called common sense, those ideas that are taken-for granted or un questioned in society." [Footnotes omitted]

[83] In its context the difference between fair and competitive is just semantics in Colombian competition law as the practical effect of both ends up being the same; i.e. judging anticompetitive market behaviours. So, public litigation outlaws anticompetitive market behaviours declaring them as a practice that restrains competition (from the Spanish *práctica restrictiva de la competencia*). Private litigation, on the other hand, appeals to the narratives of unfairness or disloyalty (from the Spanish *competencia desleal*). But, as noted, in practical terms both lead to a declaration of anticompetition. There are of course different effects and scopes depending if one is before public litigation or private litigation. So, while in public litigation declaring anticompetition (non-competitiveness) leads to fine wrongdoers and banned the market behaviour, in private litigation anticompetition (or unfairness) means compensating victims. Despite the enormous effort that (in my view) local authors, market authority, and judiciary usually makes to differentiate one from the other (restraining competition in public litigation from unfair competition of private litigation), the fact is that the sole difference between the two lies (as noted) on mere procedural and legalistic aspects. Indeed, both come from the same source: i.e. a market behaviour that because it is artificial and provokes artificiality in the market it should become anticompetitive and illegal. See Pinkas, supra note 2 at 33-34; see also, Alfonso Miranda, "La Indemnización de los perjuicios causados por las prácticas restrictivas de la competencia" (2011) 7:7 Rev Derecho Competencia 15 [Miranda Indemnización prácticas restrictivas]; see also Alfonso Miranda, "El control jurisdiccional del régimen general de promoción de la competencia y prácticas comerciales restrictivas", (Paper delivered at 1er Congreso Internacional Sobre Competencia. Comisión de Libre Competencia y Asuntos del Consumidor Panamá 1998), (1998) [unpublished] online: online: Cedec - Universidad Javeriana <http://www.javeriana.edu.co> [Miranda Control Jurisdiccional].

[84] See Report, OECD, Competition Committee-Policy Round Table, *Competition on the merits*, Doc No DAF/COMP(2005)27 (2005) [OECD Competition on the merits]; see also Policy Brief, OECD, *What is competition on the merits?*, n.d. (2006) [OECD What is competition on the merits?]; see also Viktor Vanberg, "Consumer welfare, total welfare and economic freedom - on the normative foundations of competition policy" in Josef Drexl, Wolfgang Kerber & Rupprecht Podszun eds., *Competition Policy and the Economic Approach. Foundations and Limitations* (Northampton: Edward Elgar Publishing, 2011) 44 [Vanberg]; see also Sutcke2 at 31; see also Paul Nihoul, "Do words matter? A discussion on words used to designate values associated with competition law" in Daniel Zimmer ed., *The Goals of Competition Law* (Northampton, Edward Elgar Publishing, 2012) 219 at 227-230; see also Luc Gyselen, "Rebates: competition on the merits and exclusionary practice?" in Claus Dieter & Isabela Atanasiu eds., *European Competition law Annual 2003. What is an Abuse of Dominant Position?* (Oxford.: Hart Publishing, 2006) 287 at 293; see also Eleanor Fox, "The modernization of Antitrust: a new Equilibrium" (1981) 66 Cornell L Rev 1140 at 1170-1171 and 1174-1176.

determine when market behaviours should be deemed competitive (meritocratic) and therefore when anticompetition (non-meritocracy) can be inferred.[85] Some jurisdictions focus on the effects of market behaviours through the so-called effect based approach. In it, market behaviours are anticompetitive (non-meritocratic) if they produce anticompetitive effects. Anticompetition in this case thus does not rely on the type of the market behaviour that is deployed but on the outcome that provokes. In jurisdictions that have this approach market authorities and judges are usually the centerpiece of the institutional framework as they are ultimately who determine when anticompetition happens (i.e. when the winning is not due by merits). Furthermore, given that this is usually a case-by-case system, market behaviours that are deemed today as competitive can be turned down in the future for having anticompetitive effects. These jurisdictions have, to a certain extent, a sort of mechanism of self adaptation to markets' reality (i.e. modifying the scope of the law without the need of legislator's intervention).[86]

On the other extreme is the form based approach. In it, the jurisdiction determines beforehand which market behaviours should be deemed anticompetitive (i.e. non-meritocratic). The participation of the institutional framework in these jurisdictions varies, however. So, whilst some of them have mechanisms to nuance anticompetition, in others such a nuance simply does not exist. The degree of immobility or stagnancy with respect to the qualification of anticompetition hence differs amongst jurisdictions.[87] Colombia, one can say, is a hard line form based approach jurisdiction where, as mentioned, anticompetition happens whenever market behaviours fit in law's anticompetition list (again, a jurisdiction wherein anticompetition happens as law says so).

But, again, neither competition on the merits nor its reasoning is expressly found in Colombian law. So, how can one say that is indeed a premise of the jurisdiction?[88] This is

[85] See OECD Competition on the merits, Ibid at 9-10; see also OECD What is competition on the merits? Ibid.

[86] See OECD What is competition on the merits? supra note 84 at 2; see also Hedvig Schmidt, "Private Enforcement - Is Article 82EC special?" in Mark-Oliver Mackenrodt, Beatriz Conde & Stefan Enchelmaier eds., *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*(Munich: Springer, 2008) 137 at 160-161; see also Hedvig Schmidt, *Competition law, innovation and Antitrust. An Analysis of Tying and Technological Integration,* (Northampton: Edward Elgar Publishing, 2009) at 187; see also A Ottow, "Observations on Economic Proof in Economic Cases" in Oda Essens, Anna Gerbrandy & Saskia Lavrijssen eds., *National Courts and the Standard of Review in Competition law and Economic Regulation* (Amsterdam: Europa Law Publishing, 2009) at 44-45.

[87] See OECD "What is competition on the merits?" Ibid at 2. As regards the form based approach see Eirik Osterud, *Exclusionary Abuses under Article 82: The Spectrum Tests* (Bedfordshire: Kluwer, 2010) at 16-20; see also Emil Paulis, "Abuses of dominant position and monopolization: conclusions of the major debates in the EU and USA" in Abel Mateus & Teresa Moreira eds., *Competition law and economics. Advances in competition policy enforcement in the EU and North America* (Northampton: Edwar Elgar Publishing, 2010) at 161-162.

[88] With this I am not seeking to question whether Colombia is a form based approach jurisdiction or not, which, as mentioned before, it is. Rather, I seek to question whether the rationale that lies behind this third premise (i.e. that winning depends on a [sort of] meritocratic value) is indeed part of the reasoning of the jurisdiction. Differentiating this at this point is (in my view) quite important. Certainly, for determining which methodology or grounds (i.e. form based approach or effect based approach) Colombia uses when assessing competition law issues it would be enough to say what we have said so far, namely, that market authority and judges determine that a market behaviour is anticompetitive by looking at what law says. In such a way one can arrive to the conclusion that Colombia is a form based approach. Conversely, if looking at whether or not for Colombian competition law the meritocratic claim is a key component, it would not be enough to say that law determines when anticompetition happens. It is instead

possible for two reasons, stemming directly from the former two premises. First, in a binary/legalistic jurisdiction like Colombia, the existence of anticompetition is explained from what law sees is anticompetitive so that all what is out of law is competitive. Which, in competition on the merits terms, it would be the equivalent to say that competition law only accepts winnings that come from market behaviours that are not in the reasoning of law since the purpose of law is informing markets precisely of what is seen anticompetitive and illegal (therefore as not due by merits) and, by default, of what is seen as competitive and legal (consequently, as due by merits). The second reason is the rhetoric that law uses when framing public and private litigation; more concretely, when it sets the boundaries for market authority to enforce law and market agents to perform in accordance to law. Indeed, in both mechanisms of enforcement, Colombian law sets as one of its objectives and therefore as one of the mandates for market authority and judges a notion of efficiency.[89] The practical effect of this is that the losses that competitors may have as a result of the good performance of efficient competitors are legally and rationally justified in the system.

Efficiency (in the Colombian context)[90] implies, consequently, that the losses in the

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necessary, as we are proposing here, to ask whether or not the reasoning of the jurisdiction does undertake or aims to undertake assessments on the merits.

[89] It nevertheless does so in different scopes and extents in both mechanisms. So, whereas in public litigation law refers expressly to efficiency, in private litigation law construes efficiency indirectly or, perhaps, in a more subtle way. Indeed, in public litigation is the same D2153 that clearly states in Art.2.1 that one of the goals of competition law is economic efficiency. In private litigation, however, law is not so direct. But this is not to say that efficiency is not present in private litigation. Indeed, in private litigation law says that a market behaviour is deemed to be unfair whenever it breaks (ethic) values and when (derived from that) threatens freedom of buyers/consumers and markets' functionality. Well, these lasts are precisely what leads private litigation into the rhetoric of efficiency. I must acknowledge, however, that freedom of buyers/consumers and markets' functionality can lead in some cases to efficiency and in others do not (e.g. they can meet in allocative efficiency but perhaps not so much in productive efficiency); this, of course, understanding efficiency in the traditional meaning as economics has construed. However, this is one of the (vernacular) features of the jurisdiction. Efficiency in Colombian law is understood in such a vague and wide sense that one can encapsulate it in all what can produce a benefit for the greatest number. But let me reserve this explanation for the following footnote.

[90] In Colombian competition law "efficiency" is, above all, a notion, which, moreover, is reproduced in both public and private litigation. In public litigation (Art.2 D2153), as mentioned above, is clearly stated as one of the goals of law (i.e. part of the set of values that market authority must take into account when enforcing law). In private litigation, on the other hand, "efficiency" is seen more as the necessary conclusion after considering as unfair (as anticompetitive) what affects freedom of buyers/consumers and markets' functionality (Art.7 L256). Now, the reason for saying that efficiency is a notion in both mechanisms of enforcement (and more generally in Colombian law) is because the word "efficiency" as such refers to the need of considering as competitive those market behaviours that produce beneficial outcomes for all the market. "Efficiency" is, in a way, a projection of what we discussed above in cohabitation of interests, that is, the acknowledgement that competition must produce what is best for all in such a way so that the gains that society obtains from competition offset the losses that other market agents report (i.e. of the losers of the competition process). Moreover, in Colombia such a notion of "efficiency" is inherently related with market failure or in what law has previously stated is seen as market failure. So, law assumes that what is "efficient" is because is competitive and what is "inefficient" is because is anticompetitive. One can say, accordingly, that in Colombian competition law it does not matter to what kind of "efficiency" one is referring to. Be that "allocative efficiency", "productive efficiency", "social efficiency", "dynamic efficiency", etc. (although considering Colombian competition goals one may be one can venture to say that the concept could perhaps be closer to "allocative efficiencies"). "Efficiency" is in Colombian law, hence, a wide and vague notion. It is a legal mandate that is presumed to be accomplished through the enforcement of law in both the anticompetition list and in the general prohibition. Now, this is not to say that this notion of "efficiency" is (by itself) an entitlement for market authority or judges to modify or shape law. Quite the contrary, indeed; following its binary/legalistic distinctiveness, as mentioned, in Colombia what law has previously framed and considered as anticompetitive is because it is what is deemed to produce inefficiency. And, conversely, what is not listed in the law is deemed to be competitive and efficient. So, if market authority or judges enforce law adequately, their decisions are deemed to produce economic efficiencies. And if either market authority or judges do not enforce or fit the anticompetitive market behaviour (previously listed) appropriately, the decision is deemed illegal as it assessed as inefficient (as anticompetitive) what was efficient (what was competitive). This is precisely what gives way to cause of action (in public litigation) or to appeal (in the case of private litigation). On the concept of "efficiency" see Corte Constitucional, 23 October 1997, Acción de Inconstitucionalidad (1997) C-535-97 at 5.3 [C-535-97]; see also Corte Constitucional, 4 December 2007, Acción de Inconstitucionalidad (2007) C-1041-07; see also Tribunal Superior de

competition process are tolerable because efficient competitors perform better (on their merits) and because losses are offset by the benefits that they (the efficient competitors) have brought in to markets.[91] At first one might think that law is setting through this notion of efficiency a sort of nuance that market authority or the judiciary can use for making more flexible the strictness of Colombian form based approach. Yet, neither market authority nor judges seem to have interpreted this efficient competitor construct in such a way. Moreover, it seems as though there would be an internal construction that not only prevents them from doing it but also that compels them to reject flexibility.[92] The reason can perhaps be, on the one hand, the same structure in which the premise of formal dimension of equality is underpinned and, on the other, (most notably perhaps) on the same binary/legalistic feature that shapes the jurisdiction.

Now, alongside, and to a certain extent derived from, efficiency, there is in public and private litigation alike what we mentioned above as a pricing concern. This legal construction around pricing comes to reinforce the rhetoric of efficiency and more so, of this third premise. Price is the measure of market economies par excellence as it permits to determine how well competitors perform and how much gains they transfer.[93] But let's go further regarding what this pricing concern of Colombian law might entail as, in it, one can perhaps find a reproduction of a sort of mechanism to assess the meritocratic performance of market agents and then the existence of this third premise.[94] Let's assume, for instance, the prohibition of price fixing. One of the

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Bogotá, 3 September 2003, Apelación (2003) 2002-8702 [Tribunal Bogotá 2002-8702]; see also SIC, 2003, Concepto 03020597; see also L155, supra note 61, Art.1; see also L256, supra note 62; see also D2153, supra note 61 Art.2.1; see also Tamayo supra note 75 at 149-150 and 163-167. Regarding the concept of "efficiency" more generally (out of the Colombian context) see Fox Efficiency Paradox, supra note 31; see also Fox Competition/Competitors, supra note 9; see also Coleman, supra note 8 at 96-ff.

[91] See Fox Efficiency Paradox, supra note 31 at 80-81; see also Stephen Sosnick, "Toward a Concrete Concept of Effective Competition"(1968) 50:4 AJAE 827. Some jurisdictions (e.g. EU) have incorporated the so-called as efficient competitor test. Through it, the jurisdiction assesses in situations of market dominance, for example, whether or not a dominant competitor could have been performed as well as s/he did if s/he had been immersed in a situation of competition (out of its [let's say] comfort zone of dominance). If the answer is no, then it is possible the existence of an abuse of dominance and therefore of anticompetition. If the answer is yes, then the imbalance experienced by the rest of competitors is not the result of an anticompetitive behaviour (as such) but of the same fact of the situation of dominance that is privileging (so to speak) the dominant competitor. Now, although it is not (intrinsically) related to what we are saying here, in this "as efficient competitor test" (as it is called it) one can nevertheless find a similar reasoning to the one that is being proposed here inasmuch as in both what is at stake is a determination of whether the good performance has made more efficient the market agent explaining (perhaps justifying and legitimizing) the winning in the competition process. With this, however, I do not mean that Colombia had adopted the "as efficient competitor test". With this comparison I just want to stand out the fact that what it has been said here it is (regarding efficiency) somehow related with the aforementioned test. Regarding the "as efficient competitor test" see George Hay & Kathryn McMahon, "The Diverging Approach to Price Squeezes in the United States and Europe" (2012) Cornell Law Faculty - Working Papers, Paper 91; see also Wolfgang Wurmnest, "The Reform of Article 82 EC in the Light of the "Economic Approach"" in Mark-Oliver Mackenrodt, Beatriz Conde & Stefan Enchelmaier eds., *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*(Munich: Springer, 2008) 1 at 17-20; see also Adrian Künzler, "Economic content of Competition law: the point of regulating preferences" in Daniel Zimmer *The Goals of Competition law* (Northampton, Edward Elgar Publishing, 2012) 182 at 210-211; see also John Vickers, "Abuse of Market Power" (2005) 115:504 E J F2444.

[92] As noted in the ANDEVIP case; see supra note 75.

[93] See Deepashree Raje, *Microeconomics and* Macroeconomics Environment (New Delhi: McGraw-Hill, 2007) at 13.13-13.16; see also Coase, supra note 11 at 19-20.

[94] See Dimitris Riziotis, "Efficiency Defence in Article 82 EC" in Mark-Oliver Mackenrodt, Beatriz Conde & Stefan Enchelmaier eds., *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*(Munich: Springer, 2008) 89 at 90-91; see also Aaron Edlin, "Predatory Pricing" in Einer Elhauge ed., *Research Handbook on the Economics of Antitrust Law* (Northampton: Edawr Elgar Publishing, 2012) at 161-162; see also James Dalton & Louis Esposito, "Predatory Price Cutting and Standard Oil: A Re-examination of the trial Record" in Richard Zerbe & John Kirkwood eds., *Research in Law and Economics: A Journal of Policy* (Kidlington: Elsevier, 2007) 155 at 165.

reasons for prohibiting price fixing is because one of their effects is the distortion of the price as an objective measure of markets. And by virtue of this fabrication, the price (as projection of objectivity) is induced to artificial outcomes that provoke exclusion of other competitors and compromise consumers' welfare.

The former, of course, would be enough to outlaw price fixing. But, why are they banned (in light of this third premise at least)? The first reason is because the victory is not due for the best performance but for a bogus price that did not stem from market dynamics but from the illegal action of fixing the price; in other words, for an artificial and undue advantage that market agents obtained in markets. Consequently, price fixing becomes anticompetitive because what it entails and represents does not allow to objectively measuring the merits of others in so much as, if it had not been for this bogus market behaviour, the market agents that fixed the price would have found difficulties in winning. So, the prohibition of price fixing is not only structured for conserving or defending markets from inartificial pricing. It is essentially structured to defend and protect pricing as the sole way to measure meritocracy.

Second, this fabrication of price produces an essential negative effect: inefficiency. Not only because price fixing affects competitors by pushing them out of markets, but also because it compromises consumer's welfare. So, price fixing (in addition) provokes that markets become inefficient in the sense that it blocks the winning of the (truly) efficient competitor. Considering this, thus, one could say that the legal construction of artificiality and inefficiency, from which price fixing has been considered as anticompetitive is essentially a projection of the lack of meritocracy that either one or the other (i.e. artificiality or inefficiency) entails. The concern for pricing, thus, is not just a concern for protecting a measure of efficiency or transparency. It is, rather, a concern for protecting the fact that winnings must stem from meritocracy and best performances. So, when Colombian law sets this concern for pricing as part of its set of values (whether expressly or not), what the jurisdiction is doing is seeking to protect almost the sole measure to determine whether winnings in markets are indeed a projection of meritocracy; i.e. the price.

1.2.2. Legal roles' construct

Classical premises reflect that what is at stake in Colombian competition law is a matter of markets' governance. But with this I am not simply referring to the (somehow) obvious fact of an existing legal framework ruling markets and competition. I aim instead to point out what, in my view, classical premises' interplay truly unveils: that what gives form and originates

governance in Colombian competition law is a set of dilemmas (i.e. competition v. competitors, equality v. difference, or winners v. losers).[95] These dilemmas, stemming from fundamentals and from the binary/legalistic logics of the jurisdiction, jointly compose (in this classical approach, at least) what can be seen as the pivotal (ontological) factor of Colombian competition law: i.e. the competition/anticompetition dilemma or, what winds up being the same, a predicament of legality/illegality.

Note that each of these dilemmas is essentially constructed via binary confrontations. So, perhaps solutions for each come from a similar (binary) reasoning, which is precisely what happens in classical premises. Indeed, coherent with their binary nature, solutions for these dilemmas do not come from dialogue (e.g. between competition/competitors), but from imposition (of one) and correlative exclusion (of the other). Colombian law, thereby, articulates governance in markets standing for competition but not for competitors, for equality but not for difference, and for winners but not for losers. Law solves, hence, binary confrontations through binary logics as it is compelled (because of the same binary/legalistic approach of the jurisdiction) to see markets and competition in binary terms and therefore solutions for dilemmas of governance in markets through binary lens.[96]

Now, the problem in appealing to this binary structure to govern markets is that law must appeal to a sort of rhetoric of assimilation.[97] So, all that which is out of the "ought" of law (i.e.

[95] As we just explained in the previous section, these three predicaments are encapsulated in the three classical premises of (i.) competition as general value (competition v. competitors), (ii.) formal equality (equality v. difference), and (iii.) competition on the merits (winners v. losers).

[96] Following classical logic (at least under an Aristotelian approach), I hardly doubt that Colombian law, as a binary/legalistic construct, can use dialogue to solve dilemmas of markets governance. In my view, dialogue in Colombian law would be a logical impossibllity if one follows the reasoning of the current dominant approach. The reason is that dialogue undermines the very essence of binarism (and therefore of legalism) as it implies that excluded thirds can exist. In other words, in-dialogue solutions might not always be one of the two options of the binary understanding. There can always be instead multiple options (i.e. third options), which, for themselves, would be challenging for a binary comprehension of law like the one that Colombia seems to undertake. And so, coherent with this need for rejecting dialogue, classical premises address governance appealing to a binary formula of (let's say) "choosing between options" in which excluded thirds simply do not exist. Thereby, law is always compelled to decide between two. Consider the first classical premise of competition as general value, for instance. In it, law does not choose for protecting competition and competitors at the same time as a third valid option (i.e. in between the two provided by the binary structure of governance of competition/competitors). It rather chooses to protect competition over competitors without nuance whatsoever. Putting it differently, one can say that classical premises simply do not make viable what is out of the binary equation (i.e. excluded thirds). They rather compel legal reasoning to understand markets' reality exclusively from the two options provided (i.e. is it either competition or competitors, either equality or difference, either winner or loser). To a certain extent, classical premises empower one option through a correlative disempowerment of the other. On binarism and excluded (or third) middle in social science see Pierpaolo Donati, *Relational Sociology: A New Paradigm for the Social Sciences* (New York: Routledge, 2011) at 187-190 [Donati]; see also Michel Forsé & Maxime Parodi, *The Priority of Justice. Elements for a Sociology of Moral Choices* (Bern: Peter Lang, 2005) at 131-132. About binarism more generally and the excluded third in particular see Andrew Haas, *Hegel and the Problem of Multiplicity* (Evanston: Northwestern University Press, 2000) at 250-251 and 265-266 [Haas]; see also Laura Hidalgo, *Negation, Text Worlds, and Discourse: The Pragmatics of Fiction,* vol.66 (Stamford: Ablex Publishing, 2000) at 48-50.

[97] The phrase "rhetoric of assimilation" is most commonly used in discrimination studies and critical race theory. It refers to narratives or discourses built by majority groups to support their claim (or belief) that minorities must accept what majorities stand for and consequently reject what they (i.e. minority groups) represent. Hence the word assimilation, because such narratives and discourses either (i) explain why minorities are obliged to renounce to their identity (to what defines them as different) (ii) or why they should accept the fact of being absorbed by the mainstream understanding (i.e. to be assimilated). Now, with this phrase "rhetoric of assimilation", I seek to introduce what I think are the two main tensions that are producing contradictions in markets governance of today; (a.) tensions coming from cultural or social features that explain why some market agents perform differently from the rest (a sort of confluence of tribal markets that, in a recent work, I explained as "[...] *the imaginary boundaries that members of one group mark off in local markets -due to their culture and identity- when performing businesses or taking economic decisions*.[...]" [Footnotes

what law understands markets, competition, and market agents should be) must assimilate into the forms of sameness that law reproduces (i.e. into how law understands each binary confrontation should be solved).[98] Market agents, accordingly, end by being immersed into similarity regardless how different they are and how difference affects their position in markets or their role before law. And I refer here to legal roles and market roles, because how market agents are regarded (either by law or markets) has a direct effect on how they can (legally or economically) perform before law and markets as such.

But let's consider the difficulties that each classical premise brings about to clarify my point here. Take the first premise, for instance. Its core claim is that competition is a supreme value in itself. In a word, it makes competition the legally protected right and, by the same token, it places the protection of competition above the protection of competitors. Such an understanding, however, blurs an essential fact of market economy: that not all people are equal to compete. Indeed, seeing markets and competition from an exclusive systemic stand (i.e. as an abstract all) nullifies rights and entitlements of some market agents (like victims or PBE as concrete entities). In a way, by heightening competition as a supreme value, law ends up benefiting those that are "out" of the competition race and who simply police markets and competition (i.e. market authority) since they represent the abstractions that law is deemed to protect and, similarly, benefiting those that are already in position to win (i.e. wrongdoers as winners of the competition process) as they are more prone to fit within the legal qualification of normality previously endorsed by law.[99]

Putting it more simply, the first classical premise ignores a fundamental fact that shape market economy: that whilst there are well-positioned competitors, there are also poorly-

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ommitted) and (b.) tensions that emerge between market agents for non-market reasons; this is the case of market agents who, despite of being (let's say) ascribed into the same tribal market, they nonetheless are not in the same position that successful market agents are to win the competition process because of disadvantages that do not necessarily come from markets. My point is that, in both tensions, classical premises reproduce rhetoric of assimilation; i.e. what matters are competition, formal equality, and winners, as opposed to competitors, difference, and losers. In such a way, classical premises and what they entail become the mainstream understanding of markets and therefore what is seen as normal when governing them. Putting it differently, what is acceptable in a normative governance of markets as legal and legitimate. So, these two tensions are compelled to be adapted to such forms of normality that law understands markets and market agents should always have. Hence, people who might perform differently in markets because of their beliefs or culture or just because they are simply not equal to compete with others (despite of being of the same tribal market) must irremediably accept the fact that the whole legal system protects competition (not competitors), that sees all people as equal (rejecting their differences as a result), and that awards fair winnings only on merits (not on possibilities to compete). I will explore, nonetheless, this reasoning later on when going over the role of others. For the phrase "rhetoric of assimilation" in conflicts related with discrimination issues see Bill Ong, *To Be an American: Cultural Pluralism and the Rhetoric of Assimilation* (New York: New York University Press, 1997) at 2-4; see also Cynthia Lewiecki-Wilson, "Doing the Right Thing versus Disability Rights: A Response to Ellen Barton" (2001) 21:4 J A C 870 at 871. For rhetoric of assimilation and normative convergences around economics see Marco Dani, "Economic Constitutionalism(s) in a Time of Uneasiness - Comparative Study on the Economic Constitutional Identities of Italy, the WTO and the EU" (2005) London School of Economics and Political Science (LSE) - Jean Monet Working Paper 08/05 at 55. Regarding market tribalism see Juan Mendoza, "Insights from a cross-cultural approach to mining-markets of Pacific Colombia: instances of dialogue and competition law" (2012) at 5 [unpublished] [Mendoza cross-cultural approach to mining-markets].

[98] That is, for the sake of competition but not of competitors, in terms of formal equality but not of difference, and from winners' perspective but not from losers' perspective.

[99] As mentioned in the previous note, within the binary selection of what is legal and legitimate; i.e. protecting competition, (formal) equality, and winners. See Ibid.

positioned ones.[100] And, despite formal equality and competition on the merits (or perhaps as a result of them), it is not so difficult to conclude that in market economy (even more in market competition), poorly-positioned competitors would face more difficulties to compete (efficiently) and therefore to defeat better-positioned ones. Following a similar narrative to that of the first premise, poorly-positioned competitors would hardly produce collective and individual interests/benefits at the same level as better-positioned ones. So, what is the purpose of the first classical premise in protecting competition and compounding collective and individual interests/benefits if those who can actually be more prone to produce these lasts (and become efficient as a result within the legal standards of normative normality) are better-positioned competitors? Well, perhaps that is exactly what competition as general value (in particular) and the whole reasoning of classical premises (in general) are looking for. As the most efficient to produce collective and individual interests/benefits (simultaneously) are better-positioned competitors, competition law is thus conditioned to take care of these better-positioned competitors, which explains why law structures around them a sort of archetype and therefore a source of comparison and exclusion for those not so well-positioned.[101]

[100] This idea of better or poorly-positioned competitors is in some way grounded on a Rawlsian approach of equality of fair opportunity. The purpose of bringing up this idea is emphasising on the fact that there are circumstances that do not necessarily stem from markets (the argument of non-market reasons that we referred above in the previous footnote) and that nevertheless have an impact or an effect on people as well as on their performance in markets. Such differences, as noted, may have various sources; for instance, because market agents have a different understanding of markets (cultural or social claims between tribal markets) or because market agents (even of the same tribal market) are affected by a previous situation that impact their position or performance in markets. On equality of opportunity see Richard Arneson, "Equality of Opportunity" in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2002) (Stanford Encyclopedia of Philosophy) [Arneson]; see also Richard Krouse & Michael McPherson, "Capitalism, "Property-Owning Democracy", and the Welfare State" in Amy Gutmann, *Democracy and the Welfare State* (New Jersey: Princeton University Press, 1988) 79 at 81-83; see also Robert Taylor, *Reconstructing Rawls: The Kantian Foundations of Justice as Fairness,* (n.p.: Pennsylvania State University, 2011) at 173-175, 178-179, 186-188, and 301-306; see also Arthur DiQuattro, "Rawls and Left Criticism" (1983) 11:1 Polit Theory 53 [DiQuattro]; see also Marc Cohen, "The Narrow Application of Rawls in Business Ethics: A Political Conception of Both Stakeholder Theory and the Morality of Markets" (2010) 97 J Bus Ethics 563; see also Simone Chambers, "The Politics of Equality: Rawls on the Barricades" (2006) 4:1 Perspectives on Politics 81; see also Coleman, supra note 8 at 244-246 and 250-253. Regarding Competition law, antitrust, and Rawls see Kenneth Elzinga, "The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?" (1977) 125:6 U Pa L Rev 1191; see also Ian Ayres, "Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Justified" (2007) 95 Cal L Rev 669 [Ayres]; see also Fox & Sullivan, supra note 9, at 956, 960-964; see also Hovenkamp supra note 49; see also Eleanor Fox, "Economic Development, Poverty and Antitrust: The Other Path" (2007) 13 Sw J L & Trade Americas 101 [Fox The other Path].

[101] Archetypal comparison is, to a certain extent, a hermeneutical tool quite common not only in Colombia but also in other jurisdictions. Examples of which are the reasonable man, the *bon père de famillie*, or the good businessman. All of them follow archetypes construed from ideas, beliefs, or just simple representations of what man and society are or should be for law. Well, following precisely an archetypal comparison of this sort, classical premises seem to structure standards of behaviour or models of expected competitors around market agents able to produce benefits for competition and for themselves (i.e. for the sake of collective and individual interests/benefits all at once). And this is precisely the point that we question here. For whom is it more possible to do so? Is it for those better-positioned or for those poorly-positioned? Seeing the way classical premises are framed, one would be tempted to say that perhaps better-positioned competitors are more prone to provoke efficiencies in markets and by this I mean to produce better outcomes for the system and for them. But there is more on this archetypal comparison that we are suggesting classical premises bring about. Considering the binary environment of the jurisdiction, one could say that law actually sees two kinds of competitors; (i.) those who follow the archetype and (ii.) those that do not. Who call my attention are these last competitors precisely. Indeed, competitors who cannot produce collective and individual outcomes at the same time in classical premises ends up being just losers (following in great measure, of course, the reasoning of the third classical premise of competition on the merits). Now, what is questionable from this is the lack of nuance to differentiate why and when someone is indeed a loser. Are they due to an inefficient performance or simply because they are poorly-positioned in markets as a consequence of extraneous barriers not necessarily related to efficiency as such? And going further, the same archetypal comparison is as well questionable when analyzing competitors who are in the same tribal market, but on whom law imposes procedural burdens such as the demonstration of the existence of anticompetition. Although we will go over these two points later, let me say, for the nonce, that on this last point of procedural burdens for market agents of the same tribal market, this (let's say) archetype of the successful competitor makes that law understands that there is a need

Think as well on the effects that the second premise produces when it rejects that difference becomes legitimate; more so after considering the poorly-positioned competitors' quandary. Obliging market agents in becoming theoretically equal as if all competitors were better-positioned ones just impedes that poorly-positioned competitors can defend themselves from anticompetition and therefore that they can take part of markets effectively.[102] And the reason for this to happen is that preventing poorly-positioned competitors from constructing a legitimate stand before law and markets around their differences makes in some instances impossible the materialization of their chances when competing and thus the possibility to produce individual and collective outcomes, which, as noted in the first fundamental (i.e. cohabitation of interests), has a profound relevance for the whole rationale and operability of market economy and competition law.[103]

Or mull over the effects of the third classical premise when it explains that because all market agents are equally placed when defeating others, the source of differentiation can only be the fact of performing better than the rest. This perhaps does not seem consistent when one adds into the equation market agents whose performance is affected precisely because they are different and thus poorly-positioned (either economically or legally speaking).[104] In fact, what it might explain that they do not conquer markets or that they cannot demonstrate that anticompetition is being deployed to their detriment can be more intrinsically related with the fact that their difference is not recognized, rather than with the fact that they are different as such. Then, why cannot different stands be recognized and even legitimized through law? Further, note that despite what has been said, poorly-positioned competitors not only should always regard their defeat as fair and legitimate (no matter how disproportionate markets or competition are), but they must also regard the system as necessarily blind of their difference.

All this suggests, in my view, that one of the mainstays of competition law and of governance in Colombia is a construction of otherness. For, speaking of classical premises is far

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for protecting (implicitly and veiledly) wrongdoers as they are the market agents who actually were (or are) able to produce collective and individual interests/benefits just as law is looking for. But, again, I am perhaps getting ahead, so let me reserve the explanation for this latter on this section. Regarding archetypes and similar elaborations to this archetypal comparison see Carmen Cremades & Antonio Diaz, "La ideología revolucionaria y la codificación civil napoleónica" in Carmen Cremades & Antonio Diaz eds., *Poder ilustrado y revolución* (Murcia: Universidad de Murcia, 1991) 173 at 178; see also Marcia Boumil & Stephen Hicks, *Women and the Law* (n.d.: Hein, 1992) at 17-18; see also Norbert Rouland, *Legal Anthropology* (London: Athlone, 1988) at 64; see also Geoffrey Samuel, *Epistemology and Method in Law* (Burlington: Ashgate, 2003) at 312-314.

[102] I refer here, of course, to the two tensions mentioned previously regarding market agents that are different from the mainstream understanding either because (i.) they do not share the same comprehension of markets (i.e. members of other tribal market) or (ii.) because, for extraneous reasons (non-market reasons, as we noted), they are not equally-positioned to compete. See supra note 97.

[103] Although we refer here to the same core claim of the first classical premise (i.e. producing collective and individual outcomes at the same time), the purpose here is not going over the same scheme of classical premises. It is instead to understand, as we will show in this section and the following, the production of such (collective and individual) outcomes from a deconstructive approach based on competitors/difference/possibilities. This is why we referred to the fundamental of cohabitation of interests at this point but not to the classical premise of competition as general value.

[104] See Ayres, supra note 100; see also Fox The other path, supra note 100; see also Geoffrey Hazard, "Law Reforming in the Anti-Poverty Effort" (1970) 37:2 U Chicago L Rev 242.

from simply discoursing of systemic outcomes, supreme equality, or some kind of market's natural selection. It is instead dealing with irremediably exclusion of those who can neither represent collective interests/benefits nor conquer markets. This reveals, in my view, a profound contradiction in the current dominant approach as, despite of being competition law a market economy construct, it seems to be shaped more as a mechanism of exclusion than of inclusion. Likewise, the constructions that premises reveal through it (I hope in this classical approach solely) provoke different degrees of legal involvement (i.e. legal roles) eliciting correlatively, dynamics of empowerment and disempowerment through which assimilation and exclusion are sustained, conserved, and even legitimized.

The purpose in this second section is going over these markets agents who have been empowered with active legal roles and how such dynamics of empowerment have provoked that the legal system places other market agents on the peripheries of law (either in passive or nonexistent legal roles). This section focuses, therefore, on active, passive, and nonexistent legal roles. But the goal is not simply providing a description of each market agent and each legal role. It is rather elaborating on the contradictions of classical premises, on logics of empowerment and disempowerment, and, more importantly, on how these two have ultimately shaped the logics and legal reasoning of Colombian competition law.

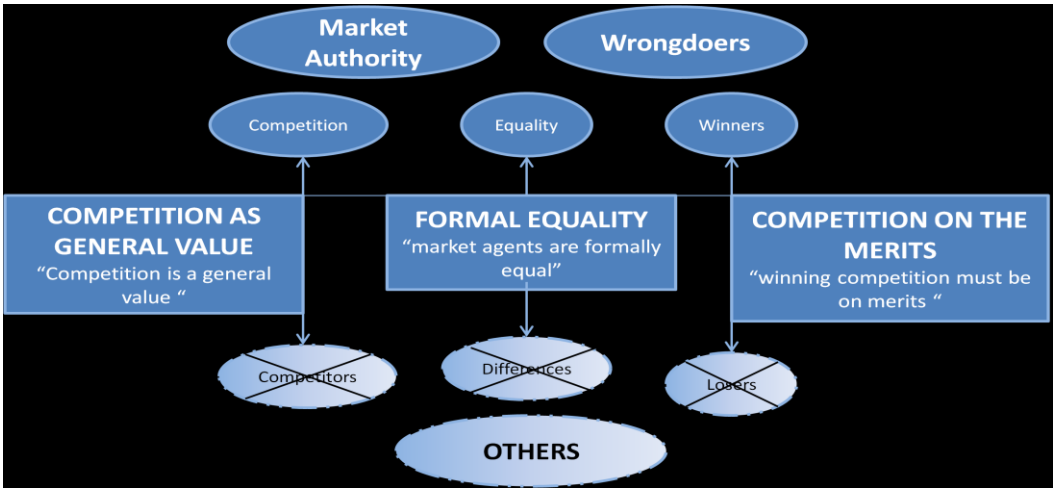

***Figure 3 presents the diagram of classical premises with market authority and wrongdoers empowered (hence are they placed above the diagram with defined lines and a consistent color) and "others" disempowered (for they are placed below with dotted lines and a different color). Similarly, the diagram represents the binary confrontation in each classical premise and the relationship of dominance that exists in each (i.e. competition v competitors, equality v difference, and winners v losers).

(a) Active roles: market authority and wrongdoers

Market authority is the government agency to which law has given police powers to

intervene in markets. Wrongdoers, on the other hand, are market agents allegedly engaged in anticompetition and thus deemed to have obtained undue and artificial advantages in markets. Both symbolize the underlying tension of the competition/anticompetition dilemma and, interestingly enough, as Colombian competition law seems to see in such a dilemma the main reason to exist, both have wound up empowered with active legal roles. But, why does this happen? Because in the institutional framework in which public and private litigation are embedded, market authority and wrongdoers are the centerpiece and consequently the only ones who can shape law and produce legal outcomes.[105] But let's briefly consider the rationale of these empowerment/disempowerment dynamics that stem from both mechanisms of enforcement in order to better understand what grounds the existence of active legal roles, which we have largely claimed benefit market authority and wrongdoers in Colombia.

What happens in public litigation? Colombian competition law is framed within a classical police power policy.[106] Therefore, market authority intervenes to ensure that the sole forces and dynamics shaping market economy are those coming (naturally and spontaneously) from markets and competition. Its purpose is in such a way limited to make markets create their own responses and thus to let the market economy model self-reproduce.[107] Accordingly, market authority should not only impede that market forces and competition dynamics arise from anticompetition, but also that they do not come from preconfigured responses of the State.[108] And

[105] See supra note 1. As noted above, this document understands for legal roles the following:

> "[...] the degree of legal empowerment that allows someone to participate effectively in the enforcement of competition law. Thereby, a market agent has an "active role" because s/he is able to provoke a legal outcome by her/his own means. Conversely, a market agent has a "passive role" because s/he depends either on the intervention of somebody else or because her/his claim is restricted in form or in context. For "no role" I mean that the market agent is absent in both the configuration of law and law enforcement; in other words, a market agent that is out of law's radar."

[106] Regarding Colombian competition law as a police power policy see, for instance, Toledo & Posada, supra note 76; see also Miranda Indemnización prácticas restrictivas, supra note 83; see also Alfonso Miranda & Pablo Márquez, "Intervención Pública, Regulación Administrativa y Economía: Elementos para la definición de los objetivos de la regulación", (Paper delivered at Symposium 7as Jornadas Internacionales en Honor del Profesor Allan Brewer-Carias 2004), (Decembre 2004) [unpublished] online: Cedec Universidad Javeriana <http://www.javeriana.edu.co>; see also Corte Constitucional, 30 June 2010, Acción de Inconstitucionalidad (2010) C-537-10 at 2.5. and 2.7.; see also Consejo de Estado, 12 April 2012, Acción de Nulidad (2012) 2005-90262; see also Corte Constitucional, 7 Septembre 1995, Acción de Inconstitucionalidad (1995) C-398-95 [C-398-95]. Regarding police power and competition law more generally see Walton Hamilton, "Common Right, Due Process and Antitrust" (1940) 7:1 Law & Contemp Probs 24 at 34-35 and 40; see also, Sagers, supra note 25; see also Thomas Bowden, "Antitrust: The War Against Contract", Gary Hull ed., *The Abolition of Antitrust* (New Jersey: Transaction Publishers, 2005) at 89; see also Gary Hull, "Antitrust is Immoral", Gary Hull ed., *The Abolition of Antitrust* (New Jersey: Transaction Publishers, 2005) at 154-155; see also Maurice Stucke, "Morality and Antitrust" (2006) 3 Colum Bus L Rev 443 at 489-491, 495-496, 498-499, 505-506, and 510-514.

[107] See, for instance, Corte Constitucional, 17 July 2003, Acción de Tutela (2003) T-583-03 [T-583-03]; see also Corte Constitucional, 13 June 2001, Acción de Inconstitucionalidad (2001) C-616-01 [C-616-01]; see also Corte Constitucional, 25 February 2003, Acción de Inconstitucionalidad (2003) C-150-03 [C-150-03]; see also SIC, 2011, Concepto 03100089 [SIC03100089]; see also SIC, 2002, Concepto 02082486 [SIC02082486]; see aso SIC28350, supra note 54; see also SIC, 2004, Concepto 03025237; see also SIC, 29 June 2012, Proceso Abreviado de Competencia Desleal (2012) Resolución 3288; see also Consejo de Estado, 20 February 1997, Acción de Nulidad (1997) 3488.

[108] My goal of course is not rebutting the possibility of the State's intervention in the economy either policing markets or simply as competitor or consumer (not only key roles of States on today's economy, but also plausible and legitimate mechanisms of intervention according to Colombian Constitution according to Arts.333 and 334). Instead, I am referring here to the two main capacities in which SIC works as market authority. First, the classical function of overseeing markets and market agents to prevent or punish anticompetition. In it, SIC basically sets in motion its police powers to discipline market agents and thus deter anticompetition from markets. The second capacity is building confidence in markets by enhancing (or fostering) market economy through competition law and particularly through what is known as competition advocacy. In this second capacity, however, SIC does not rely on its police powers as such. It rather works as a competition policy proxy. And it is precisely because of this that SIC has been empowered in

so, as it happens in most jurisdictions, market authority is entitled to prevent and punish anticompetition using similar mechanisms to those of other jurisdictions.[109]

But, we said that in both mechanisms of enforcement there are dynamics of empowerment/disempowerment shaping legal roles. So, what explains such dynamics in public litigation? Public litigation has been structured (almost exclusively) around market authority insomuch competition law (from a public litigation perspective at least) can only be seen through market authority's lens. The reason for this to happen is intrinsically related with the very nature of public litigation, particularly on how it is unfolded within the jurisdiction. Above all, public litigation reproduces a dispute between the State (market authority) and private actors (wrongdoers), for it revolves around a decision that looks to discipline the private will and intervene in markets for the sake of competition. Public litigation can be defined, thus, as an administrative law matter arising from a classical police power policy.

And so, it is just this double connotation (of administrative-law/police-power policy) that reveals a key element in the structure of this mechanism of enforcement and, furthermore, explains why the whole power in it lies on market authority's shoulders: the administrative act. This is an administrative law construct that stands for a unilateral decision of market authority through which it exercises its powers to discipline markets and market agents.[110] The

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different ways (particularly as of 2009 reforms) to spur a competition law culture in the jurisdiction amonst competitors and other State agencies. As a way of example, this second capacity is what makes that all State agencies in Colombia have to inform SIC about programs or measures that may compromise free competition and particularly market economy's scaffolding (i.e. that market forces and competition dynamics be released from artificiality or undue restrains). So, speaking of this first capacity entails speaking of mechanisms of enforcement, which for market authority we have encapsulated in what we have labeled here as public litigation. Quite the contrary, when speaking of the need of the State of avoiding artificiality, we are mainly bringing up the second capacity; i.e. competition advocacy. This document, nevertheless, revolves around the first capacity (i.e. mechanisms of enforcement; specifically, public litigation). Regarding both capacities see D2153, supra note 61 Arts.2.1-2.3, 4.15-4.16, and 47-51; see also Ley 1340, Diario Oficial 47.420, 24 July 2009 [L1340] Arts. 6-7. As per competition advocacy in Colombia see Archila, supra note 59 at 7-8; see also Miranda, supra note 54 at 112-113. Regarding both capacities see OECD Colombia, supra note 56 at 39-45 and 57-59.

[109] For instance, fining wrongdoers, restricting market behaviours (even before they produce effects), issuing injunctions, assessing M&As and imposing countermeasures to moderate their effects; in sum, a myriad of instruments that seek to stop anticompetition and thus let markets operate within their own means and logics. Regarding SIC mechanism and faculties on this regard see D2153, supra note 61, Arts. 2.1-2.2, 2.10, 2.22, 4.15-4.16, 44, 51-52 ; see also OECD Colombia, supra note 56 at 37-44 and 48-49; see also Eliana Torrado, "El régimen sancionatorio y el otorgamiento de garantías sobre prácticas restrictivas de la competencia en la Ley 1340 de 2009" (2010) 43 Revista de Derecho Privado Universidad de los Andes 1 at 5-12 [Torrado]; see also Alfonso Miranda & Juan Gutierrez, "El control de las concentraciones empresariales en Colombia" (2007) 3:3 Rev Derecho Competencia 45 at 60-63, 66-72, 78-80, 154-157, 164-182; see also Dionisio de la Cruz, "Régimen sancionatorio de la nueva ley de competencia en Colombia" (2009) 8:2 e-Mercatoria 1 [de la Cruz].

[110] The administrative act (*acte administratif* in French or *acto administrativo* in Spanish) is central in Colombian administrative law's scaffolding as well as in State's decision making process. In general, despite some specificities and particularities, Colombian law follows classical lineaments of continental administrative law traditions similar to those in France and Spain. The importance and relevancy of the administrative act in the jurisdiction is due to its normative dimension since it represents, above all, an act of authority that enables the State to rule individual issues and public matters at the same time (hence the difference made in Colombia between administrative acts with general scope [in Spanish, '*acto administrativo de contenido general*'; closed to the French '*recours de plein contentieux*' and particularly to the '*recours en appréciation de légalité*'] and administrative acts with particular scope [in Spanish, *acto administrativo de contenido particular*, closed to the French *recours en annulation*]). The institution of the administrative act, moreover, confirms what we mentioned above about the binary/legalistic rationale of the jurisdiction. Indeed, administrative act is built also upon binary confrontations like public v. private or legality v. illegality as well as from legalist expressions and functions like its distinctive role of source of normative authority and its power to subdue (in Kantian terms) the private will. As a matter of fact, one could even say that the administrative act becomes one of the many catalysts of Law's and State's rigidity (i.e. the absence of nuance in law that we mentioned before) given that it shows, for itself, that the primary function of law is overseeing behaviours and forcing surroundings to adapt into the preconfigured realities and worldviews that law aims to bring forward. On this regard and particularly on administrative act see Francisco Ahumada, *Materiales para el estudio del derecho*

administrative act is, moreover, a one-sided expression of market authority's will with a special normative significance since it is protected through what is known as presumption of legality (from the Spanish *presunción de legalidad*) whose effect is basically deeming the administrative act legal (therefore enforceable) unless wrongdoers prove otherwise.[111] So, if wrongdoers have cause of action for bringing into question the presumption of legality, they must appeal before market authority's director who, acting as an appeal body, would decide whether the administrative act should be revoked or not. If the decision is no, wrongdoers would have cause of action before administrative judges who, assuming jurisdiction in a second stage, would decide whether the administrative act can indeed continue being enforceable or if it should be revoked.

And this is precisely how public litigation unfolds, that is, in two stages with different natures and therefore with different scopes. First, in an inquisitorial stage in which market authority plays the double role of judge and party and in which, while wrongdoers would try to persuade market authority that there are no grounds for issuing the administrative act, market authority will determine (autonomously) if the administrative act should indeed continue

administrativo económico (Madrid: Dykinson, 2001) at 65-67; see also Eberhard Schmidt-Assmann, *La teoría general del derecho administrativo como sistema,* (Madrid: Marcial Pons 2003) at 315-316 and 318-322; see also Josefa Cantero, "La decisión administrativa de externalizar y su repercusión en el empleo público. Limites y pautas para su adopción" in Luis Ortega et al. eds., *Crisis y Externalización en el sector publico: solución o problema?* (Madrid: INAP, 2011) 69 at 76-79; see also Rolando Pantoja, *El derecho administrativo. Clasicismo y modernidad* (Santiago: Editorial Jurídica de Chile, 1994) at 52-56 and 63-66. As per the administrative act in Colombia see Jaime Santofimio, *Acto Administrativo. Procedimiento, eficacia y validez* (Bogotá: Universidad Externado, 1994) at 53-55, 59-62, 96-99, and 110-118; see also Gabriel de Vega, "La discrecionalidad administrativa", in Jaime Vidal, Viviana Diaz & Gloria Rodriguez eds., *Temas de derecho administrativo contemporáneo* (Bogotá: Universidad del Rosario, 2005) 145 at 151-155, 160-165, 167, and 186-188; see also Catalina Atehortua & Miguel Malagón, "Evolución del concepto del acto político o de gobierno", in Jaime Vidal, Viviana Diaz & Gloria Rodriguez eds., *Temas de derecho administrativo contemporáneo* (Bogotá: Universidad del Rosario, 2005) 259 at 262-265, and 275-277; see also Óscar Vargas, "Discrecionalidad administrativa: naturaleza, limites y garantías ciudadanas", in Jaime Vidal, Viviana Diaz & Gloria Rodriguez eds., *Temas de derecho administrativo contemporáneo* (Bogotá: Universidad del Rosario, 2005) 339 at 340-347. Regarding historical tracks of administrative law and administrative act in Colombia see Malagón, supra note 64 at 28-31, 109-114, 128-134, and 155-159; see also Miguel Malagón & Julio Gaitán, "Colonialismo cultural francés y la creación del Consejo de Estado en el derecho administrativo colombiano" (2008) 115 Universitas 161; see also Libardo Rodríguez, "Las vicisitudes del derecho administrativo y sus desafios en el Siglo XXI", (Paper delivered at Symposium Seminario Iberoamericano de Derecho Administrativo 2000), (2000) [unpublished] online: Instituto de Investigaciones Jurídicas - Universidad Autónoma de México <http://biblio.juridicas.unam.mx>.

[111] As other jurisdictions grounded in continental administrative law traditions, Colombian law coats administrative acts with the assumption that such acts have been issued in accordance with law. In other words, law sees in them an embodiment of legality so that both (i.e. the act and the orders and mandates that are incorporated in it) are projections of the legal system. And thus, the act is enforceable as any other norm of the system. There are, of course, a number of implications stemming from this presumption of legality. The most noticeable perhaps, at least for this work, are the procedural burdens created for plaintiffs; particularly the burden of proof. Indeed, rebutting legality and therefore administrative acts' enforceability entails a demonstration that the act is illegal and, consequently, that is necessary to invalidate it (i.e. to declare it unenforceable). In practice, nonetheless, illegality is a qualified event (so to speak) insofar as it can only happen in five events (in which is deemed that plaintiffs may break presumption of legality and hence that they have cause of action for getting into the jurisdiction): (i) when administrative act violates or contravenes a higher rank norm (e.g. a constitutional provision, a law, or decree), (ii) when the State agency or the person who issued the act did not have jurisdiction or was simply not entitled for issuing it, (iii) when the act did not follow the forms or procedures for being (legally) issued, (iv) when there was a violation of due process, (v) or when the grounds that support the decision were false or due to abuse of power. Regarding presumption of legality see Ley 1437, Diario Oficial 47.956, 18 January 2011 [L1437] Arts.88-91 and 136-138. Regarding relevant decisions on the matter see, for example, Corte Constitucional, 23 February 1995, Acción de Inconstitucionalidad (1995) C-069-95; see also Corte Constitucional, 7 November 1992, Acción de Tutela (1992) T-552-92: see also Corte Constitucional, 25 October 2000, Acción de Tutela (2000) T-1436-00; see also Corte Constitucional, 9 July 2009, Acción de Tutela (2009) T-465-09; see also Consejo de Estado, 4 December 2006, Acción de Nulidad (2006) 1988-05046; see also Consejo de Estado, 5 July 2006, Acción de Nulidad (2006) 1999-048201; see also Consejo de Estado, 3 August 2006, Acción de Nulidad (2006) 2000-04814; see also Consejo de Estado, 3 December 2007, Acción de Nulidad (2007) 1995-00424; see also SIC, 2001, Concepto 01020844.

producing its effects or if it should be annulled.[112] And, second, in an adversarial stage before administrative judges wherein the discussion will focus on whether presumption of legality should continue protecting the administrative act. For, whereas a wrongdoer will try to rebut presumption of legality, market authority will attempt to demonstrate that it must be conserved and thus that the act should continue being enforceable.

Note, however, that no matter in which of the two stages one would be placed, the discussion will always revolve around market authority's will (i.e. on the administrative act). From this one can say that, thus, the whole institutional framework of public litigation is centered on the administrative act, as it is that which ultimately defines whether market behaviours are competitive or anticompetitive. But, as market authority's will is the sole thing that can actually bring into life and shape as a result the extent of the administrative act (ergo the qualification of competition and anticompetition), market authority ends up having an absolute concentration of power and decision-making. For, the only one who can decide whether or not an inquiry against a wrongdoer can begin is market authority and the same when determining whether this or that measure should be taken in a specific case.[113] Meanwhile, participation of others (like victims)

[112] This first stage is known in the local milieu as *via gubernativa*, which can be translated as government procedures. It is mainly a native development of the classic administrative law formula (or concern) of letting government to first know what citizens' discrepancies are with respect to the administrative act before they get to the judiciary (close with the French *décisión préalable*). *Via gubernativa* works in practice pretty much like a trial in the sense that it follows similar rules and presuppositions of trials (e.g. evidentiary rules, including of course burden of proof). Its operability, though, has some variances; for instance, the condition of it being an inquisitorial procedure. *Via gubernativa*, thus, begins with the State agency notifying the administrative act to whom the order or mandate will be enforced (e.g. a competitor that SIC has decided to fine for having performed a market behaviour listed as anticompetitive). The notified has then two options; s/he can either accept the decision by complying the order or mandate (e.g. paying the fine) or s/he can appeal. The appeal body, as noted, is not the judge, but the same State agency (concretely the superior of the division or official that issued the administrative act). Although at first the analysis of the superior can be ample, the fact is that most of the time analyses are restricted to the same events that the administrative judge would go over. For, one can say that the purpose of determining in *via gubernativa* whether or not the administrative act is in accordance to law is ultimately assessing if the same could eventually be revoked in the jurisdiction. See on *via gubernativa* Juan Galindo, *Lecciones de derecho procesal administrativo, Colección Discentibus Auxilia No. 1, vol 2* (Bogotá: Universidad Javeriana, 2006) at 326-334 and 344-347; see also Gustavo Cuello, "*Medios de impugnación en el derecho administrativo - vía gubernativa -"* (2004) 107 Universitas 797; see also William Burgos, "Procedimiento en las actuaciones por la presunta violación de las normas de protección de la competencia"(2010) 32 Con-Texto 73 [Burgos]; see also Miranda Control Jurisdiccional, supra note 83. Regarding similar institutions to *via gubernativa* in other jurisdictions and particularly to the inquisitorial scope of this sort of proceedings see Laverne Jacobs, Sasha Baglay, Melissa Kwok et al., "The nature of inquisitorial processes in administrative regimes: global perspectives research workshop report" (2011) 24 Can J Admin Law Pract 261; see also Bernard Schwartz, *French Administrative law and the Common-law World* (new Jersey: Lawbook Exchange, 2006) at 108-110 and 132-135; see also Arie Jansse, "Judicial Review of Administrative Decisions by the Dutch Administrative Courts Recours: Objectif or Recours Subjectif? A Survey Including French and German Law" in Frits Strink & Eveline van der Linden eds. "Judicial Lawmaking and Administrative law (Oxford: Intersentia Antwerpen, 2005) 153 at 157. Regarding Colombian legislation and case law on the matter see L1437, supra note 111 at Arts. 74-92, 138, and 161.2; see also Consejo de Estado, 20 September 2007, Acción de Nulidad (2007) 1995-12217; see also Consejo de Estado, 4 August 2007, Acción de Nulidad (2007) 1996-03070; see also Consejo de Estado, 11 December 2006, Acción de Nulidad (2006) 2001-00413; see also Consejo de Estado, 25 November 1999, Acción de Nulidad (1999) 5262.

[113] When dealing with the faculties of the State in general and of State agencies in particular, administrative law in Colombia, as in other jurisdictions, differentiates between discretionary powers and regulated powers (in Spanish *poderes discrecionales y poderes reglados*). In a simpler way, the difference between the two is the scope of the decision. So, whilst the first refers to the possibility of deciding on a wide spectrum, the second means that the power of the State is restricted to specific situations and of particular circumstances previously defined by law. In other words, law allows State agencies to have a large wiggle room in discretionary powers and it restricts it in ruled powers. SIC, as State agency, has both, discretionary and regulated powers. Among its discretionary powers, for instance, one can find the decision of opening and closing inquiries as well as the determination of fines, injunctions or remedies. See, on this regard, Ingrid Ortiz, "La regla del minimis en el ámbito de los acuerdos restrictivos de la libre competencia" (2009) 8:2 e-Mercatoria 1 at 35-39 [Ortiz Regla del Minimis]; see also Torrado, supra note 109, at 43-44; see also Carlos Uribe & Fernando Castillo, "El otorgamiento de garantías de la libre competencia (un análisis jurídico y económico)" (2006) 2:2 Rev Derecho Competencia 401 at 431-434; see also Jaeckel & Montoya, supra note 56 at 37, 41-45, and 49; see also Corte Constitucional,

remains incidental at best.

In recent years there have been attempts to let others participate in public litigation more actively allowing them to present evidence or take part as thirds on ongoing inquiries, which would allow them to appeal an inquiry's closing of market authority influencing its decision somehow.[114] Still, their role continues being ineffective (not saying insignificant) as their participation has a very limited extent. Though I will refer to such limitations in the second part, let me just mention two of them (just as an example, reserving elaborations for later). First, thirds (or others) cannot ask for compensation or direct remedies.[115] And, second, despite that they can bring evidence to public litigation, they can hardly ever access the evidence collected (e.g. to

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26 July 2002, Acción de Inconstitucionalidad (2002) C-492-02; see also Consejo de Estado, 27 January 2011, Acción de Nulidad (2011) 2002-04725; see also Consejo de Estado, 25 November 2010, Acción de Nulidad (2010) 2003-06792; see also Consejo de Estado, 18 November 2010, Acción de Nulidad (2010) 2002-10342; see also Tribunal Administrativo de Cundinamarca, n.d., Acción de Nulidad (2005) 2000-00550; see also SIC, 30 January 2002, Resuelve Recurso (2002) Resolución 2853 at par. 1; see also SIC, 13 November 2007, Resuelve Recurso (2007) Resolución 37291.

[114] There are two ways for thirds to take part on public litigation (i.e. for market agents that are neither market authority nor wrongdoers). First, perhaps an obvious one, denouncing the existence of anticompetitive market behaviours in order that market authority opens an inquiry. Second, once the inquiry is opened, providing evidence and giving their opinion on what market authority should decide on the matter. Although these two were plausible options before 2009 reforms, they become nevertheless clearer after (specially the last one), as L1340 expressly states that "interested thirds" (using law's own wording) can indeed intervene in public litigation. But this is far from being an innovation of the legislator or an actual improvement of others' position in public litigation. It is rather an incorporation on public litigation norms of what was recognized before via direct interpretation of the general rules of *via gubernativa* according to which, whenever inquiries or administrative acts (in general) affect other people or (in any case) have a direct impact on them, interested thirds should have the chance to present their position before the inquirer or the issuer of the act (e.g. market authority) and even before administrative judges. So, I think it would be fair to say that things have not changed that much after 2009 reforms. The scope of others' participation is still narrow in terms of their actual and real possibilities to defend their interests through public litigation, especially after considering that it is still impossible for them to look for compensation or remedies in this mechanism of enforcement. The question would be, then, why does this happen? Even though I will try to answer this latter, for the nonce, I would say that one can only explain this (me at least) for the way how the jurisdiction is still seeing what the goal and scope of public litigation should be. This is, as a mechanism limited to defending markets and competition and thus always conditioned to revolve around the State (i.e. market authority) and wrongdoers. Such an interpretation is what fundamentally makes thirds' participation one of many ways to deter anticompetition. In other words, what makes that the role of thirds continues being merely instrumental. In this way, thus, one could say that thirds' intervention is intended only to help market authority in monitoring public litigation, but, in the end, public litigation continues being a dispute between market authority and wrongdoers wherein thirds are simply thirds; nothing more, nothing less. Now, what can thirds do in public litigation? Their intervention, as we said, is restricted to precise events that one can encapsulate in the following: (i) giving information to SIC (before or during the inquiry), (ii) suggesting injunctions, (iii) giving hers/his view on what market authority's decision should be, (iv) appealing before SIC and even bringing an action before judges if SIC decides to close the inquiry (although debatable, this is a possibility that remains nonetheless opened via interpretation of the Administrative Code [Art.46]. Yet, being honest, there is little possibility of success as the powers of SIC are deployed on a discretionary way [following D2153 Art.2.1par. specifically what refers to the significance of the market behaviour]). For this explicit legal provision on 2009 reform see L1340, supra note 108 at Art.19. Regarding the Administrative Code formula see Decreto 1, Diario Oficial 36.439, 2 January 1984 [CCA] Arts.14 and 46. As per case law or SIC decisions related with the intervention of thirds in public litigation see, for instance, SIC, 19 January 2004, Declara Nulidad (2004) Resolución 398 [SIC Resolución 398]; see also SIC, 5 May 2005, Resuelve Recurso (2005) Resolución 9842 [SIC Resolución 9842]; see also Consejo de Estado, 20 February 1997, Acción de Nulidad (1997) 3488. See also on Jaeckel & Montoya, supra note 56 at 150-154; see also Torrado, supra note 109, at 17; see also Archila, supra note 59 at 27.

[115] As I will go over later on, there are two reasons for impeding others or thirds to bring compensatory claims in public litigation (both of which, I must say, once again, framed within the same binary/legalistic reasoning of the jurisdiction). First, as noted, public litigation is seen as an administrative law mechanism in which there is at stake a dispute between wrongdoers and the State. For, its goal is not solving private issues that, as such, have their own channels to be solved (i.e. private litigation). Second, the legalistic mindset of the jurisdiction would prevent in any case SIC to incorporate others (let's say) more actively; for instance, letting them ask for compensation. This is so because the scope and content of SIC's action is seen as always regulated and, in any case, subordinated to the strict framework that law has previously stated. So, if SIC's decision exceeds the boundaries imposed by law regarding the events in which others can participate in public litigation (e.g. permitting compensatory claims), what would most likely happen is that wrongdoers would challenge SIC's decision before administrative judges arguing that its decision on that matter contravened a higher rank norm and, consequently, that the decision must be revoked. Regarding this two reasons see Miranda Indemnización prácticas restrictivas, supra note 83; see also Ingrid Ortiz, "La aplicación privada del derecho antitrust y la indemnización de los daños derivados de ilícitos contra la libre competencia - 1era parte" (2008) 7:1 e-Mercatoria at 36-38 and 40-43 [Ortiz]; see also OECD Colombia, supra note 56 at 42-46 and 88. Regarding case law on the matter see, for instance, Consejo de Estado, 28 August 2003, Acción de Nulidad (2003) 2002-00779 [Consejo de Estado 2002-00779]; see also Consejo de Estado, 28 November 2002, Acción de Nulidad (2002) 2001-0060; see also SIC, 18 August 2011, Orden Archivo (2011) Resolución 42838.

build their case in private litigation) due to obstacles such as the statutory and legal reserves with which wrongdoers' information is protected and that, as such, perpetuates information asymmetries to the detriment of victims.[116]

Now, in my view, these are neither innocent nor unintentional omissions of law. They are, in fact, manifestations of the real and intended scope of public litigation of empowering market authority and disempowering those who are not the State or winners of competition (i.e. wrongdoers). But, to make this point, let's consider for a moment market authority's role. When referring to premises we said that market authority could not intervene in markets arbitrarily and that it has to do so within the boundaries instituted for such a purpose.[117] Considering what such boundaries (implicitly or explicitly) entail, one could at first say that market authority, when enforcing public litigation, works as a sort of collective interests/benefits representative and therefore as a sort of spokesperson (at least a proxy) for unknown competitors and unknown consumers; in other words, of unknown individual interests/benefits.

But this is not true in Colombian competition law. Public litigation norms could have said that law's main goal was actually protecting others, even more in a jurisdiction so influenced by a legalistic understanding. Yet, it did not. Law chooses instead to build on market authority's purview around set of values and with that around non-figurative representations of collective

[116] Information asymmetries are amongst the most challenging issues to grapple with when litigating competition law cases; hence why taking part of public litigation for victims could be decisive as it might allow them to access information that they otherwise could not get for bringing a strong compensatory claim (in private litigation, of course, as this is the sole option that they left). But why can public litigation eventually break information asymmetries? Simply, because SIC has judicial police powers that victims evidently lack in private litigation. Accordingly, while in public litigation SIC can access key evidence through inspections, unannounced visits, or just compelling wrongdoers to send information (with threat of fines, for instance). In private litigation, victims do not have similar powers and thus the only way left to demonstrate anticompetition (and therefore the right of being compensated for) is what they can actually perceive from markets or what they can bring forward from their own experience (which will be explained later as the "subjective predicament" of private litigation). So, accessing to this evidence collected by SIC for victims becomes crucial. Yet, it is not easy. As a matter of fact, it seems to be almost impossible due to the restrictions that exist as, according to Colombian law, both sensitive business and industrial information of wrongdoers (e.g. accounting information or board of directors' minutes) are protected with legal reserve and therefore with confidentiality (even [and specially] for private litigation purposes). This, of course, does not apply to SIC, given that one of the few exceptions for legal reserve discovery is the existence of a judicial order that, due to its judicial police powers, SIC is entitled to issue in public litigation. Now, the fact that SIC has access to this confidential information and that it can incorporate it as evidence against wrongdoers in public litigation cases does not mean that others can access such information. According to case law (coming of SIC and Tribunals who have jurisdiction to decide over declassification of information cases in one instance procedures called insistence [in Spanish, *recurso de insitencia*]) the sole way to access information classified is for the sake of the right of self-defence which, in other words, mean that, for case law, whenever there is a tension between due process and rights like privacy or confidentiality (the core of legal reserve), the former prevails over the latter. But remember that others are just interested thirds of public litigation. They are not parties. For, the scope of their due process and therefore of their right of self-defence is limited to what their role in public litigation truly is. Thereby, as the sole parties in public litigation are SIC and wrongdoers, according to case law, the only ones able to access classified information protected under legal reserve are SIC and wrongdoers (of course not others as thirds). Regarding legal reserve provisions see Decreto 410, Diario Oficial 33.339, 27 March 1971 Art. 61 [Commercial Code]; see also L155, supra note 61, at Art,13; see also L1340, supra note 108, at Art.15; see also Ley 57, n.d., 5 July 1985 Arts.13, 21, and 27. Regarding case law on legal reserve see, for instance, Corte Constitucional, 16 June 2010, Acción de Inconstitucionalidad (2010) T-466-10; see also Tribunal Administrativo de Cundinamarca, 19 July 2007, Recurso de Insistencia (2007) 2007-00198; see also Tribunal Administrativo de Cundinamarca, 18 November 2010, Recurso de Insistencia (2010) 2010-00527; see also Tribunal Administrativo de Cundinamarca, 30 October 2010, Recurso de Insistencia (2008) 2008-00392; see also Tribunal Administrativo de Cundinamarca, 17 July 2003, Recurso de Insistencia (2003) 2003-00547; see also Tribunal Administrativo de Cundinamarca, 24 January 2008, Recurso de Insistencia (2008) 2008-00010; see also SIC, 24 December 2019, Orden Desglose de Documentos (2009) Resolución 66765; see also SIC, 19 January 2004, Declara Nulidad Procesal (2004) Resolución 398; see also SIC, 14 April 2004, Resuelve Recurso (2004) Resolución 7918.

[117] That is, (i) consumer welfare, (ii) economic efficiency, and (ii) free participation on markets; see supra pages 22-23 and supra note 61.

interests/benefits. My point is that law does not envision a representation of market agents through market authority. For law, nothing should tie market authority with other market agents (whomever they are). The sole bonds (if any) should be distant and intangible so that market authority can keep objective stands when enforcing law for the sake of markets and competition.[118] And it is precisely here where classical premises begin acting upon fundamentals adapting them into legal worldviews.[119] So, what law does through market authority is simply re-embodying set of values. And although other market agents (apart from State and wrongdoers) may beneft as a result that does not make the protection of others the axis of law. Public litigation reproduces in such a way a kind of 19th-century liberal logic of police state wherein what matters is protecting abstractions that by no means should mirror favouritisms or special treatments (what in turn explains, in my view, the rationale of each one of the three classical premises).[120]

So, when market authority fines wrongdoers, the decision is not for the sake of the rest of market agents, but to redress a market failure that compromises the market's stability and coherence.[121] The decision may favour others indeed, as wrongdoers can experience difficulties with fines or injunctions. Yet, this is more a collateral effect (so to speak). Market authority, putting it differently, ends up having a peculiar double overtone of speaking and acting on behalf of anybody and speaking and acting (at the same time) in favour of nobody. In a way, saying in Colombia that market authority's actions and decisions are a projection of other market agents is

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[118] When I say that the defence of collective interests/benefits should be seen in law as a "non-figurative representation", I mean that, when law endorses the protection of this collectivistic approach in public litigation, it is far from just creating ethereal and impractical discourses or elaborations. Law conceives collective will of markets as a fact and therefore as a practical and tangible elaboration (so to speak) that market authority should represent and embody. See Philip Pettit, "A Sensible Perspectivism" in Maria Baghramian & Attracta Ingram eds., *Pluralism and politics of diversity* (New York: Routledge, 2000) 60 at 71-73. Pettit gives an interesting account on "non-figurative representations" which is precisely the extent that I aim to give here to such a word. Pettit says:

> "Some uses of language are meant only to amuse or shock or play but many, even many that are intended to elicit such effects, are representational in character: they are meant to convey a way things are. Among such linguistic representations of the world - among such conceptualisations, as I shall say - some are more or less figurative, some more or less non-figurative. [...] By non-figurative conceptualisation I mean that sort of representation in words or in concepts that relies solely on the pre-established meanings of the words used or, in the case of novel terms, on meanings that it explicitly introduces. [...] non-figurative relies only on the pre-established or stipulate meanings of the words it employs, figurative - in particular, metaphorical - speech has to rely on something else besides. It puts into use not just the literal meanings of the words, but the shared experience of the things and properties to which the words literally direct us and the shared sense of how those things and properties model items in the situation that the speaker is addressing. The dark and cold ascribed to the day of Yeat's death come to model features of the loss which his death entails. The instruments that chart the dark and cold come to stand for the indices by which we might measure that loss. And so on. [...] The language of analysis and the language of science in general, strives for exactitude and reliability and naturally embraces non-figurative modes of expression. The language of art [example of figurative expression for Pettit] strives for expression that is evocative rather than exact, and oriented to particularity rather than replicability." [Footnotes omitted]

[119] In the case of Colombia, such legal worldviews are what we have referred in this work as Spanish legalism and Civilian binarism.

[120] See on early liberal developments and competition law Gerber, supra note 5 at 17-21, 28-31, and 34-41. Regarding competition law and a historical approach to this notion of police power see David Millon, "The Sherman Act and the Balance of Power" (1988) 61 S Cal L Rev 1219 at 1240-1242 and 1250-1251; see also Page, supra note 57.

[121] See L155 Motives, supra note 56, at 474-477, 482, 486-488, and 513; see also Colombia, Asamblea Nacional Constituyente, Gaceta Constitucional 46 (15 April 1991) at 36-38, and 41; see also Colombia, Asamblea Nacional Constituyente, Gaceta Constitucional 80 (23 May 1991) at 89-91, 93-94, and 100-105; see also SIC03100089, supra note 107; see also SIC28350, supra note 54; see also C-616-01, supra note 107. As regards competition law and markets' protection see Wolfgang Kerber & Oliver Budzinski, "Competition of Competition laws: Mission Impossible?" in Richard Epstein & Michael Greve eds., *Competition laws in Conflict. Antitrust Jurisdiction in the Global Economy* (Washington: American Enterprise Institute, 2004) 31 at 49-51; see also Basedow, supra note 35, at 714-715 and 717-719; see also Marion Fourcade & Kieran Healy, "Moral Views of Market Society" (2007) 33 Annu Rev Sociol 285; see also Miranda Indemnización prácticas restrictivas, supra note 83, at 21.

just as impossible and incoherent as saying that with market's authority empowerment other market agents have also been empowered. Market authority's empowerment, thus, is just for its own sake and therefore for seeking its own goal of policing markets and competition.

What does happen in private litigation, though? Having explored public litigation dynamics, one could perhaps think that its reasoning is somehow reversed in private litigation as this is the mechanism that market agents have (par excellence) to exercise their rights and defend from anticompetition. More so after considering that, contrary to public litigation, private litigation is, substantively and procedurally speaking, a dispute between two individual interests (i.e. wrongdoers and victims), that ground their claims and defence on commercial law. At first this is true and thus one can say that the exclusion of others from public litigation is (to a certain extent) reasonable as others (victims) have their own mechanism of enforcement. And, as a matter of fact, private litigation norms in Colombia confirms this (at least in theory), stating that all market participants can bring actions whenever they have been harmed by anticompetition.[122] Yet, in reality, the scope of private litigation seems to have its own nuances.

Contrary to public litigation, wherein dynamics of empowerment/disempowerment are (let's say) notorious, in private litigation they are not, which does not mean that they do not exist. The difference is perhaps that wrongdoers' empowerment (and thus others' disempowerment) is

[122] Before 1996 reforms (which gave way to L256), private litigation could only be tried by merchants, that is, by people who professionally and routinely perform acts of trade (e.g. corporations or businesses) and who, for that very same reason, hold such a formal label of "merchants" before law. This precondition for using private litigation, although straightforward and thus relatively easy to verify by judges, it was nevertheless criticised since it was seen as a stumbling block for other market agents (not formally considered as merchants) to use private litigation. 1996 reforms sought therefore a more accessible and consequently more democratic access to private litigation. Accordingly, they not only stated that all market agents (not just merchants) had access to private litigation, but also that other people (or groups) could use it too. In practice, however, 1996 reforms did not change things that drastically (at least with respect to this point of who can bring an action in private litigation). And, as it happened before 1996 reforms, L256 ended up limiting the access to private litigation too. So, despite that law begins saying that all market agents can bring forward private litigation, it nevertheless links the role or condition of plaintiff and defendant to the need for demonstrating a participation in markets (or at least the intention for participating in it). For, if there is evidence of a jointly participation of plaintiff/defendant in the market (which most of the times translates into direct competition and not just into a simple spatial coincidence), then it is deemed that the plaintiff could use private litigation and, therefore, that s/he could put wrongdoers (defendants) on trial. If there is no evidence (for both or even for one of them), the judge would simply dismiss plaintiff's suit. Truth be told, though, private litigation continues being more easily accessible for merchants. After all, who else is in a better position to demonstrate either joint participation in markets or that there is (or was) some kind of trade relationship? Thus, when referring to market participants, market agents or competitors in this part, we are making reference precisely to this (direct or indirect) trade or market relationship that law demands for letting market agents take part in private litigation. Now, I also mentioned other market agents. And with this I was referring to what can be seen as the second component of 1996 reforms in democratizing private litigation (so to speak). Indeed, 1996 reforms introduced the possibility that other market agents could bring an action. This is the case of consumers, industrial and trade associations, professional guilds, and the *Procuraduría* who is deemed to represent (in theory) society's interests (*Procuraduría* is a *sui generis* State agency in Colombia with a number of roles and that one can identified, in a non-Colombian context, as a hybridity between General Attorney and Ombudsman [although these two also exist in Colombian institutional network]). Regarding legal provision on the matter see L256, supra note 62, at Arts.21-22; see also Exposición Motivos L256, supra note 62, at 3-4; see also SIC, 20 January 2009, Proceso Abreviado de Competencia Desleal (2009) Sentencia 1 at 2.3 [SIC Sentencia 1]; see also SIC, 25 January 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 2 at 2.1. and 2.3.; see also SIC, 15 October 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 17; see also SIC, 30 January 2009, Proceso Abreviado de Competencia Desleal (2009) Sentencia 2 at 2.2.; see also SIC, n.d. 2005, Resuelve Investigación de Competencia Desleal (2005) Resolución n.d. (Expediente No.04072866); see also SIC, 18 May 2005, Resuelve Investigación de Competencia Desleal (2005) Resolución 10875; see also SIC, 23 January 2004, Resuelve Investigación de Competencia Desleal (2004) Resolución 509 [SIC Resolución 509]; see also SIC, 20 December 2005, Proceso Abreviado de Competencia Desleal (2005) Sentencia 8; see also SIC, 29 November 2004, Resuelve Investigación de Competencia Desleal (2004) Resolución 29192; see also SIC, 14 October 2004, Resuelve Investigación de Competencia Desleal (2004) Resolución 25429; see also Tribunal Bogotá 2002-8702, supra note 90, at 5; see also SIC, 22 October 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 19; see also SIC, 28 February 2011, Proceso Abreviado de Competencia Desleal (2011) Sentencia 5.

deployed more subtly. But, let's clarify first the scope of private litigation. When anticompetitive market behaviours happen, victims may bring actions before judges asking for compensation, remedies, or injunctions.[123] Apart from some particular elements of the jurisdiction, there is nothing special in private litigation that makes it different from a typical adversarial procedure and from any other legal action in Colombia.[124] Nonetheless, it is precisely this lack of special rules that makes that dynamics of empowerment/disempowerment benefit wrongdoers to the detriment of others (at least of victims).

Again, I will address this point in the second part, but let me make a brief reference to it here to make my argument. The reason that private litigation produces advantages for wrongdoers to the point of empowering them with active legal roles is because the deep asymmetry that

[123] See L256, supra note 62, Arts.20-22, 24, 26, and 31.

[124] When I say that there is nothing special in private litigation, I mean that this mechanism of enforcement follows the typical procedural dynamics of direct liability such as the burden of proof, that is, that the duty of proving the existence of the obligation to compensate (i.e. anticompetition) should be carried by plaintiff (i.e. by the victim). There are, however, two distinctive features in private litigation that I cannot help to note here: (i) first, the role of SIC as adjudicative body and, (ii) the type of procedure that follows (modified by the new CPC to which I will reffer in a subsequent footnote). (i) Regarding the first one; SIC operates in two different capacities depending on which mechanism of enforcement one is referring to. As noted, in public litigation SIC, as market authority, has the (sort of) double role of judge-and-party in *via gubernativa*, which nevertheless changes as soon as wrongdoers bring SIC's administrative act before judges wherein the nature of public litigation mutates from inquisitorial to adversarial becoming SIC, as a result, in one of the parties of public litigation procedures (as defendant) as is already by then the wrongdoer (as plaintiff). Yet, this does not happen in private litigation where the adversarial nature never changes. Private litigation, thus, always has two parties, namely, victims of anticompetition (as plaintiffs) and wrongdoers (as defendants). But, where does SIC enters in the scene? In private litigation, when plaintiffs decide so, SIC can become a judge (as any other of the civil judges of the jurisdiction). In other words, plaintiffs can choose to bring private litigation either before civil judges or SIC. This is due to the changes that 1998 reforms introduced allowing some State agencies (like SIC) to becomes judges in conflicts in which they have already a supervisory role. Consequently, insofar SIC works as market authority in matters related with breach of competition law (i.e. in public litigation), it can become then an adjudicative body on issues of the same kind in private litigation. This dual position of SIC was initially confusing and full of concerns in the jurisdiction. One of the worries, for instance, was the lack of impartiality and transparency that SIC could face at a certain point since, whereas it performs as judge in private litigation, it could act as police market of public litigation in the same case. The Constitutional Court, however, clarified this point ruling that SIC must operate and enforce public and private litigation differently. What the Constitutional Court meant with this was that while in public litigation SIC should work as market authority (as a police market) in private litigation it should assume the condition of judge and, with that, the condition of an independent and impartial actor. Accordingly, in public litigation SIC ought to adopt an active participation as its primary goal is prosecuting wrongdoers, but, in private litigation, it must take a passive stand (so to speak) waiting thus for victims to unfold their claims and for wrongdoers to present their defence. Moreover, for the Constitutional Court, while both capacities could be made by SIC at the same time in the same case, both should nevertheless be run by SIC's different divisions and officers to ensure due process to parties. (ii) As per the type of procedure that private litigation follows; before the recent modification of Colombian civil procedure code (hereinafter the new CPC, which comes into force in January 2014), there were different categories of proceedings. Two of them were *proceso ordinario* (which can be translated as ordinary process) and the so-called *proceso abreviado* (which might be translated as brief proceedings). Although there are a number of differences between the two, the one on which I want to focus on is on the possibility of reaching cassation. In brief, the difference was that, whereas in ordinary process there was cassation, in brief proceedings there was not. Thereby, whilst an ordinary process could get Supreme Court, brief proceedings could not. But, why was that important? From an institutional perspective, having the chance of reaching cassation and therefore Supreme Court entailed (in Colombia) that Supreme Court rulings could make case law on the matter. In other words, that there could be *doctrina probable* (i.e. Colombian version of stare decisis). Now, according to 1996 reforms, private litigation cases should follow brief proceedings meaning (as of 1996) that none competition law case could ever reach cassation, with the correlative effect that none could eventually conform *doctrina probable*. This, as noted, was however modified by the new CPC that eliminates this difference between ordinary process and brief proceedings. For, at first, as of January 2014, private litigation can eventually reach Supreme Court via cassation and thus create *doctrina probable* on competition law cases. Regarding (i) see Ley 446, Diario Oficial 43.335, 8 July 1998 Art.148; see also Ley 1564, Diario Oficial 48.489, 12 July 2012 Arts.20.3 and 24.1 [New CPC]; see also Corte Constitucional, 20 June 2001, Acción de Inconstitucionalidad, (2001) C-349-01; see also Corte Constitucional, 15 May 2001, Acción de Inconstitucionalidad, (2001) C-501-01; see also Corte Constitucional, 28 May 2002, Acción de Inconstitucionalidad, (2002) C-415-02 [C-415-02]; see also Corte Constitucional, 5 April 2000, Acción de Inconstitucionalidad, (2000) C-384-00; see also Consejo de Estado, 6 August 2004, Resuelve Recurso de Apelación contra auto admisorio de demanda (2004) 2003-00341; see also Consejo de Estado 2002-00779, supra note 115. As regards (ii) see L256, supra note 62, at Art.24; see also Decretos 1400 y 2019, n.d., 6 August 1970 & 26 October 1970 at Arts. 408-414 and 366 [Old CPC]; see also, on *doctrina probable,* Corte Constitucional, 9 August 2001, Acción de Inconstitucionalidad, (2001) C-836-01; see also Sebastián Mantilla, "La mal llamada doctrina probable en la Ley 1340 de 2009" (2011) 8 Universitas 279; see also Andres Palacios & Camilo Pabón, "La doctrina probable en sede administrativa: los escollos del artículo 24 de la Ley 1340 del 2009" (2008) 28 Con-texto 45.

anticompetition produces is not considered in private litigation's operability at all.[125] As I said before, most of the procedural rules of private litigation follow the same rules of any regular process in Colombia. One of which is what is deemed a cardinal rule of civil wrongs and civil procedure: i.e. procedural burdens and most notably the burden of proof. Indeed, civil procedure in Colombia is structured around the rule (or belief) that the person who pleads the existence of a fact and of a legal effect derived from such a fact must demonstrate not only the existence of that fact but also that there is a casual link with it and the norm that is being invoked.[126] In other

[125] In my view, the word asymmetry in competition law conflicts must be understood in a broad sense. In fact, I dare to say it would be wrong to understand it in a narrow one by restricting it, for instance, to just one type of asymmetry. What I mean is that, when speaking of asymmetries in markets and competition (more so in competition law), one usually makes the mistake (me at least) to instantly think and restrict the debate to information asymmetries. But these are just one of the many types, manifestations or symptoms of a larger asymmetric phenomenon that markets and competition experience in a competition law context. My point is that, when dealing with conflicts that lead to competition law's intervention, one must understand that both (i.e. markets and competition in a market economy environment [more so in market competition]) do not compel competitors to balance their relationship, but rather to unbalance it. This approach is of course due to the confrontational substratum that we have taken in this document as stand to understand competition law as an ontological phenomenon. Indeed, so far our understanding of what happens in and what motivates the existence of competition law has been that competitors do not enter in markets simply to perform an act of competition. The nature of the act of competing (at least with the one with which competition law's rationale deals with) is antagonistic and bellicose. Our position is that competitors enter in markets to struggle for conquering shares, for gaining profits, for obtaining positioning, for getting market differentiation, for reaching innovation, and for a number of outcomes and reasons all of which aiming to "win the race" (i.e. to win competition in markets). And when that happens, winners of competition unbalance their relationship with the rest of the market as they become richer, powerful, and better-positioned. Now, one can indeed speak of cooperation, support, help, and of other antonyms for confrontation in markets and competition. But this is only possible out of competition law's realm and in any case in other (of the many) areas or disciplines that explore competition and markets as general phenomena. But it is different when one talks about competition law. The conflicts that these laws address grapple with the exacerbation of competition in market economy (and, again, in market competition) so that they deal with the asymmetrical relationships that winners of the competition process end up having before the rest of the market. So, when we confront the fact of competition in the competition law realm, we will always be in front of someone who has won and someone who has lost. And thus, while the former would claim that her/his win was legitimate and legal (due to merits), the last would say that the winning (or advantage) of the winner was dubious, bogus or in any case illegal (non-meritocratic). In competition law, accordingly, there is always an asymmetrical relation that not only benefits from hidden information (i.e. information asymmetries), but in general terms from a position of hierarchy and superiority of defendants (as winners of the competition struggle) over plaintiffs (as losers). See W. Röpke, supra note 19, at137-141; see also Peter Ulrich, *Integrative Economic Ethics. Foundations of a Civilized Market Economy* (New York: Cambridge University, 2008) at 132-133; see also Hart, supra note 31; see also Gregory Gundlach, "Price Predation: Legal Limits and Antitrust Considerations" (1995) 14:2 JPP&M 278 at 282-283; see also Peter Hammer & William Sage, "Antitrust, Health Care Quality, and the Courts" (2002) 102:3 Colum L Rev 545 at 599-600; see also David Besanko & Daniel Spulber, "Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement" (1990) 80:4 AER 870 at 873-874 and 881-882; see also Lior Strahilevitz, "Asymmetries and the Right to Exclude" (2006) 104:8 Mich L Rev 1835; see also Juan Rodriguez, "Expert Economic Testimony in Antitrust cases: a Comparative Law and Economics Study" (2009) 14 Int Law Rev 221; see also Working Paper, Council of Europe, Commission of the European Communities, Green Paper - Damages actions for breach of the EC antitrust rules Documents COM(2005)672 Final (2005); although related with consumers, quite insightful on the EU green paper, see also Hanneke Luth & Katalin Cseres, "The DCFR and Consumer Protection: An Economic Assessment" in Pierre Larouche & Filomena Chirico eds., *Economic Analysis of the DCFR The work of the Economic Impact Group within* CoPECL (Munich: Walter de Gruyter, 2010) 235 at 261-262; see also M E Beesley, *Privatization, Regulation, and Deregulation* 2nd ed. (New York: Routledge, 2005) at 376-378.

[126] Both the old CPC and the new one have a similar rule for burden of proof, that is, that the party who pleads a claim should present evidence to prove it. In other words, and speaking particularly of competition law, that victims of anticompetition (as plaintiffs) must demonstrate (i) that they suffered damages from a market behaviour deemed anticompetitive and, consequently, (ii) that they are entitled to compensation. But the new CPC incorporates a new rule that the old CPC did not explicitly state but nevertheless was developed in the jurisdiction since early 90's via case law and that is commonly known in Colombia as the dynamic burden of proof's rule (in Spanish *la carga dinámica de la prueba*). Indeed, the first developments of this rule were made by the State Council in medical liability cases (*Consejo de Estado* in Spanish, which works as the higher court for administrative law matters). With time, not only State Council began using this rule in other cases, but other Courts adopted it in their case law too (e.g. Constitutional Court and Supreme Court). Now, the reasoning of the rule is relatively straightforward; judges can shift the burden of proof (initially on plaintiff's shoulders) to the party to whom the evidence is more accessible (whether it be plaintiff or defendant). So, whenever judges consider that is easier for one of the parties to bring evidence for proving a specific fact at trial, the party is obliged to present that specific evidence. But this entails something additional; the party is also obliged to carry on her/his back the consequences of burden of proof; to wit, if s/he does not bring the evidence, the benefit of assumption would be for her/his counterpart. Or, what ends up being the same, not providing the evidence makes her/him liable for the facts that such evidence would have rebutted. For, at the end, dynamic burden of proof's rule is not just a mechanism to distribute procedural burdens between parties. It is, above all, a mechanism for liability presumption. In this way, one can think of this new provision of the new CPC as a positivization of what Colombian jurisprudence have already been developing on the matter thus far. However, echoing, perhaps, some of the criticism against dynamic burden of proof's rule (chiefly, that it affects the core of *onus probandi* and therefore civil liberties of defendants), the

words, and referring to competition law specifically, market agents affected by anticompetition must demonstrate that wrongdoers did deploy anticompetitive market behaviours and, moreover, that such behaviours are in fact legally deemed anticompetitive.[127]

Why does this happen? The reason I want to focus on is what creates (somehow) a conceptual similitude with public litigation's presumption of legality, which, as mentioned, is the ration d'être of market authority's empowerment. Asking defendants to demonstrate anticompetition entails that, until anticompetition would not be proved, the fact that wrongdoers did not do wrong or that they performed competitively must be presumed. But consider how difficult demonstrating anticompetition could be, even more when most of the evidence is controlled or owned by wrongdoers (in a jurisdiction with no discovery procedure) and even more when wrongdoers are still exercising an asymmetrical relationship in markets.[128] Yet problems do

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new CPC introduces a new element that may help clarify the extent of it, namely, four examples in which dynamic burden of proof would be deemed to apply (and ergo shift the burden of proof). They work indeed as a sort of hermeneutical tool to guide (and frame) its scope. These four examples are: a.) when the party has a physical control of the evidence, b.) when the evidence entails a technical knowledge or expertise that only the party knows, c.) when the party has participated in the facts that produced or were deemed to have produced the evidence, or d.) when the other party is (or was) in state of defencelessness. In these four examples, as noted, it would be deemed that the evidence is more accessible for one of the parties and, thus, that judges should shift the burden of proof. Yet, given that the new CPC goes into effect in January 2014, only then it will be known the extent that the judiciary is going to give to this "new rule," as from that moment onwards judges would be bound by law to apply dynamic burden of proof's rule. Regarding this new evidentiary rule on the new CPC see New CPC, supra note 124, Arts. 166-167; see also Ulises Canosa, "Código General del Proceso. Aspectos Probatorios", (Paper delivered at Symposium 33vo Congreso Colombiano de Derecho Procesal September 2012), (2012) online: Casa del Abogado <www.casadelabogado-asf.org> at 38-39; see also also Jairo Parra, "Reflexiones sobre algunos aspectos importantes del Código General del Proceso", (Paper delivered at Symposium 33vo Congreso Colombiano de Derecho Procesal September 2012), (2012) online: Casa del Abogado <www.casadelabogado-asf.org> at 31-32; see also Sergio Rojas, "Código general del proceso: aciertos y vicisitudes de un nuevo régimen de pruebas" (2011) 8 Universitas 299 at 319-320. Regarding the dynamic burden of proof in Colombia and similar developments see, for instance, Juliana Perez, "La carga dinámica de la prueba en la responsabilidad administrativa por la actividad medica (decaimiento de su aplicabilidad)" (2011) 68:152 Estudios de Derecho 202 at 207-212; ; see also Luis Ruiz & Óscar García, "La relación de causalidad en la valoración de la prueba en la responsabilidad médica administrativa, estudio de la jurisprudencia del Consejo de Estado" (2010) 67:150 Estudios de Derecho 13 at 17-20; see also Mercedes Fernández, *La carga de la prueba en la práctica judicial civil* (Madrid: Wolters Kluwers, 2006) 117-119 and 142-147. Regarding case law supporting dynamic burden of proof's rule see Consejo de Estado, 30 July 1992, Reparación Directa (1992) 6897; see also Corte Constitucional, 23 March 2010, Acción de Tutela 2010) T-211-10; see also Corte Constitucional, 19 April 2010, Acción de Tutela (2010) C-265-10; see also also Corte Constitucional, 27 July 2010, Acción de Inconstitucionalidad (2010) C-595-10 [C-595-10]; see also Corte Constitucional, 23 April 2009, Acción de Tutela (2009) T-291-09 [T-291-09]; see also Corte Constitucional, 20 August 2003, Acción de Tutela (2003) T-724-03 [T-724-03]; see also Corte Suprema de Justicia, 22 July 2010, Recurso de Casación (2010) 2000-00042.Regarding case law rejecting the burden of proof see Consejo de Estado, 18 July 2007, Reparación Directa (2007) 1998-00249; see also Consejo de Estado, 31 August 2006, Reparación Directa (2006) 2000-09610.

[127] There is no evidence that cases in private litigation use dynamic burden of proof's rule. Instead, the classical stand of *onus probandi* is what seems to dominate case law. For, plaintiffs (victims) are bound to demonstrate damages, the joint participation in markets (of plaintiff and defendant), casual link, and the existence of anticompetition as such. This last one, moreover, can be seen as the centerpiece of plaintiff's claim before the jurisdiction since it is not only what gives way to private litigation but also what explains why victims can indeed become victims before competition law. As per case law mentioning the burden of proof see, for instance, SIC Sentencia 7, supra note 74; see also SIC Sentencia 2, supra note 74; see also SIC, 22 October 2009, Proceso Abreviado de Competencia Desleal (2009) Sentencia 13 [SIC sentencia 13]; see also SIC, 2 May 2006, Proceso Abreviado de Competencia Desleal (2006) Sentencia 6 [SIC sentencia 6]; see also SIC Sentencia 1, supra note 122; see also SIC, 5 May 2009, Proceso Abreviado de Competencia Desleal (2009) Sentencia 7 [SIC sentencia 7-2009]; see also SIC, 19 July 2010, Proceso Abreviado de Competencia Desleal (2010) Sentencia 10; see also SIC, 23 March 2004, Proceso Abreviado de Competencia Desleal (2004) Resolución 5321. Regarding civil liability and competition law in Colombia see Ingrid Ortiz, "La aplicación privada del derecho antitrust y la indemnización de los daños derivados de ilícitos contra la libre competencia - 2nd parte" (2008) 7:1 e-Mercatoria at 4-6, 21, 27-31, 33-35, 40-42, and 46-50 [Ortiz2].

[128] In Colombia, there are two mechanisms that can eventually be seen as closed to discovery procedures. (i) First, conciliatory hearings (in Spanish *audiencias de conciliación*), that is, extrajudicial hearings obligatory for plaintiffs prior to bring a claim before judges and wherein the purpose is not gleaning evidence as such but attempting to reach a solution out of courtrooms. Interesting enough, despite conciliations do not work for evidentiary purposes, in administrative law matters (e.g. public litigation) plaintiffs are bound to present the proofs on which they aim to build their case and, moreover, they can actually access public information from their future counterpart (i.e State agencies like SIC) which they can use as evidence in trial. But none of this is plausible in commercial law matters (e.g. private litigation), as law says nothing on this respect. For, every party uses the evidence that

not stop here. The legalistic reasoning that conditions anticompetition is an additional obstacle to overcome this asymmetrical predicament.

When explaining premises, we said that Colombia seems to rely profoundly on an anticompetitive market behaviours list due, in part, to the legalistic construction in which the jurisdiction has been systemically and historically grounded.[129] We noted also how the hard-line form-based approach and the absence of nuance impeded movable assessments of competition/anticompetition. Well, these are additional obstacles for victims to overcome as, apart from the lack of recognition of the asymmetrical reality that anticompetition provokes in their detriment, they actually have to prove that what is causing them harm fits in with what law understands is anticompetitive. In other words, victims must qualify wrongdoer's behaviour, about which they might not only have little and even no information, but they also must do it in an ambiance of asymmetry and threatening and, most of the times, submitted to what the law previously understood as anticompetition.

Wrongdoers end up, as a result, benefited with these obstacles that either equally or poorly-positioned competitors (more for the latter than for the former) have to experience. And the reason for this to happen, as mentioned, seems relatively simple, namely, the asymmetrical relation that anticompetition creates against them is in some instances disowned by private litigation norms. My point is that, as mechanism of enforcement, private litigation fails to recognize that the peculiarity under which anticompetitive wrongs and harms are unfolded (not only systemically but more so individually) is what fundamentally provokes logics of empowerment in favour of wrongdoers and in detriment of others (like victims).

(b) Passive and nonexistent roles: others

Public and private litigation unveil tensions between interests. Not only between interests of those holding active legal roles, but between interests of those others who do not have such roles. Thus far this second chapter has been mostly devoted to those with active legal roles (i.e. market authority and wrongdoers). And the progression of ideas seemed to run so smoothly at times that exclusion of others seemed to be the necessary conclusion. This makes one reflect (me

poses without sharing it with their counterparts unless the content press defendants for getting a conciliatory agreement (in the case of plaintiffs) or to make plaintiffs desist in their intentions to sue (in the case of future defendants). (ii) Second, *pruebas extraprocesales* (which can be translated as evidence out of trial), these are pre-trial hearings that parties may attempt before judges to gather evidence to build upon their case and which not only should be tried before judges but also must follow procedural rules as though parties were in trial. As noted in a previous footnote, nevertheless, most of the information that actually can be useful for victims is protected by legal reserve, which makes it certainly difficult that these *pruebas extraprocesales* become efficient means for private litigation purposes. Regarding (i) see Ley 640, Diario Oficial 44.303, 24 January 2001 Arts. 25-27; see also Decreto 1716, Diario Oficial 44.303, 24 January 2001 Arts. 25-27. As per (ii) see New CPC, supra note 125, at Arts. 183-190.

[129] See supra pages 23-24 and supra note 64.

at least) that perhaps what has been said and how has been said is far from being just methodologically correct. We are perhaps in front of constructions that oblige us to reason in such a way. And this is precisely why I must now turn to others and specifically to otherness aiming to re-orient this work recapitulating what I have said to recommence on what I have to say. I will begin hence drawing from this point onwards a (sort of) finishing line for classical premises and, at the same time, a starting line for deconstructed premises.

Let's begin thus with public litigation wherein market authority violently deploys its police powers against wrongdoers, who in turn try to show how illegitimate and needless such violence is.[130] Public litigation is, above all, a fight of two, as Colombian competition law implicitly makes it when saying that those that are not market authority or wrongdoers are just thirds. This, moreover, works (directly or indirectly) as a formal declaration of otherness as whatever (or whoever) is out of the binary dispute (of competition/anticompetition) is a third and thus something or someone that does not concern to public litigation.

This third/other is, thus, someone between the outside/inside of public litigation. Someone who is neither market authority, nor wrongdoer, and who makes evident how complex and difficult is for law (in a binary/legalistic environment like Colombia) to situate what is atypical for its power or what is almost extraneous from its reality. This third/other is thus not the segment zero, as it is not segment one of the binary equation of competition law either. It is, further, someone who, despite not threatening collective interests/benefits of competition, is nevertheless threatened by individual interests/benefits of anticompetition. The third/other is, hence, someone who public litigation cannot see as abnormal (i.e. anticompetitively) but who, paradoxically enough, cannot be seen as normal either (i.e. competitively).[131]

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[130] The word "violence" is used here in the Benjamian sense, but in a Derridanian approach. My goal, therefore, is stressing on the normative content that the administrative act (by means of presumption of legality) gives to this mechanism of enforcement as, throughout it, law legitimates the action of the State against wrongdoers and, at the same time, it justifies the exclusion of others from public litigation. Regarding this approach to the concept of "violence" see Jacques Derrida, "Force of Law: The "Mystical Foundation of Authority"" (1989-1990) 11 Cardozo L Rev 920 at 977, 979, 981, and 983 [Derrida]; see also F A Hayek, *The Road to Serfdorm* (London: Routledge, 2007) at 155-156; see also Petra Gehring, "Force and "Mystical Foundation of Law": How Jacques Derrida Addresses Legal Discourse" (2005) Ger Law J 151 at 155; see also James Martel, "Waiting for Justice: Benjamin and Derrida on Sovereignty and Immanence" online: (2011) 2:2 Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts at 162 <http://arcade.stanford.edu/journals/rofl/>.

[131] We have left pending two thoughts so far. (i) One is the structure of the binary equation of competition law, which we have insisted mirrors the binary/legalistic approach of Colombian law, and (ii) the other is this idea of otherness, which, moreover, seems to be a direct consequence of the former. (i) Regarding the structure of the binary equation; following what Payne and Rae say in their Dictionary of Cultural and Critical Theory, binarism is fundamentally an antagonistic relationship of two values that, although in contention and contradiction, jointly compose the structure of a given whole. Think, for a moment, plainly and without much elaboration, how a binary structure of law (of course, considering law as the given whole) would look like, in light of this attempt of definition. In my view, it would be chiefly composed by two phenomena; on the one hand, what is considered legitimate and therefore legal, and, on the other, what is considered illegitimate and thus illegal. And, trying to give amounts to each of this values, one would get a binary equation being expressed in a balance between the emptiness or nullification of segment zero (i.e. what is illegitimate and illegal) and the completeness or validity of segment one (i.e. what is legitimate and legal). For, one could venture to say that, in competition law, this binary structure is reflected in a segment zero representing anticompetition (or nullification of competition) and a segment one standing for competition (or perpetuation of market economy). The existence of this balancing equation of anticompetition (as segment zero) v. competition (as segment one) is just what gives way to competition law and consequently to the need for creating an environment of control and oversight over market economy that ultimately justifies the existence of competition law both institutionally and ontologically. (ii) Now, it is precisely because of this binary approach of public litigation of seeing only

Now, in private litigation, others surpass this condition of thirdness of public litigation as, at first, they are no longer others but one of the parties. Yet, this does not mean that they have active legal roles, nor does it mean that constructions of otherness and dynamics of empowerment/disempowerment have disappeared. The problem in private litigation, as noted, is that it does not focus on the asymmetrical substratum that anticompetition produces between wrongdoers/victims but on whether others (like victims) can demonstrate that anticompetition happened.[132] In a way, it is as though law considered that anticompetition produces symmetrical relationships and symmetrical outcomes between victims/wrongdoers. For, others end up depending not just on them (i.e. proving damages, the link between these and the market behaviour that they adduce is anticompetitive, and the jointly participation in markets), but on what they believe wrongdoers did or are doing wrong (i.e. showing either that the market behaviour should be deemed anticompetitive or that is one listed). But this entails something more complex and, in a way, more enlightening for what we claim here are constructions of otherness, as what Colombian competition law does is actually push others into subjectivity when, for law, what is legitimate is unfolding anticompetition as an objective phenomenon.[133]

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two actors in the scene (i.e. market authority representing competition and wrongdoers represinting anticompetition) that we get to this idea of otherness, which, in a sense, points out what could be seen as the biggest pitfall of binarism, that is, the impossibility of looking beyond the binary structure. Such an inconsistency has indeed been more noticeable (so to speak) in some areas and conflicts than in others. Consider, for instance, gender issues and the emergence of alternative identities that have been strongly surfaced against the traditional binary gender dominance of male/female. Now, in markets, multiculturalism is currently leading a transformation of a similar kind. Although this is not my aim in this work and much less in this part (i.e. discoursing over markets and multiculturalism, which, furthermore, I tried to address in other work), I nevertheless seek to show here how the binary/legalistic structure of a jurisdiction like Colombia might be working as stumbling block for the (full) recognition of the different realities of markets that law, (again) due to its binary condition, is being deprived from taking over when it is enforced. See Michael Payne & Jessica Rae, *A Dictionary of Cultural and Critical Theory* , 2d ed (Malden: Wiley-Blacwell, 2010) at 74-75; see also Donati, supra note 96; see also Haas, supra note 96; see also J Harris, "A Structuralist Theory of Law: An Agnostic View" in Adam Podgórecki & Christopher Whelan eds., *Sociological Approaches to Law* (London: Croom Helm, 1981) 33 at 37-40; see also Raia Prokhovnik, *Rational Woman: A Feminist Critique of Dichotomy* (New York: Routledge, 1999) at 110-115 and 137-140; see also Val Plumwood, "The Politics of Reason: Toward a Feminist Logic" in Rachel Joffel & Marjorie Hass eds., *Representing Reason: Feminist Theory and Formal Logic* (Lanham: Rowman & Littlelfield, 2002) 45 at 46-50.

[132] I aim to emphasise here what, in my view, is a contradiction of competition law in Colombia, that is, that law, on the one hand, recognizes on a theoretical level the harmfulness of anticompetition and the difficulties that victims and markets experience as a result, but, on the other, it deals with competition law conflicts on a practical level like any ordinary dispute of market economy. The problem of private litigation norms is that they fail in balancing asymmetries between wrongdoers/victims. And, as law does not do so, it implicitly contributes to the perpetuation of asymmetries and therefore of the harmfulness of anticompetition in market economy. What law must do, as I will try to explore in the second part when referring to victims' empowerment, is recognize a position of preference for victims in their anticompetition claims. Regarding asymmetries, markets governance, and competition law see, for instance, Glenn Graff, "Target Standing Under Section 16 of the Clayton Act: when your Antitrust Injury Hurts, Standing Can Be a Problem", (1991) 1991 Ill L Rev 219; see also Ralph Bradburd & David Ross, "Regulation and Deregulation in Industrial Countries: Some Lessons for LDCs", World Bank - Working Paper WPS 699 at 17-19; see also Stucke, supra note 5, at 70; see also Devlin, supra note 55.

[133] This is what in a previous footnote we called the "subjective predicament" of private litigation. What does this mean? One can say that, in Colombia, objectivity is the sole valid stand for demonstrating the existence of facts and thus to build on legitimate claims to get a legal effect (e.g. obliging defendants to bear with the consequences of what it is proved against them on trial). Hence the way how, as noted, the jurisdiction structures its *onus probandi* rule. The rest (i.e. what is not objective) is simply a reproduction of what plaintiffs perceive but which they cannot prove could have been factual, which, by the same token, is deemed as a projection of plaintiff's subjectivity but not as a perceivable reality that could stand for itself (i.e. without plaintiff's subjectivity). Subjectivity is therefore rejected since it is seen as synonym of bias, emotions, intuition, and idiosyncrasy, as opposed to the kind of responses law should in theory always reproduce, that is, impartial, rational, logical, and systemic. Now, what I mean by subjective predicament in private litigation is that, procedural burdens (again, most notably the burden of proof) impose on victims the need to demonstrate not only what they could perceive and materialize as an objective fact (e.g. the damages they suffered, the link between these damages and what provokes them, and the joint participation of victims/wrongdoers on markets), but also what wrongdoers might have done wrong (i.e. the anticompetitive market behaviour, which obviously implied what surrounded it). Well, this last thing

My point is that, in the way Colombian competition law seems to have been intended, others have no other way than reflecting on their claims something that they judge or think was or has been anticompetitive. In other words, as others bear *onus probandi*, but asymmetries make difficult for them accessing objective information, others would not have a different option than showing that anticompetition occurred inasmuch as the market behaviour that harmed them created a failure in their individual interests/benefits in markets and competition. And if they do so, their claim risks becoming a projection of an intersubjective assessment (i.e. a subjective projection of the harm they suffered and therefore verifiable by victims only) rather than an objective finding of anticompetition (i.e. a factual deployment of anticompetition verifiable by law and any other person). What is paradoxical (perhaps incoherent) is that law be seeking objectivity through victims who most of the times can barely produce intersubjective assessments of what they experience in markets and competition. Putting it differently, the core problem at stake here is that the whole structure and institutional operability of private litigation relies on others (like victims) to demonstrate anticompetition. And it does so without validating victims' subjectivity as it obliges that the evidence of anticompetition be factual (i.e. objective) and without imposing on wrongdoers (who have the means for a factual and objective demonstration) the burden of proving that anticompetition did not happened or that they acted competitively before others.[134]

Of course, there are a number of sources to demonstrate anticompetition (objectively) and they might not necessarily depend on wrongdoers (e.g. markets' information via circumstantial

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poses a quandary for private litigation since victims (as plaintiffs) must demonstrate all this not as they perceived it (i.e. subjectively) but (using legal rhetoric) as it happened in fact (i.e. objectively). The problem, however, is that anticompetition asymmetries (one of which, again, is information asymmetry) can most of the times block the objectivite unfoldment of anticompetition for victims, so the only way they left (i.e. victims left) to demonstrate it is from their own subjectivity. If one looks at such a reasoning carefully, the former results certainly paradoxical, as one would irremediably conclude that law imposes on victims the need for demonstrating anticompetition only through objectivity (i.e. what victims and anyone can perceive as anticompetitive [as a fact]) when most of the times the sole evidence left to victims for brining into question anticompetition is subjectivity (i.e. what they internally perceived was the reason of their harm). Let me reserve, though, solutions and further elaborations on the matter for the second part. See supra note 116. For subjectivity, objectivity, and law see Tibor Machan, *Classical Individualism. The Supreme Importance of Each Human Being* (London: Routledge, 1998) at 52-60 [Tibor Machan]; see also James Boyle, "Is Subjectivity Possible? The Postmodern Subject in Legal Theory" (1991) 62 U Colo L Rev 489; see also Tamar Frankel, "Lessons From the Past: Revenge Yesterday and Today" (1996) 76 B U L Rev 89; see also Robin West, "Disciplines, Subjectivity, and Law" in Austin Sarat & Thomas Kearns eds., *The Fate of Law* (n.d.: University of Michigan Press, 1993) 119. Regarding similar insights in competition law see also Abayomi Al-Ameen, "Antitrust Pluralism and Justice" in Daniel Zimmer ed., *The Goals of Competition Law* (Northampton: Edward Elgar Publishing ,2012) 260 [Abayomi]; see also Richard Posner, *Antitrust Law* 2nd ed. (London: The University of Chicago Press, 2001) at 99-100.

[134] One might ask, though, where is the evidence of this objectivity or even of this subjective predicament? I dare to say, there is no legal provision or case law that explicitly states it. Both are, essentially, legal constructions. In a way, it is, to a certain extent, a legal mindset embedded in Colombia, as one of the many constructs that have been embedded in the jurisdiction perhaps for the sole fact of being ascribed (or anchored) into the western thought and into a western legal tradition (if such a category is even possible). Both (objectivity and this idea of "subjective predicament") are thus everywhere in the jurisdiction. Is it even possible that law or case law decide a conflict based on what was the impression or feelings of victims? Certainly no; the mere proposal would blush our western legal mentality and we would immediately claim for objectivity as, in our view, law must always conserve its unbiased, rational, and impartial stand. And so, this is precisely my point here, to what extent is it consistent to oblige victims to demonstrate anticompetition when what they have at hand is an impression or feeling of what their counterparts did wrong? In any case, the following are just some examples of case law in Colombian competition law that in some way mirrors this construction of objectivity to which I am referring to. See, thus, SIC, 30 May 2011, Proceso Abreviado de Competencia Desleal (2011) Sentencia 31; SIC sentencia 3, supra note 74; see also SIC sentencia 13, supra note 127; see also SIC sentencia 6, supra note 127; see also SIC sentencia 1, supra note 122; see also SIC sentencia 7-2009, supra note 127.

evidence). But, albeit such sources would reflect market failures, they do not necessarily demonstrate the casual link between others' damages with anticompetition (i.e. with wrongdoers' anticompetitive market behaviour). And even if they did, is that the proper course of action for protecting others from anticompetition? Moreover, is that enough to punish anticompetition as an individual and systemic harm? Based on classical premises, the answer seems to be: "it does not matter," as competition law stands just for competition but not for competitors, for equality but not for difference, and for winners but not for losers. From which one might ask, then, why does competition law rely on an intersubjective assessment if what it pursues (veiledly, through private litigation) are objective outcomes but not subjective ones through which law could perhaps let victims protect their rights in markets (let's say) more effectively? The truth of the matter is that dimensions of otherness in private litigation do not have the same source that they have in public litigation. So, whereas in public litigation, they revolve around thirdness, in private litigation they result from an absolute state of passiveness.[135]

As we said before when defining legal roles, passive roles occurred as market agents affected by anticompetition are not self-sufficient to produce legal outcomes by their own means. In public litigation, this passive roles are (let's say) evident as others are barely deemed as thirds, which, as mentioned, impedes their ability to produce legal outcomes by themselves and for their own benefit, but in private litigation passive legal roles are derived from the fact that others are not as well-positioned as wrongdoers to produce a decision that benefit them before anticompetition. The main reason, as insisted, is that private litigation does not reflect in its dynamics the asymmetrical relation that anticompetition creates. Hence, it is more likely in private litigation that wrongdoers demonstrate that they did no wrong than it is that others can successfully show that the damages that they claimed have resulted from anticompetitive market behaviours of wrongdoer as they (subjectively) might claim.

So far we have gone over market authority, wrongdoers, and others. All of them assessed from different stands as each have different levels of interaction and degrees of legal empowerment/disempowerment. We said, thereby, that while market authority is empowered in public litigation due to the double connotation of administrative-law/police-power policy of this mechanism of enforcement, wrongdoers have ended up favoured (and therefore empowered) in private litigation because of the procedural burdens imposed on others. The consequence of this,

[135] Private litigation norms in Colombia use the words "activeness" and "passiveness" in a quite different context than we are using here. Both refer to what plaintiffs or defendants must meet beforehand not only to get the jurisdiction and be on trial, but also to be linked at the end by the sentence. In Spanish is commonly known as *legitimación activa* and *legitimación pasiva* (which would translate plaintiff's standing and defendant's standing). We went over both concepts in a previous footnote. Now, when we said that others are relegated to a passive role, we are not linking passiveness with any of the former private litigation standings. We are instead referring to the notion that this document has been proposed for the understanding of legal roles (i.e. active, passice, and nonexistent legal roles). For plaintiff's standing and defendant's standing see supra note 122. For legal roles in this document see supra note 1.

thus, is others have been affected either by a construct of thirdness in public litigation or by a construct of passiveness in private litigation.

But, to this point, it is somewhat clear who market authority and wrongdoers are. And, who are others? Up until now we have referred to those others that are on law's radar already and that one can identify as victims. Yet, there are other others who are not even part of competition law's reasoning. For them, otherness does not come from dynamics of empowerment/disempowerment per se insomuch as they cannot enforce competition law either because they cannot afford competition law litigation or because they hold a passive economic role in markets. Otherness for them, thus, comes from the very essence of premises and particularly from a kind of exacerbation of the rhetoric of assimilation.[136] These (let's say) others of the others (or PBE)[137] are affected not from a specific anticompetitive behaviour but for the categories of sameness that classical premises reproduce in markets throughout competition law.

As noted earlier, premises reveal that law provokes archetypes around better-positioned competitors (a kind of role model of [let's say] successful competitors).[138] But, if so, what happens with poorly-positioned competitors? Moreover, what happens when the reason for not being successful when competing or just for accessing markets comes from constraints out of markets logics or competition dynamics? I also plan to address this point in the second part, but, for the nonce, I just want to make a brief reference to what is at stake with these PBEs. These are market agents excluded from markets for non-market reasons (either legaly or illegaly). For instance, think of market agents that because of their skin color, sexual orientation, religious beliefs, or social status have less privileged position in markets and thus a passive economic role that impedes them from competing successfully.[139]

Well, for Colombian competition law, these PBEs seem not to be a concern and thus they are not part of competition law's reasoning. And perhaps the reason is that what is driving them out of markets is not what originates or motivates competition law. In a sense, there is no identity with competition law. This can be true if one focuses only on classical premises, but, if one takes fundamentals (particularly cohabitation of interests), perhaps the reasoning takes a different stance, making this a violent exclusion not completely extraneous for competition law. But, I repeat, I would like to address this in more detail in the second part using the Afrocolombians' case as an example, so let me reserve ellaborations on this point for later.

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[136] For rhetoric of assimilation see supra note 97.
[137] For the definition of PBE for this document see supra note 18.
[138] For archetypes see supra note 101.
[139] See Fox The other path, supra note 100; see also Fox South Africa, supra note 18; see also Bakhoum Dual Language supra note 23; see also Okeoghene supra note 23; see also Nancy Fraser, "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation", (Paper delivered at The Tanner Lectures of Human Values - Stanford University May 1996), (1996) online: Tanner Humanities Center - University of Utah <http://tannerlectures.utah.edu/> at 3-4, 11-14, 16-18, and 39-41

1.2.3. Outlining a deconstructive approach

Classical premises suggest the existence of interrelated legal constructs that reproduce, justify, and legitimize logics of empowerment/disempowerment between market agents. But to introduce this section, let me first sum up what we have said so far in a more schematic way. We said that premises are local legal constructs that ground markets' governance. Likewise, that classical premises address governance through binary forms (i.e. in the confrontation that takes place in each classical premise) and that, in turn, all together, they (i.e. classical premises) wind up reproducing two additional constructs (sub-legal constructs, if I may). One is a construction of legal empowerment (i.e. active legal roles) wherein market authority (the segment one of competition) and wrongdoers (the segment zero of anticompetition) become the self-sufficient or in any case better-positioned to produce legal outcomes for theiri own benefit. The other is a construct of legal disempowerment which, essentially, transforms those who are not market authority or wrongdoers (i.e. those out of the binary equation) into others awarding them as a result passive and nonexistent legal roles. And, deepening more in this last construct, we further said that three additional constructs (sub-sub-constructs if you will) justify and legitimize otherness, on the one hand, thirdness and passiveness (devitalizing victims' position) and, on the other, assimilation (precipitating PBEs' exclusion).

Hence, one can say that legal roles (and with that difference and exclusion amongst market agents) are, basically, constructed legal values in Colombian competition law. Now, such constructs are so embedded in the jurisdiction that is difficult (at least for a practitioner like me) not taking most of them for granted. Yet, it is even more difficult (again, for a lawyer like me, who has been trained in the aftermath of 1991 Colombian Constitution when the jurisdiction began a transformation from monoculturalism/assimilation to multiculturalism/dialogue) to let such constructions and hierarchies go unnoticed.[140] And the reason is twofold; first, because what these constructs (and hierarchies) do is basically reduce governance to two market agents, and with that to what they understand governance should be. This entails, therefore, that perhaps law is being deprived of other approaches and other insights in the configuration and reproduction of Colombian market economy. Second (somehow derived from the former), because letting such constructions and hierarchies act upon the system impedes other issues, other conflicts, other situations, and other realities that originate in or affect competition, markets, and market agents

[140] On 1991 Colombian constitution see Jeff Browitt, " Capital Punishment: The Fragmentation of Colombia and the Crisis of the Nation-State" (2001) 22:6 Third World Q 1063; see also Tianna Paschel, "The Right to Difference: Explaining Colombia's Shift from Color Blindness to the Law of Black Communities" (2010) 116:3 Am J Sociol 729; see also Carlos Zambrano, *Ejes Politicos de la Diversidad Cultural* (Bogotá: Universidad Nacional de Colombia, 2006) at 91-95, 97-100, and 103-107.

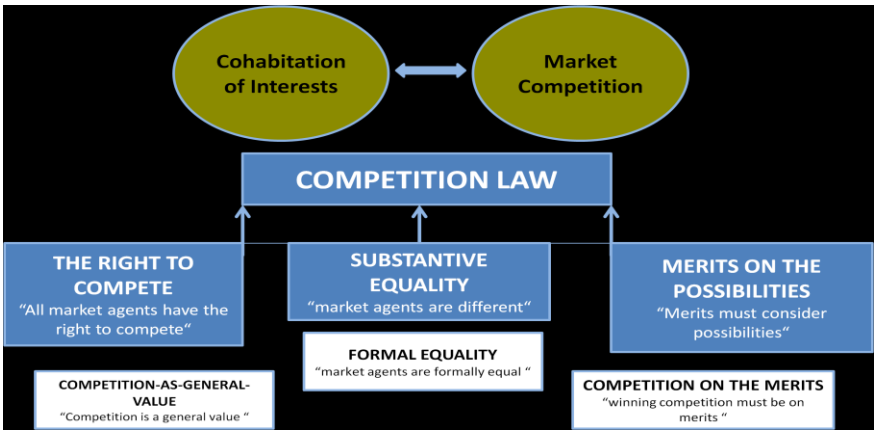
from becoming visible. In short, if these constructs and hierarchies are left untouched, the legal system and markets' governance may be at risk of experiencing a reversion of the current multicultural/dialogue insight to the monocultural/assimilation approach that 1991 Colombian constsitution has attempted to transform.

But I must make at this point a methodological annotation (so to speak). The fact that I have been referring to victims and PBE as others, it does not mean that they are or should be the sole others. I focus on them perhaps because, in my view, they experience the most pressing contradictions in the current dominant and classical insight or perhaps because I do not see other others. What I mean is that victims and PBE might not be the only ones who could be considered as others. So, what I am about to do cannot be seen (I do not see it in that way at least) as a concluding process, but one of many steps of what I would like to think of as a long project (surely more complex and daring) of deconstruction. Accordingly, this section (and perhaps this thesis) is not just concerned with providing answers but with opening questions.

Having said this, the purpose from now on will be setting the grounds for dismantling hierarchies and binarisms through which others have been prevented (to a greater or lesser extent) from having active legal roles and, therefore, from shaping Colombian market economy. In any case, I do not seek to reverse all binary constructs of Colombian competition law. My claim is rather going beyond binarism in some instances to force law to include others in an active legal interplay and, in so doing, in markets' governance. What I propose, consequently, is deconstructing what provokes differentiation and exclusion in Colombian competition law; i.e. classical premises. A process that, moreover, we have already begun in the previous section identifying constructions and hierarchies. In this section, though, I propose deconstruction through a confrontation of classical premises with other constructs, legal values, and realities of the jurisdiction seeking (as noted) to address law and governance through (let's say) multisided logics.[141] The confrontation that we propose, thus, will take place throughout three

[141] I want to clarify here two points; (i) first, the scope of the deconstructing plan that we propose and, (ii) second, the extent of the word "deconstruction" as such. (i) Regarding the scope of the deconstructing plan; we are neither proposing deconstruction for competition law, nor for fundamentals, nor for market economy. Such an enterprise will be rather pretentious, naive, and even incoherent given the purpose that this work has undertaken (i.e. integrating others in competition law and market economy governance). What deconstruction in this document does is instead taking these (super)structures as given wholes (i.e. competition law, fundamentals, and market economy) and then deconstructing binary (sub)constructs that lead to empowerment/disempowerment dynamics (i.e. classical premises). As noted, such dynamics stem from the binary interplay of each classical premise compelling law (and governance) to produce hierarchical structures wherein there is preference for values like competition, (formal) equality, and winners (as opposed to competitors, difference, and losers) and, moreover, wherein, as a result, it is created a violent binary understanding of legal roles (i.e. active legal roles v. passive and nonexistent legal roles); therefore, the goal here is deconstructing classical premises as they are what provoke others' exclusion from law and governance. (ii) As per the second point (the extent of the word "deconstruction"), this work takes a Derridanian stand for deconstruction. Consequently, with deconstruction we aim to describe a critic in which we will seek to provoke the emergence of others as a conflictual category in public and private litigation and, more importantly, in the competition/anticompetition predicament. The word deconstruction works threfore as a system by means of which the violent hierarchical opposition that brings about each classical premise is (essentially) destabilized due to the integration of other concepts, other values, and other constructs that seek ultimately to make emerge victims and PBE in both mechanisms of enforcement (i.e. before law and governance). In other words, through deconstruction we will explore, vis-à-vis, other elements of the jurisdiction seeking to undermine classical premises' hierarchies by de-emphasizing

(counter)premises: (a) All market agents have the right to compete (the right to compete), (b) market agents are different (substantive equality), and (c) merits must be based on possibilities (merits on possibilities).[142]



**** Figure 4 shows a similar diagram to that of classical approach with fundamentals composing the superstructure that grounds competition law but, instead of supporting competition law on classical premises (which are subordinated in this figure), the mainstays are deconstructed premises.

(a) The right to compete

The reasoning of the first classical premise (competition as general value) compels competition law in Colombia to protect competition but not competitors. And following such logic one can say that, what matters for law (at the end) is neither the will nor the need of market agents to compete, but the preservation of markets and competition as such.[143] Protecting market

competition/(formal)equality/winners) and re-emphasizing competitors/difference/losers. On both, (i) and (ii), see Jacques Derrida, *Positions* (London: Chicago University Press, 1981) at 41-45; see also Leonard Lawlor, "Jacques Derrida" in Edward Zalta ed, *The Stanford Encyclopedia of Philosophy* (2011) (Stanford Encyclopedia of Philosophy) at paras 4-5; see also Petra Gehring, "Force and "Mystical Foundation" of Law: How Jacques Derrida Addresses Legal Discourse" (2005) 6:1 Ger Law J 151 at 154, 156, 158-159, and 164-167; see also Chung Chin-Yi, "The Relation of Derrida's Deconstruction to Heidegger's Destruction: A Review Essay" (2009) 1:1 SKASE Journal 92 at 94, 97-99; see also Jack Balkin "Deconstructive Practice and Legal Theory" (1987) 96 Yale L J 743 at 745-746, 748-750, 751-752, 757-759, 768-770, and 781-784; see also Derrida, supra note 130, at 963, 971, and 981; see also Abayomi, supra note 133, at 267-270.

[142] See supra note 22. As noted above, the extent and the role of the word premise for this document is the following:

> "The concept premise (or proposition) exceeds the connotation of legal principle. According to Klement, premises (or propositions) are, from a propositional logic point of view, autonomous statements that, if connected with other premise (or premises), will produce *complex* conclusions. [...] the purpose in this document is precisely using premises on such a propositional context (so to speak). Therefore, we seek to structure each premise as a truth bearer of Colombian competition law and then (progressively) compound them to arrive to a different or (perhaps) more complex conclusion that perhaps exceeds the information that each one alone involves. Specifically, the purpose is structuring the following: competition law is designed for market authority and wrongdoers excluding as a result 'other' market agents [...]"

For deconstructed premises, though, the complex conclusion to which we aim to arrive is that competition law must include 'other' markets agents apart from market authority and wrongdoers. [Footnotes omitted]

[143] Where do these two words ("will" and "need") come from? We said that one of the two fundamentals of competition law is cohabitation of interest in which there is at stake, on the one hand, the disposition of people to enter in markets and compete, and, as corollary, the dependency of people on markets to survive and advance socially and economically. Well, here is just where "will" and "need" enter in the scene. "Will" stems from the willingness of people to take part in markets whereas "need" derives precisely from the necessity of people to enter in markets. More importantly (for this document at least), both words are intrinsically related with others (i.e. with victims and PBE). Indeed, as we will go over later on, victims' disempowerment compromises their "will" (and,

agents and their individual rights thus seems not to be central. What is important, instead, is shielding the platform that both markets and competition create. Consider, for instance, an oligopolistic market in which a new market agent is seeking to enter.[144] One will have at stake in such a case two types of individual interests/benefits. On the one hand, those of old competitors who would be more prone to block than to accept the new competitor and, on the other, that of the new competitor who will try to defend her/his position in the market. Competition law does not stand for any of them, but for safeguarding markets and competition. In this vein, its goal is looking after system's sake rather than after market agents' (direct) interests/benefits.[145]

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consequently, an essential element of market economy's scaffolding) whilst PBE's exclusion undermines their "need" to enter in markets to have a meaningful living (a key component in the structural role that market economy plays in society). See supra pages 11-12

[144] This example of an oligopolistic structure is not commonplace and it is not included here inadvertently. I use it appealing to a similar reasoning to that that we explained in the previous footnote regarding the words "will" and "need" given that markets concentrations phenomena (e.g. monopoly, monopsony, oligopoly, oligopsony, etc.) are the most perfect expressions that market competition (the second fundamental) is taking place in markets and, therefore, that there is need of oversighting markets through competition law (as market economy's superstructure). See supra page 16

[145] This is true in Colombia (in general terms and not only in market concentration cases) for public litigation and private litigation alike. Let me elaborate on this idea a little bit. When dealing with public litigation we said that SIC does not stand for any market agent in particular when enforcing law, but for the system itself insomuch that, as noted, SIC finishes off having a "*peculiar double overtone of speaking and acting on behalf of anybody and speaking and acting (at the same time) in favour of nobody*". So, as we have claimed so far and as we insist in this part again, it is self-evident that public litigation in Colombia protects systemic values rather than individual rights of victims. Now, in private litigation one would be tempted to say (at first) that what is proposed here (i.e. that law primarily protects systemic values) is not applicable because what is at stake in it is the protection of individual interests/benefits (even despite the fact that asymmetries are not recognized in its interplay in favour of victims and that they ended up affected or disempowered as result). But, in my view, an insight of this kind would simply restrict the real scope and extent of private litigation. It is true that private litigation let victims bring wrongdoers to trial and, thus, that it allowed victims ask for compensation and remedies. Still, private litigation has a systemic role that not only shapes its institutional role in the jurisdiction but also marks off its real content. And let me refer here, to make my point, to what private litigation precipitates when it is enforced. If dealing with agreements or contracts in which content or effect was anticompetitive, the consequence (if proved on trial) is the contract's absolute nullity. Why? As anticompetition is forbidden, the object of the contract would be deemed against law (in Spanish *nulidad por objeto ilícito*, which translates nullity by unlawful object). In Colombia, as in other jurisdictions, this nullity by unlawful object provokes absolute nullity which effects are, not only that any person could ask for annulment, but also that there is no possibility to rectify or in any case to overcome what caused the nullity (hence the adjective "absolute"). And the question of course would be; why is absolute nullity the effect? First, because the contract would have an unlawful object and, according to Colombian Civil Code, in such an event the contract would be absolutely null and, primarly, because absolute nullity entails a harm for public order; in other words, the rationale for having such a harsh consequence of absolute nullity is because the harm was not only against the parties but also against the system. Well, this is perfectly coherent with this idea that the first classical premise of competition as general value brings forward: a systemic value at stake in anticompetition that must be redressed and seen, first and foremost, in its aggregate dimension rather than in its individual content. Now, what happens when anticompetition is unfolded as an extra-contractual liability claim is not so distant. In cases wherein there was no contract in the middle, the right to being compensated derives directly from the fact of having been harmed by an anticompetitive market behaviour that, because of its anticompetitive scope, is prohibited by law. And, once again, law's operability reflects that what is at stake is not just an individual harm but, essentially, a systemic harm. I share the opinion of some authors in the sense that in anticompetition issues, we are in front of cases of strict liability as what matters is not the fault (or intent) but the sole fact that the wrongdoer had deployed anticompetition. And this is precisely what reveals in private litigation a systemic concern above the individual harm. The risk that is at stake in anticompetition is so meaningful for law because of its social and wide effects that plaintiffs are revealed from proving wrongdoer's intention, which, as it happens in contractual liability, shows that what it is ultimately behind anticompetition is not a matter of individual damages but, more importantly, of systemic harms. What I want to highlight from all this is the fact that the reason for which law opens the possibility of asking for compensation through private litigation is because the individual harm ultimately provokes a systemic harm. Thereby, when the harm was caused extra-contractually, the right of being compensated exists because the victim suffered a harm that should not (legally and legitimately) bear. And this is so because, for law, what the wrongdoer did was illegal as it has the potential to affect markets and competition systemically. Likewise, when the harm was because of contract, law's sanction is nullity because the object of the contract was against law; putting it differently, because the contract affected public order. Moreover, such a systemic concern of private litigation is confirmed when going over the foundational norm of private litigation (i.e. Art.7 of L256) which specifically links anticompetition with a systemic reasoning such as generic values like "commercial mores" or "honest practices" and structural needs like the necessity for impeding that freedom of buyers and consumers as well markets' functionality be distorted. So, although there is no-question that private litigation is a dispute between two individual interests/benefits (those of victims and those of wrongdoers), the reason for private litigation to exist is not merely the possibility of awarding compensation but of safeguarding a systemic value like competition.. Regarding private litigation as well as protection of systemic values through private litigation in other jurisdictions and Colombia see Giorgio Monti, *EC Competition law* (London: Cambridge University Press, 2007) at 420-426; see also John Cooke, "Administrative Regulation versus private enforcement - the EU perspective" in Abel Mateus & Teresa Moreira eds. *Competition law and Economics.*

And, of course, the question becomes, what happens with market agents and with their rights? The answer is somewhat predictable at this point. Both wind up subsumed in this systemic value of competition that, integrating all that occurs within markets and within competition, becomes as a result in an all-comprehensive value that encapsulates everything (even individual rights).[146] What the first classical premise does, therefore, is represent competition as a (sort of) supra-construct which works like a melting pot in which all kind of constructs, sub-constructs, values, entitlements, interests/benefits, market agents, rights, etc. are embedded. And I have to say that, at first, such an integrationist narrative (so to speak) is quite persuasive. Indeed, placing at the core of the whole legal and institutional framework a systemic value like this of safeguarding markets and competition (in lieu of, for instance, a more individualistic one of defending market agents) makes governance revolve around some kind of collectivistic construction of markets (rather than [again] an individualistic one of market agents). A powerful insight if one looks at it carefully as it pushes to understand markets from the sum of gains and losses (i.e. for aggregate outcomes) making possible therefore that the individualistic and egoistic stand for which capitalism (or market competition) is so commonly criticized be channeled and eventually blocked.

Yet, in practice, this systemic understanding of competition raises many questions. Particularly if one takes into account the role that competition law holds before market agents as a result of it. The fundamental problem is that individual rights wind up conditioned to be understood only from this systemic dimension of competition and, in so doing, their content and significance end up distorted. In other words, the first classical premise misrepresents the essential purpose of rights and perhaps the necessary interplay between these and the law. Why? Because law (by and large) does not just ensure people to have rights or permit that those rights have some (systemic) meaning as part of a supra-construct as the first premise seems to entail. Law must primarily ensure the enforcement of those rights before anyone; even before the system itself. Otherwise law becomes worthless and rights just theoretical ellaborations without legal and

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Advances in Competition Policy Enforcement in the EU and North America (Northampton: Edwar Elgar Publishing, 2010) 59 at 63-64; see also Cristina Roy, "Problem with liability actions stemming from the annulment of a colusive agreement: conditions for filling an action and calculating damages" in Luis Velasco, Carmen Alonso, Joseba Echebarría et al eds. *Private Enforcement of Competition law* (Valladolid: Lex Nova, 2011) 499 at 505-506; see also Miranda "Indemnización prácticas restrictivas", supra note 83; see also Burgos, supra note 112; see also Ortiz, supra note 115, at 37-40; see also Ortiz2, supra note 127 at 6-7, 8-13, 42-47, ; see also T-583-03, supra note 107, at para 2.1.-2.2.; see also C-228-10, supra note 53, at 5; see also Corte Suprema de Justicia, 19 December 2005, Recurso de Casación (2005) 4018 at para 1 [Corte Suprema 4018]; see also SIC Sentencia 16, supra note 74 at para 2.5.2.a; see also SIC Resolución 509, supra note 122; see also SIC, 2000, Concepto 00030176; see also SIC03100089, supra note 107; see also L155, supra note 61, Arts.1, 19; see also L256, supra note 62, Art. 7.

[146] See Oles Andriychuk, "Thinking inside the box: why competition as a process is a sui generis right - a methodological observation" in, Daniel Zimmer ed., *The Goals of Competition Law* (Northampton: Edward Elgar Publishing ,2012) 95 at 102-104 and 107-109 [Andriychuk Competition sui generis right]; see also Bakhoum, "Economic Freedom", supra note 51, at 424; see also Coleman, supra note 8, at 292-296.

factual content or scope.[147]

But, to what rights am I referring to? Although market economy encompasses a myriad of rights and freedoms, there is one in particular without which neither markets nor competition could be set in motion and therefore without which the systemic value of competition will fall down alongside with competition law: the right to compete. This is nothing different than the right to earn a living by having the (real) chance of taking part of economic transactions in market economy. Let me explain this in more detail. Market economy is shaped by people's will and by what people are willing and in need to trade. Thus, all of what surrounds markets (therefore competition) is built upon an essential fact: people are entitled to take part in markets. The reason is quite simple. Inasmuch as people can participate in markets and competition, they can obtain the means to survive and therefore to have a meaningful existence. The sum of transactions certainly provokes an aggregate/systemic effect, but it is nevertheless the exercise of the right to compete what ultimately makes that possible. Following a kind of Aristotelian approach one could say that, although a systemic value of competition shapes competition law, the right to compete is nonetheless ontologically anterior to all that surrounds competition law. An almost necessary conclusion, if one considers that, though it is in markets where one can deploy the right to compete, it is notwithstanding by exercising it that markets (and competition) do ultimately exist. [148]

In Colombian constitution, the right to compete is incorporated into the legal system in two different ways. First, framing the economic system into a social market economy (appealing somehow to an ordoliberal insight)[149] and, second, considering as fundamental a set of rights and freedoms that, as such, are projections of it.[150] But the tracks can also be found in Colombian

[147] See, for instance, Robin West, *Re-imagining Justice - Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Burlington: Ashgate, 2003) at 92-94 and 98-100; see also Max Travers, "A Sociological Critique of Rights" in Reza Banakar ed., *Rights in Context - Law and Justice in Late Modern Society* (Burlington: Ashgate, 2010) 41 at 45-47; see also Robert Nozick, *Anarchy, State, and Utopia* (New Jersey: Basic Book, 1974) at 90-94.

[148] See Timothy Sandefeur, *The Right to Earn a Living. Economic Freedom and the Law* (Washington D.C.: Cato Institute, 2010) at 1-5, see also Thomas Nachbar, "Monopoly, Mercantilism, and the Politics of Regulation" (2005) 91:6 Va Law Rev 1313 at 1336; see also, Andriychuk Competition/Consumers, supra note 11, at 81-85; see also Andriychuk Competition sui generis right, supra note 146, at 112; see also Terry Burke, Angela Genn-Bash & Brian Haines, *Competition in Theory and Practice* 2ed. (London: Routledge, 1991) at 12-15 and 18-19 [Burke, Genn-Bash & Brian Haines]; see also Eleanor Fox, "What is harm to competition? exclusionary practices and anticompetitive effect" (2002) 70:2 Antitrust L J 371 at 407; see also Mark Steiner, *Economics in Antitrust Policy. Freedom to Compete vs. Freedom to Contract* (Boca Raton: Universal Publishers, 2007) at 3-6 and 144-148; see also Tibor Machan, supra note 133, at 66-70; see also Daniel Zimmer, "The basic goal of Competition law: to protect the opposite side of the market" in, Daniel Zimmer ed., *The Goals of Competition Law* (Northampton: Edward Elgar Publishing, 2012) 484 at 496-501 [Zimmer]; see also Vanberg, supra note 84 at 52-54.

[149] See Colombian Constitution Arts.333 and 334. For case law on Colombian economic system and the role of the State see, for instance, C-150-03, supra note 107; see also C-228-10, supra note 53; see also C-263-11, supra note 71; see also C-398-95, supra note 106; see also C-535-97, supra note 90; see also C-616-01, supra note 107.

[150] Although neither the Constitution nor the Constitutional Court has considered the right to compete as a fundamental right, Constitutional Court rulings have nevertheless protected it via other rights that have as such such a connotation (i.e. of fundamental rights); for instance, via protection of the right of self-determination (e.g. the constitutional freedom to choose a profession or occupation), through equality and non-discrimination, property rights, and even human dignity. Therefore, although it would be a mistake to say that the right to compete in Colombia is a fundamental right, it would also be a mistake to say that it is not intrinsically related with fundamental rights and therefore that it can end up being protected (at least indirectly) through constitutional actions. What I mean with this is that Constitutional Court jurisprudence suggests that, despite that the right to compete is not a

competition law. For instance, in the set of values of public and private litigation and, indirectly, in anticompetitive behaviours' list. For, one can say that, though the first classical premise compels law to undertake a systemic approach, there is, however, in the articulation of Colombian legal system a substantive concern for protecting the individual right to compete as such. Yet the problem is that such a concern has been mediatized (so to speak) by the binary logics of the first classical premise. Accordingly, public litigation disregards victims' rights through a legal construct of thirdness whilst private litigation closes its eyes before the asymmetries that emerge in anticompetition through a construct of passiveness (which, as noted, provokes a correlative empowerment of wrongdoers), and needless is to say the invisibility that PBEs experience as consequence of rhetoric of assimilation.

Still, an interesting phenomenon has been rebutting this consistency and consensus that in some way one might think the classical approach (of the first classical premise) has in the jurisdiction. Based on 1991 Colombian constitution and on some of its later legal developments, people who can be considered as victims or PBE (either because they have been affected by anticompetition or simply because they have been prevented from accessing markets) are bringing actions to counter anticompetitive market behaviours or decisions from the State that may threaten their (individual) position in markets. More interestingly, they have done so grounding their claims on their right to compete via fundamental rights. And even more interestingly, the way to do so has not been public or private litigation, but constitutional and collective legal actions that are (to a certain extent) out of competition law litigation.[151]

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fundamental right per se, it ought to be protected inasmuch as its infringement may impact other rights considered as such (i.e. as fundamental rights). And, why is such a qualification of fundamental rights important in the Colombian context? In practical terms, because fundamental rights opens the door for *tutela* (which plainly translates tutelage), that is, a Constitutional action that has some special features, to which I will refer later on, and that basically let people to ask for (let's say) a sort of preferential enforcement of constitutional rights as well as for special remedies. See, for instance, Corte Constitucional, 8 March 1996, Acción de Tutela (1996) T-104-96; see also T-583-03, supra note 107; see also C-398-95, supra note 106; see also Corte Suprema 4018, supra note 145; see also Corte Constitucional, 13 August 2010, Acción de Tutela (2010) T-629-10 [T-629-10]; see also Corte Constitucional, 19 December 2011, Sentencia T-724-03 (2011) Auto-275-11 [Auto-275-11]; see also C-263-11, supra note 71; see also Corte Constitucional, 14 August 1997, Acción de Tutela (1997) T-375-97 [T-375-97]; see also C-535-97, supra note 90; see also C-616-01, supra note 107; see also Corte Constitucional, 28 August 2003, Acción de Inconstitucionalidad (2003) C-741-03; see also T-291-09, supra note 126; see also T-583-03, supra note 107; see also T-724-03, supra note 126.

[151] I am referring here particularly to *acción de tutela*, *acción de grupo*, and *acción popular*. Just a brief note on each one in case you are not familiar with Colombian law; *acción tutela* (which plainly translates tutelage) is an individual constitutional action that anyone can bring in Colombia if (i) there has been or can be a violation of a fundamental right and if (ii) the plaintiff has no other legal mean to protect such a right. Moreover, as it is a special mechanism to protect Constitutional rights, it is not necessary to be represented by a lawyer, it does not follow excessive formalisms, it can be filed before any judge in Colombia, it cannot be suspended in states of emergency (in Spanish, *estados de excepción*), judges must render their decision shortly, and if defendants do not comply with the judgement or if in any case they fail in doing so, they can be arrested for contempt. *Acción de grupo*, on the other hand, can be seen, to a certain extent, as Colombian analog to US class actions since, through them, members of a specific group can bring a compensatory claim before the jurisdiction. *Acciones populares* are non-compensatory actions that can be brought to redress or in any case impede damages against a collective right such as the environment, public utilities, and free competition. Regarding *tutela* see Decreto 2591, Diario Oficial 40.165, 19 November 1991 Arts 1-8; see also Miguel Schor, "An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia" (2009) 16:1 Ind J Global Legal Stud 173 at 187-188. On *Acción de grupo* and *Acciones populares* see Ley 472, Diario Oficial 43.357, 6 August 1998 Arts. 1-4. See also Miranda Indemnización prácticas restrictivas, supra note 83 at 37-41. Regarding case law on the matter see, for instance, T-104-96, ibid; see also T-583-03, supra note 107; see also T-629-10, ibid; see also Auto-275-11, ibid; see also T-375-97, ibid; see also T-291-09, supra note 126; see also T-724-03, supra note 126; see also Consejo de Estado, 22 September 2005, Acción Popular (2005) 2003-00452 [Consejo de Estado 2003-00452]; see also Corte Suprema de Justicia, 25 August 2008, Recurso de Casación (2008) 2000-00624 [Corte Suprema 2000-00624]; see also

What is more, and (once again) interestingly enough, these actions have a special meaning before what was mentioned about asymmetries in private litigation. In these constitutional and collective legal actions, plaintiffs (like victims and PBE) could eventually be exempted (usually in events of defenceless) from demonstrating the violation of their rights, being defendants (e.g. wrongdoers and the State) compelled to demonstrate that plaintiffs are either not entitled to such a right or that the right has not been violated. In other words, in such cases, although the jurisdiction weighs plaintiffs' subjective assessment, it nevertheless displaces the burden of objectivity in who is deemed to have unbalanced or created the (social or economic) asymmetry.[152] Quite in contrast with the difficulties that, as noted, public and private litigation entail for those who are not market authority or wrongdoers.

Now, I do not want to focus on whether these actions have been successful or not, or if they are the appropriate way to bring claims against anticompetition, or if they are indeed the proper course of action for solving competition law conflicts. What is interesting in my view from this is that the use of these actions seems a direct consequence of the lack of effective integration of others in competition law's purview. As simple as if these plaintiffs had had an active legal role before competition law, they would not have had the need for redirecting their individual claim out of it. Instead, they would have simply used public or private litigation. Likewise, if either public or private litigation had had the chance to get access to such claims, a different assessment could have been made or even a different understanding of anticompetition could have emerged. This leads one to think that (perhaps) classical premises as well as dynamics of empowerment/disempowerment are not just affecting others individually but even law and law enforcement as superstructures of market economy.

Furthermore, it shows that the absence of what we call here as active legal roles has not impeded others from making their claims visible in the jurisdiction. As a matter of fact, thanks to these alternative mechanisms, others have had the possibility of bringing their individual claims to obtain (or at least expecting to obtain) some kind of remedy. And more revealing perhaps, despite the excessive concern of law in defending systemic values, the jurisdiction has not been absent (it cannot be, I dare to say) from individual claims pursuing individual interests/benefits to be

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Corte Suprema de Justicia, 19 July 2011, Recurso de Casación (2011) 2007-00209 [Corte Suprema 2007-00209]; see also Consejo de Estado, 22 September 2005, Acción Popular (2005) 2003-00452; see also Consejo de Estado 2000-00016, supra note 54; see also Tribunal Administrativo de Cundinamarca, 5 April 2002, Acción Popular (2002) 01-421 [Tribunal 01-421]; see also Tribunal Administrativo de Cundinamarca, 4 October 2005, Acción Popular (2005) 04-2007 [Tribunal 04-2007]; see also Tribunal Administrativo del Cauca, 26 October 2010, Acción Popular (2010) 2009-00148 [Tribunal 2009-00148].

[152] See, for instance T-291-09, supra note 126; see also Corte Constitucional, 4 March 2011, Acción de Tutela (2011) T-141-11; See Corte Constitucional, 19 April 2010, Acción de Tutela (2010) T-265-10; see Corte Constitucional, 8 March 2011, Acción de Tutela (2011) T-153-11; see also Corte Constitucional, 22 February 2007, Acción de Tutela (2007) T-131-07; see also Corte Constitucional, 5 April 2000, Acción de Tutela (2011) 3-388-00; see also Corte Constitucional, 4 May 2011, Acción de Tutela (2011) T-314-11; see also Corte Suprema 2000-00624, supra note 151; see also Corte Suprema de Justicia, 24 September 2009, Recurso de Casación (2009) 2005-00060.

redressed. In other words, although competition as general value compels law to be understood from the systemic value of competition, market agents and the same legal and constitutional system is reproducing (almost spontaneously) legal responses to empower individual concerns to protect competitors (i.e. individual rights) and not necessarily competition (i.e. systemic concerns).

Finally, that the current dominant insight of classical premises can be experiencing difficulties when addressing and solving the different realities emerging from markets. And with this last point I mean that markets and competition cannot be universalized or normalized from the vantage point of only market authority and wrongdoers. Quite the contrary, it is by unravelling the dynamics that exist in the different individual interests/benefits at stake in markets and competition that a more all-encompassing markets' governance can be achieved. It might be thus at the core of the right to compete that a true protection of markets and competition can perhaps be found. Failing to do so by not empowering those who hold such a right (like victims and PBE) might compromise the materialization of economic freedoms and, ultimately, the reproduction of the very grounds of fundamentals and market economy.

(b) Substantive equality[153]

As noted, the aim in this section is not just proposing new premises but outlining a way to dismantle hierarchies and dynamics of classical ones via direct confrontation with other constructs and values looking, ultimately, for a broader understanding of active legal roles. And that was

[153] See Colleen Sheppard, *Inclusive Equality. The Relational Dimension of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 39-40 [Sheppard]For "substantive equality", we take Sheppard as reference, who writes on this respect:

> "A substantive definition of equality meant that judges could not rely on the simple procedural rule of equal treatment, which had been the starting point of formal equality. It was no longer possible to assume that differential treatment constituted discrimination and that sameness of treatment constituted equality. Instead, discrimination had to be assessed in terms of the harmful or disadvantaging effects of laws and policies. As McIntyre J. explained, discrimination entails the imposition of inequitable burdens obligations, and disadvantages, or the denial of access to opportunities, benefits, and advantages based on group membership. [...] In both the statutory and constitutional domains, the legal definition of equality goes beyond sameness in treatment to require assessment of the purposes and effects of laws, policies, and programs. As a result, a formal process-based rule no longer sufficed and new interpretative strategies were needed to assess which effects were discriminatory. Most significantly, a growing consensus emerged that a substantive approach to equality rights required legal purposes and the specific social, economic, and institutional context in which they arose." [Footnotes omitted]

Now, remember that, at the beginning of this last section, we said that this second (counter)premise (or proposition) of substantive equality stands for "market agents are different" with which we seek to counter the classical premise of formal equality that stands in turn for "market agents are formally equal". The word "substantive equality works here hence not as a way to understand equality in law but rather to understand difference throughout law. This is precisely the reason for which we have decided to label (or shorten) this second deconstructed premise as "substantive equality", because in substantive equality the understanding of equality is reversed to the notion of difference and, consequently, to the need for recognizing dissimilarity and multiplicity. Yet, the fact that we have entitled this sub-section as substantive equality does not mean that we will explain the concept or notion of substantive equality as such. We will try here rather to elaborate on the importance of difference and dissimilarity for both markets/competition and law/governance. In other words, we seek to highlight the importance of recognizing difference as a legitimate and legal stand, as opposed to the misleading idea of understanding in competition law that everybody must be seen formally equal in markets and competition, as the second classical premise seems to purports..

precisely the purpose in confronting competition as general value with the right to compete; showing that the classical approach deforms individuality insomuch that it ends up conditioning this last to a systemic understanding of markets and competition hiding in such a way the multiple realities that other market agents may experience in both.[154] Now the turn is for formal equality, the second classical premise. We propose for it, however, an inner-confrontation (so to speak) with projections of the right to compete; more specifically, with projections of individuality in markets and competition. In other words, we question here the consistency of seeing all market agents as formally equal disregarding in such a way difference as source of legality and legitimacy. The purpose, therefore, is developing a very precise idea, the need to consider the existence of difference in a particular and individualized context via the right to compete and not just as a normalized by-product of a systemic value of competition.

So, recapitulating, we said that formal equality stemmed from the need to provide a degree of uncertainty in markets to build confidence among competitors over their possibilities to win. We further said that, as consequence, this second premise is grounded upon the idea that, if nobody knows who can win, then nobody knows who can lose (for sure). Hence, through formal equality, law makes market agents believe that, as everybody is regarded as formally equal, winning or losing is always possible but never certain; a reasoning that, furthermore, leads to disallow differential treatments, favouritism, and preference, which suggests by the same token a deep rejection of differentiation.

But the truth of the matter is that neither markets nor competition are (and cannot be) extraneous to difference. In fact, notions of difference seem far more consistent with market economy than plain notions of equality.[155] For instance, it is by differentiating with the rest that successful (efficient) competitors conquer markets. It is for this very same reason that, at some point, such successful competitors can keep positions of dominance, becoming as a result different from their counterparts.[156] Similarly, it is by trading different goods that competitors

[154] See Richard Dien, *From Concept to Objectivity. Thinking Through Hegel's Subjective Logic* (Burlington: Ashgate, 2006) at 89-90, 94-96, 98, and 104-105; see also Ross Poole, *Morality and Modernity* (New York: Routledge, 1994) at 80-81

[155] See, for instance, Maloy, supra note 29, at 124-125; see also Arthur Rich, *Business and Economic Ethics. The Ethics of Economic Systems* (Leuven: Peeters, 2006) at 355-359.

[156] I am making reference of course to the widely known Chicagoan goal of efficiency, which, very briefly explained, and in practical terms, stands for letting winning firms acquiring market power (and thus market dominance) insofar they are the consequence of and bring to markets as a result a more thorough, rational, and effective allocation of resources. This, of course, is a quite reduced and simplified explanation of Chicago. With it, however, I am aiming to emphasize this very essential fact of the importance of opening the door to markets to produce differences and hierarchies in lieu of equality and plain social dynamics among individuals. In Colombia, for instance, although assessments of M&As are subordinated to a previous clearance of SIC, whenever it is demonstrated that the potential losses that the new firm would create in the market will be offset by the gains that markets will perceive from it, SIC must clear it and thus accepting the possibility that a market agent become (hierarchically) different than the rest. On this efficiency exception in Colombian law (which is a plain translation from the Spanish *excepción de eficiencia*) see D2153, supra note 61, Art. 51. On Chicago School and this idea of economic efficiencies see, for instance, Joshua Wright, "Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust" (2009) 5 Competition Pol'y Int'l 1; see also Fox "Efficiency Paradox", supra note 31; see also Marc Eisner, *Antitrust and the Triumph of Economics* (n.d.: The University of North Carolina Press, 1991) at 2-5, 79-81, and 184-187; see also Mercuro & Medema, supra note 27, at 52-53.

make markets operate. Difference is, moreover, in some ways, what is expected to produce aggregate outcomes as markets tend to look for diversity (hence for differentiation) of products, prices, qualities, advantages, conditions, etc.[157] What is more, homogeneity is often seen with distrust as similarity can be, most of the times, indicative of anticompetition.[158] So, one may say that, in markets and competition, it is not possible to reject difference plainly as this plays, as a general phenomenon, a key role in shaping the forces and dynamics of each.

What about law and governance? The fact that difference is part of markets and competition narratives makes it difficult to state otherwise when dealing with law and governance. And yet, when looking at both, one realizes that actually the legal acknowledgement of difference is quite limited and in any case framed into (and thus conditioned to) the systemic value of competition. In fact, one could even say that, the sole way for law to accept difference is when it comes from the inartificial and natural unfolding of markets and competition. Only in such an event difference is seen as (let's say) legal and legitimate. This, apart from reinvigorating the first classical premise (because the system itself winds up empowered), builds on a sort of arbitrage (blindness and unbiased enough, but at the same time coherent with the systemic value of competition) to let the decision of who wins and loses emerges almost spontaneously. Consequently, one can say that it is not that formal equality forces law to reject difference, but rather that it conditions the way difference is accepted, admitting it only when it comes out autonomously, nonpersonificated, and coated with a degree of transparency and objectivity.[159]

But, following what has been outlined thus far in this attempt at deconstruction, what if one introduces into the reasoning an autonomous right to compete? And with this I mean, what if one takes the right to compete not as a normalized and universalized particle of a systemic value of competition (whence the word "autonomous"), but from its own content and scope. To wit, as an individual claim that empowers market agents to let them enforce their individual entitlements in markets and makes certain their individual interests/benefits. Doing this, in my view, entails the need for acknowledging the existence of multiple positions in law and governance and, by the same token, the need for going beyond classical and typical binary understandings of competition/anticompetition and thereby of market-authority/wrongdoers. In a way, an approach that, atomizing and decoupling the right to compete from the system, compels law to recognize the particularities and specificities that stem from the multiple and (real) positions that people occupy in markets and competition, which, furthermore, imposes the need for legitimizing

[157] See Sherwin Rosen, *Markets and Diversity* (n.d.: Harvard University Press, 2004) at 1-4, 18-19, and 30-31.
[158] Consider, for instance, anticompetitive market behaviours such as cartels, refusals to deal, price fixing, conscious parallelism, product homogeneity, divisions of territory, etc., all of which begining, most of the times, with similar patterns among its participants (i.e. among wrongdoers).
[159] See supra pages 26-27 and 34-35.

multiplicity, dissimilarity, and difference as opposed to unicity, similarity, and formal equality.[160]

Let's try this shift elaborating (again) on law enforcement and others. But let me explain first why I propose so. Because it is through enforcement that the political and economic content of the right to compete is embodied in form of legal duties and, subsequently, in obligations (i.e. in vinculums) through which market agents, ultimately, project their individuality into the system. In a sense, the sequence freedom/legal-duty/vinculum permits the materialization and subjectivization of law.[161] My point is that, if others are holders of the right to compete, but they cannot (effectively) enforce it, such a fact would be indicative of two things; on the one hand, that their right would remain in its political and economic facet lacking of legal materialization and subjectivization whatsoever and, on the other, that there would be a violent inconsistency in law that must be redressed since the fact of not being possible for them to (effectively) enforce their right to compete implies that, at certain point, the same sequence freedom/legal-duty/vinculum has been broken in their detriment.[162]

If this is so, then, the recognition of active legal roles to whomever the right to compete has been harmed becomes a pressing factor for competition law and markets' governance. But, making the right to compete certain in its own dimension needs first that difference and dissimilarity be recognized as legitimate and legal stands in both markets/competition and law/governance. However, in my view, this cannot happen in the same ways and with the same logics as classical premises of understanding difference from the systemic value of competition

[160] Following a Foucauldian approach of difference and of subjects out of political arrangements of the State, what we propose here aims, somehow, to reinvigorate individuality or alter preconfigured and normalized forms of subjectivity. On this regard, and seeking to clarify my claim at this point, let me cite Butler who, refering to Foucault, writes:

> "[...] For Foucault, then, the disciplinary apparatus produces subjects, but as a consequence of that production, it brings into discourse the conditions for subverting that apparatus itself. In other words, the law turns against itself and spawns versions of itself which oppose and proliferate its aiming purposes. The strategic question for Foucault is, then, how can we work the power relations by which we are worked, and in what direction? [...] In his later interviews, Foucault suggests that identities are formed within contemporary political arrangements in relation to certain requirements of the liberal state, ones which presume that the assertion of rights and claims to entitlement can only be made on the basis of a singular and injured identity. The more specific identities become, the more totalized an identity becomes by that very specificity. Indeed, we might understand this contemporary phenomenon as the movement by which a juridical apparatus produces the field of possible political subjects. Because for Foucault the disciplinary apparatus of the State operates through the totalizing production of individuals, and because this tantalization of the individual extends the jurisdiction of the state (i.e. by transforming individual into subjects of the state), Foucault will call for a remaking of subjectivity beyond the shackles of the juridical law. In this sense, what we call identity politics is produced by a state which can only allocate recognition and rights to subjects totalized by the particularity that constitutes their plaintiff status. In calling for an overthrow, as it were, of such an arrangement, Foucault is not calling for the release of a hidden or repressed subjectivity, but rather, for a radical making of subjectivity formed in and against the historical hegemony of the juridical subject." [Footnotes omitted]

See Judith Butler, *The Psychic Life of Power* (Stanford: Stanford University Press, 1997) at 99-101; see also Ben Golder & Peter Fitzpatrick, *Foucault's law* (New York: Routledge, 2009) at 114-115 and 117-121. On the idea of subjectivity see also Tibor Machan supra note 133 at 15, 18-19, 22-23, 29 51-52,55, 65-70, 73-74, 80, and 82-88; see also Alastair Murray, *Reconstructing Realism. Between Power Politics and Cosmopolitan Ethics,* (Edinburgh: Keele University Press, 1997) at 164-165; see also Nancy Fraser, "Reframing Justice in a Globalizing World" online: (2005) 36 New Left Review <http://newleftreview.org/>

[161] For legal duty and obligations see Ricardo Uribe, *Cincuenta breves ensayos de obligaciones y contratos* 2nd ed. (Bogotá: Temis, 1979) at 39-44 [Uribe]; see also Hans Kelsen, *General Theory of Law and State* (New Jersey: Lawbook Exchange, 2007) at 71-72 [Kelsen]; see also Geoffrey Samuel, *Law of Obligations and Legal Remedies* 2nd ed. (London: Cavendish, 2001) at 249-251; see also Reginald Allen, *Socrates and Legal Obligation* (Minnesota: University of Minnesota Press, 1980) at 107-109. On obligations and subjectivization see Pietro Costa, "The Rule of Law: A Historical Introduction" in Pietro Costa & Danilo Zolo eds., *The Rule of Law. History Theory and Criticism* (Dordrecht: Springer, 2007) 73 at 113

[162] The word "violence" here is understood, again, as mentionoed before, from a Benjamin stand but with a Derridanian approach. See supra note 130.

and thus recognizing it only when it spontaneously emerges from markets and competition. Difference should rather be understood from the individual right to compete and, thereby, it must be recognized not just as part of markets and competition, but as an individual and contextual phenomenon that depends on the circumstances that surround each market agent in a given moment. What I mean is that, including victims and PBE into law and governance makes that the right to compete arises not just from the right of all competitors to be considered formally equal, but from the right of each that their true position in markets and competition be recognized and legitimized through law, that is, of the right of being considered substantilly different (or equal).

To begin with, let's see what freedoms/legal-duties/vinculum entails. Political and economic freedoms in market economy arose when people were entitled to shape markets. Making this possible purported a (let's say) tacit and mutual acceptance of respecting the right to compete of all. In this way, thus, freedoms and rights became legal duties and, accordingly, intangible bonds that protected market agents and their rights from the rest.[163] For, when someone performs against the legal duty of (let's say) "not affecting the right to compete of others", for instance, the intangible bond of the legal duty would be broken giving way to a tangible bond (i.e. to a vinculum) between victim/wrongdoer. Now, as it happens in other domains of law, in competition law issues are precisely because of this vinculum that those affected by anticompetition (i.e. victims) become creditors of those that caused harms, who become debtors (i.e. wrongdoers) as a result.[164] Hence, breaching the legal duty of "respecting others' right to compete" lets victims become entitled to deter the action of wrongdoers and to ask them (i.e. to wrongdoers) for compensation of damages.[165]

Now, what is problematic with classical premises is that, in practical terms, determining "who is who" does not depend on who are victims/creditors, or who are wrongdoers/debtors, or who are holders of the right to compete. It pretty much depends, instead, on where one is located and about whom one is talking. What do I mean with this? In public litigation, for example, the creditor is market authority because, according to law, if anticompetition is deployed, wrongdoers must pay a fine and be subject to injunctions. The vinculum hence lies on the legal prohibition of not deploying anticompetition and it is for that very same reason that market authority becomes wrongdoers' creditor.[166] And, what about victims, after all, they are the true holders of the right to

[163] See Kelsen, Ibid; see also on this respect Hartian elaborations on rights as protected choices on George Rainbolt, *The Concept of Rights* (n.d.: Springer, 2006) at 239-240

[164] See Kelsen, supra note 161; see also Uribe, supra note 161.

[165] In a sense, all this by means of what Mill called as the "harm principle", which, paraphrasing Frank, can be explained as what entitles (under a utilitarian scope) government's intervention in markets in order to prevent or redress harm to others that may affect the core of their rights and the coherence of market economy. See Robert Frank, *The Darwin Economy. Liberty, Competition, and the Common Good* (Princeton: Princeton University Press, 2011) at 85 and 98

[166] There is an intersting phenomenon to consider here regarding public litigation and the patrimonial substratum that it is at stake in it. Before 2009 reforms, public litigation norms said that fines for anticompetition ought to be paid to *El Tesoro Nacional*

compete? Due to dynamics of empowerment/disempowerment (particularly the legal construction of thirdness), the materialization of their individual right to compete is blocked in public litigation. What results is certainly paradoxical as this means that, in public litigation, although there is a legal duty for wrongdoers of not deploying anticompetition (hence the vinculum that makes market authority a creditor), there seems not to be a possibility to make certain the legal duty of not thwarting the right to compete of others (whence the impossibility that a vinculum of victims/wrongdoers could be materialized in it).[167]

With respect to PBE, they can indeed inform on wrongdoers as any other third is entitled to. But, again, this does not imply recognition of their special situation or condition in markets and much less a possibility for accessing to the possibility of preventing the deprival of their right to compete. This, of course, unless one argues that such a recognition (or remedy) comes indirectly via market authority's intervention or as a side effect of it, which would be, in my view, misleading public litigation scope since, as noted earlier, what public litigation entails is a deployment of a police power rather than a materialization of individual rights.[168]

What happens in private litigation? Once again, logics of empowerment/disempowerment hinder the possibility of enforcing victims' and PBEs' right to compete. In the case of victims, the

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(which translates National Treasury). Yet, 2009 reforms introduced a slight changed to this rule stating, instead, that fines must be paid to SIC (directly). Now, this can be seen at first as a superfluous modification (even commonplace) as the money collected (before and after 2009) ultimately goes (and should be going) to the same entity, that is, the State (represented by National Treasury before 2009 or by market authority after 2009). However, this change is revealing not only for what was mentioned before about how SIC (as market authority) does not represent any other market agent apart from itself when enforcing law, but also for what we are mentioning here regarding the determination of who the actual creditor (or beneficiary), patrimonially and legaly speaking, of public litigation is. And let me explain a little bit more what this change entailed to better develop my point here. From a fiscal point of view, the implications of saying that fines are of SIC and not of National Treasury is enormous. If fines go to National Treasury, the money goes to public budget, for it would be part of the ordinary income that the State collects for all kind of concepts like royalties, taxes, tariffs, and so forth. This has a direct impact on public budget as the State can use that money for whatever it considers necessary. In other words, the money collected as fines paid for anticompetition might end up funding (in theory) schools, roads, and even SIC payroll. But if law says that goes to SIC, the money collected would go precisely to SIC budget directly so that it will be part of SIC's revenues and patrimony. Now, it is indeed quite debatable what the nature of SIC is (i.e. if it is part of the government [following Constitutional Court case law] or if it is an autonomous and independent legal entity [as some recent legal developments seem to suggest - e.g. 2009 reforms]), but, in terms of public litigation norms (i.e. D2153), the fact is that the creditor of what could be seen as the sole economic benefit at stake in this mechanism of enforcement (i.e. fines in public litigation) is SIC and, consequently, following law, SIC is the only one who can be entitled (either by its own means or as State's proxy [depending on which position is one ascribed]) to be seen as completing this sequence of legal-duty/vinculum. Perhaps anticipating one of the points that I aim to raise in the second part, what I mean with this is that one cannot think of public litigation as a disinterested, out of economic calculations, and non-patrimonial mechanism or in any case as a way that is out and completely absent of economical conflicts (i.e. without economic consequences in benefit of a particular actor). It is actually quite the contrary as recent legal developments in Colombia confirm it (i.e. 2009 reforms). For, what one has in public litigation is actually the struggle of two market agents pursuing their own (economic) interests/benefits. Certainly, one of which (i.e. SIC) helps in protecting systemic values like markets and competition from anticompetitive market behaviours, yet this does not mean that through public litigation non patrimonial effects are sought on benefit of someone (like SIC) or that other market agents (apart from SIC) could not contribute in protecting systemic values as well. But, again, let me reserve this point for later. Regarding the nature of SIC see D2153, supra note 61, Art.1; see also Ley 1151, Diario Oficial 46.700, 25 July 2007 Art.71. Regarding the obligation that fines should be paid to SIC (and, implicitly, not to National Treasury) see L1340, supra note 108, Arts.25 and 26. As per Constitutional Court case law on the matter see Corte Constitucional, 4 October 2006, Conflicto de Competencias (2006) Auto 275-06; see also Corte Constitucional, 6 October 2011, Acción de Inconstitucionalidad (2011) C-748-11 at para 2.18.3.2.; see also Corte Constitucional, 16 October 2008, Acción de Incostitucionalidad (2008) C-1011-08 at para 3.1.5.

[167] This, of course, is a "friendly" interpretation of what might happen in reality as, the other way to see it, it is that, despite the existence of a legal duty of not harming others' right to compete, public litigation simply chooses to close its eyes (so to speak) claiming that, for the sake of protecting systemic values and collective interests/benefits of markets and competition, all forms of confrontation that do not refer (exclusively) to a dispute between market authority (or collective interests/benefits of competition) v. wrongdoers (or private interests/benefits of anticompetition) must be disregarded

[168] See supra pages 45-48.

problem lies in presuming that wrongdoers/debtors did no wrong unless victims/creditors demonstrate otherwise.[169] Let's see. From a civil-wrongs/civil-procedure perspective such a presumption is just, but the common and natural burden that plaintiffs must ordinarily face in accordance with principles of good faith and due process (powerful contentions that I will try to address in the second part).[170] But looking at this presumption and procedural burdens from a competition law perspective (from its classical approach at least), the same might have a different reasoning than just protecting rights and freedoms of wrongdoers.[171] Let me explain this point. If wrongdoers are blamed for anticompetition is because they imbalanced markets (somehow). Such an imbalance, in turn, can only be explained (at least in the binary logics of the classical approach) either for competition or anticompetition. Yet law obliges victims/creditors to demonstrate anticompetition. So, what law does is actually presuming that wrongdoer's/debtor's victory was obtained legaly and legitimately, that is, competitively.

Keeping intact procedural and evidentiary burdens over plaintiffs' shoulders, thus, cannot only be seen as a mere procedural aspect of law or as a substantive understanding of civil wrongs. From a (let's say) competition law standpoint such a fact can also be linked with the need to protect the winner (following the narrative of assimilation) and, similarly, with the need to let systemic logics (of the first classical premise) remain intact. All in all, this entails (once more) that the protection of the systemic value of competition prevails over the protection of competitors' right to compete. But, moreover, it entails as well that the (almost certain) sacrifice of the individual right to compete of victims is offset by the systemic gain of collective interests/benefits, which, in addition, explains the active legal role from which wrongdoers might be benefiting.

But let's assume, for the sake of argument, that plaintiffs (victims) demonstrate anticompetition. This would bring about two effects and two beneficiaries. The first effect is that the right to compete would be enforced in victims' interests/benefits so that first beneficiaries would be victims, as they will redress the infringement of their right to compete through anticompetition deterrence and compensation of damages. The second effect, on the other hand, would be the protection of the systemic value of competition since anticompetition (as systemic harm) would be blocked in markets and so the second beneficiary will be market authority who

[169] See supra pages 50-52 and 54-56.

[170] See supra note 124, 126, and 127; see also Marco Bronckers & Anne Vallery, "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law" (2011) 34:4 World Competition & Econ Rev 535; see also International Chamber of Commerce, Policy Statement, ICC Commission on Competition, *Due process in EU antitrust proceedings. Commonest on the European Commission's draft Best Practices in Antitrust Proceedings and the Hearings Officer's Guidance Paper*, Doc No 225/667 (2010); see also C-415-02, supra note 124.

[171] See, for instance, the situation in EU and due process in competition law proceedings that, although related with public litigation proceedings, sheds nevertheless lights on similar thoughts of these that we are trying to build on here regarding procedural burdens, Ivo van Bael, *Due Process in EU Competition Proceedings* (n.d.: Kluwer, 2011) at 100-101 [Bael]; see also Jürgen Basedow, *Private Enforcement of EC Competition Law* (n.d.: Kluwer, 2007) at 182.

would have indirectly achieved (systemic) anticompetition deterrence. Hence, one can say that, in placing on plaintiffs' shoulders private litigation's operability, one irremediably returns to similar logics to those of public litigation wherein the whole legal apparatus is designed to pursue the system's sake and, if possible, individuals' sake. In other words, even when victims surpass the obstacles that anticompetition asymmetries and procedural burdens impose on them, the reasoning of law seems to be the same, that is, that the individual right to compete must work as a vehicle to channel collective interests/benefits and thus the systemic value of competition. Worth asking, then, is the system in fact concerned with the enforcement of the right to compete? Well, according to what has been said, it seems more as though the asymmetrical position and actual difficulties that victims/creditors face be more a projection of systemic values and therefore of sameness (i.e. of formal equality) than of individuality and difference.

Regarding PBE, their situation in private litigation is even more worrisome as their position is aggravated by the fact that, to bring an action, they should first demonstrate their competitor condition, that is, that there was a (direct or indirect) relationship with the wrongdoer from which their claim for anticompetition stemmed.[172] But, taking into account the assumption that PBEs have been excluded from markets, or in any case that their right to compete has been affected, then we must agree that demonstrating this competitor condition or linking the reasons for which they were excluded from markets as a legitimate stand to build upon anticompetition would be, if not impossible, at least extremely difficult, as impossible and difficult as it would thus be to enforce their right to compete (at least through competition law).[173] Not to mention the difficulty of fitting into the anticompetitive behaviours' list the reasons or situations that have prevented them from participating in markets since these, as noted earlier, originate most of the times from non-market reasons (e.g. systemic discrimination). So, once more, in the case of PBE, the same systemic logics and narrative of assimilation act upon their position before law preventing them thus to have active legal roles and therefore to enforce their right to compete.

But let me raise two points here considering all the foregoing. Although a kind of

[172] See also, for instance, SIC Sentencia 1, supra note 122; see also SIC Sentencia 6, supra note 127; see also Corte Suprema 2000-00624, supra note 151.

[173] We said before that it is interesting how others have begun using ways apart from public and private litigation to bring their competition law claims before the jurisdiction (in particular, we mentioned *tutela*, *acciones de grupo*, and *acciones populares*). However, one of the things that we did not mention and that we judge necessary to bring at this point is that most of the cases found were not tried against private market agents but against the State, and State agencies (different from SIC) being the central claim in almost all cases, not the existence of anticompetition but the impossibility of taking part of market economy. This finding can be explained, at least in the case of PBE, by the difficulty that we mention here of showing in competition law enforcement (public and private litigation) the competitor condition or at least the effective participation in markets. Indeed, it seems as though it would be easier at certain point to ask the State to force the entrance into the market than pleading for the existence of anticompetition, restraints to commerce derived from non-economic reasons, or unduly advantages. See, for instance, T-629-10, supra note 150; see also Auto-275-11, supra note 150; see also T-375-97, supra note 151; see also T-291-09, supra note 126; see also T-583-03, supra note 107; see also T-724-03, supra note 126; see also T-104-96, supra note 150; see also Consejo de Estado 2003-00452, supra note 151; see also Corte Suprema 2000-00624, supra note 151; see also Corte Suprema 2007-00209, supra note 151; see also Corte Suprema 4018, supra note 145 see also Consejo de Estado 2000-00016, supra note 54; see also Tribunal 01-421, supra note 151; see also Tribunal 04-2007, supra note 151; see also Tribunal 2009-00148, supra note 151.

summary, the first point seeks to call attention over the fact that none of the rights and entitlements in conflict in competition law are balanced with each other in the same extent. Take, for instance, the case of market authority in public litigation. Its power to intervene and punish wrongdoers is not the result of its right to compete, which one could say it does not exist per se. The vinculum that links market authority with wrongdoers emerges from its legal entitlement of exercising police powers in markets. And, it is precisely for this very same reason that public litigation is conceived almost exclusively from and for market authority in its inquisitorial stage and, by the same token, it is because of that that market authority reaches the adversarial stage (of public litigation) empowered with presumption of legality.

Consider as well wrongdoers; they do have in conflict their right to compete in both (public and private litigation). And despite that in these two mechanisms of enforcement wrongdoers are being inquired because of anticompetition, the position that they hold in each cannot be measured in the same degree. So, in public litigation wrongdoers are almost submitted to the will of market authority during the inquisitorial stage. And, as noted, although market authority gets favoured in the adversarial stage because of presumption of legality, wrongdoers are nevertheless re-empowered before administrative judges in the second stage insofar as they are able not only to demonstrate that they acted competitively, but also that market authority did not act in accordance with law when enacting the administrative act. Wrongdoers deploy as well their right to compete in private litigation. Nonetheless, contrary to public litigation, procedural burdens and the non-recognition of the asymmetries that come from anticompetition end up favouring them before victims.

As per victims, in public litigation, as noted, they are not entitled to exercise their right fully given the legal construction of thirdness, which, furthermore, leads to the paradox of accepting in public litigation the fact that anticompetition causes harms to the system, that such harms can be brought by market agents as thirds in order to help market authority to build its case, but that they nevertheless cannot protect their right to compete by asking for remedies or compensation. In private litigation, on the other hand, although victims' position, as interested parties, is (somehow) reinvigorated, burdens and anticompetition asymmetries impede a (let's say) re-equalization of the unbalanced position in which anticompetition has left them. In this way, thus, victims get private litigation with law presuming that their lost was due because they did not perform as well as wrongdoers and, consequently, that wrongdoers' win should be seen as competitive (i.e. in accordance to law).[174]

[174] Apart from the difficulties that this might represent for victims, there is an additional element at stake that victims must assess before embarking on private litigation; i.e. wrongdoers' response. Indeed, if victims did not succeed in proving anticompetition, wrongdoers are entitled to bring an action asking for damages. This produces a sort of double victimization that certainly might

Close to victims, we have PBEs who are, certainly, the most visibly affected in both mechanisms of enforcement. In public litigation they can actually bring claims as thirds as almost all kinds of market agents can. In this way, thus, PBE can indeed make visible their claim. But, nevertheless, this does not allow them to protect their right to compete. Private litigation, on the other hand, is far from being the forum in which they can bring claims and much less the place where they can actually enforce their right to participate in markets. All this leaves them with only few options, for instance, the constitutional jurisdiction making their case via the violation of fundamental rights or provoking a response throughout collective actions.[175]

The second point that I want to raise here is that, in the current understanding of law (shaped by classical premises), the sequence freedom/legal-duty/vinculum seems to be far more accessible for wrongdoers than to other market agents. And what I mean with accessibility is that wrongdoers seem better-positioned to defend themselves against claims of anticompetition than others to protect their right to compete. This, of course, is due to the understanding shaped by classical premisess according to which "what matters is the system but not individuals", which leads to the need for weighing all the particles that compose the system as equals and, more troubling perhaps, to disregard all kinds of difference when operating law (e.g. the asymmetries in which anticompetition has left victims or the non-market reasons from which PBE have been relegated from markets).

This is why, in public litigation, others cannot participate even though what is at stake is the legal duty of wrongdoers of not deploying anticompetition. Moreover, this is also the reason for which, in private litigation, law cannot at first see victims as victims but as competitors who had the same chances as wrongdoers to win the competition process but who are now claiming that wrongdoers' win was obtained through anticompetition, for victims must be seen as equally positioned to prove anticompetition as wrongdoers are equally positioned to demonstrate competition. Similarly, this is what explains PBEs' invisibility (at least in competition law) since the exercise of their right to compete is taken almost for granted as all people have (formally speaking) the same possibilities to enter in markets and compete.

Formal equality is, thus, a theoretical aspiration that in practice ends up distorting difference not just in markets/competition but fundamentally in law/governance. This leads us to consider that perhaps there issomething missing in law in not awarding special treatments and, moreover, in not giving further consideration to the realities of difference that emerge precisely from markets and competition. For instance, the impossibility of considering that victims of

impede frivolous claims from victims, but that it can nonetheless provoke impunity as victims would restrain from exercising private litigation, not to mention of course that counter-responses of wrongdoers might work as well as a way of intimidation and even of vexatious litigation. See, for instance, L256, supra note 62, Art.31

[175] See supra note 172

anticompetition are not exactly better off than wrongdoers when reaching mechanisms of enforcement, not only because they can have difficulties in demonstrating what wrongdoers did, in fact, do wrong due to the asymmetrical position in which anticompetition left them, but essentially because neither are victims who are being blamed for unbalancing markets and competition, nor are they who are being blamed for putting market economy in jeopardy. In the same way, regarding PBE, that perhaps not all people can, in fact, have access to markets simply because there are elements or situations that impede them for doing so.

This opens a concern, the need for redressing the impossibility of others for exercising their right to compete through competition law as the mechanism that, par excellence, aims to govern markets and regulate interactions between market agents. Perhaps it is time for understanding competition law not in its supreme mandate of equality but from its need for recognizing the fact that difference is the common notion of markets and competition and so should it be for law and governance. In other words, passing from a systemic value of competition to the protection of the right to compete and, consequently, from a formal dimension of equality to a substantive dimension in which recognizing and legitimizing difference becomes centerpiece.[176]

(c) Merits on the possibilities

Competition on the merits concludes the reasoning of classical premises solving the dilemma of how to mak the victory and defeat legal and legitimate in markets and competition. This, despite that law is deemed to pursue a systemic value of competition and, moreover, that as a result of it, it should regard everybody as equal. And the solution for such a predicament (of promoting equality but creating differences at the same time) is as straightforward as it is powerful. As simple as if one has agreed (based on fundamentals) that market forces and competition dynamics result from the free and natural interplay of market agents, then whatever both provoke (either to market agents' benefit or detriment) must thus be caused by their own individual choices and decisions.[177] In a way, winning or losing are expected to be on market agents' hands so that each market agent must be accountable for her/his win or defeat and thus only each should be blamed for her/his performance and results. So victory and defeat becomes a matter of individual efforts and merits, not of underserved outcomes or artificial means.[178]

[176] See Weber, supra note 68; see also, Abayomi, supra note 133, at 266-270 and 274; see also Bakhoum Economic Freedom, supra note 51, at 411-412; see also Zimmer, supra note 148; see also Arneson, supra note 100.

[177] See Vanberg, supra note 84 at 50-51; see also Friedman, supra note 28, at 21-22.

[178] See Franceso Duina, *Winning: Reflections on an American Obsession* (Princeton: Princeton University Press, 2011) at 16-19, 35-39, and 77-78; see also Frank Lovett, *Rawls's 'A Theory of Justice'* (New York: Continuum, 2011) at 52-55.

One of the interesting things in this reasoning of competition on the merits, though, is that it shows how competition law does not simply legitimize mechanisms to determine who winners and losers will be. Further, it gives form to the way on how differences and (more importantly) hierarchies unfold in market competition. The point is that, inasmuch as by winning one can access the means that lead one in turn to become better-positioned, the fact of winning makes one more prone (or suitable) to vanquish markets and competition, defeat others, and thus make survival feasible for one's sake. Looking retrospectively, this was precisely the reason that, when dealing with formal equality, we said that law needs to create a blindness and an objective arbitrage around markets and competition, as what is at stake in competition law is precisely the determination of who will be privileged or underprivileged.[179] Accordingly, if merits play such a primary role in distributing wealth, merits should therefore also be critical in defining who can actually reach positions of hierarchy and power. In accepting this, hence, one would arrive at the conclusion that, not only competition law is deemed to govern markets and competition, but it is also deemed to govern how hierarchies originate (legally and legitimately) in society as well as how difference (economically, legally, socially, and even politically) should be allocated.[180]

But all this reasoning of competition on the merits is not trouble-free (much less when considering its attempt of concluding the classical approach). What is problematic from it is that it seems as though it appeals to meritocracy without considering how and from where merits (truly) stem. If one looks at the formula of competition on the merits in such way (i.e. without considering the "how" and the "where" of merits), one can perhaps wind up excluding from meritocratic assessments individuality and difference, which may be neither the fairest nor the safest way to protect competition, competitors, or equality.[181] If this is so, we should face thus the fact that competition on the merits may lead to deep contradictions even in the same classical approach, which would definitely shed light over this deconstructive attempt and particularly over the importance of protecting both the right to compete and difference.[182] Bearing this in mind, let's go over the problems and contradictions that this meritocratic claim (in this way understood) might be leading competition law into.

First, decoupling merits from reality leads one to assume that, because people reach (or

[179] See supra page 68

[180] See Friedman, supra note 28, at 22-24, 128, 131-133, and 135-137; see also Fox, The other path, supra note 100; see also Bakhoum Economic Freedom, supra note 51, at 424-430, and 436 ; see also Karounga Diawara, "A social approach to the goals of competition law in developing countries - comment on Bakhoum" in Daniel Zimmer ed., *The Goals of Competition Law* (Northampton: Edward Elgar Publishing ,2012) 439 at 445-448 [Diawara A social approach]; see also Stucke Occupy Wall Street, supra note 25.

[181] The term "individuality" is linked with the first deconstructed (counter)premise of the right to compete whilst the term "difference" refers to the second (counter)premise of substantive equality.

[182] See Arneson, supra note 100; see also DiQuattro, supra note 100 at 64-65; see also Peter Iadicola & Anson Shupe, *Violence, Inequality & Human Freedom* (Lanham: Rowman & Littlefield, 2003) at 87-88; see also Robert Hayman, *The Smart Culture - Society Intelligence, and Law* (New York: New York University Press, 1998) at 171-172, 181-183, 195, 200-202, and 214

can get) markets in the supposedly same conditions, everybody can expect the same outcomes with their winning performance. Second, (somehow derived from the foregoing) that the reason that market agents do not compete or they lose is that they have chosen not to or because they have not performed as well as winners. In Rawlsian terms, the meritocratic claim in this classical reasoning fails in seeing market economy as a race between equals in which all market agents, as consequence, are equally placed to defeat others before and during competition. And, as this affects the narrative of competition law, law and governance in theory proclaim a construct of winning around a matter of choice and consequently of merits. But, in reality, winning is rather a matter of choices and merits among people who may not have the same choices or that cannot defend their merits in the same way (e.g victims and PBE).[183]

In the real world a supreme state of equality in markets simply does not exist. And it is impossible (almost naive) to think that such a state can indeed take place in market economy (much less in market competition), not even before competition begins (or when exaltation is taking place). Thus, there will always be people with better chances of reaching the starting line (Rawlsianian speaking, of course) and others with less favorable possibilities to do such a thing. Or there will always be people with better information than others to take better decisions and risks that may harm markets systemically or her/his counterparts individually. So, not taking part of markets or not winning in competition cannot necessarily be due to lack of will or absence of skilfulness. In some cases, as a matter of fact, it could instead be a sign of lack of opportunity either to reach markets or to demonstrate that one's win was indeed competitive or that the win of one's counterpart was anticompetitive. Truth be told, the problem of the current dominant insight (in competition on the merits) is not considering the right to compete foundational and therefore as the main element of the scaffolding of both market/competition and governance/law.

There is, nevertheless, an interesting contradiction in competition on the merits, namely, that the core of the meritocratic claim takes merits, ultimately, as a projection of market agents' individuality. Otherwise, how can one explain that winning or losing can be considered as expressions of market agents own freedom to choose? But the fact of the matter is that the articulation of classical premises blocks the deployment and materialization of the real dimension of individuality in markets, making it, as a result, impossible for some market agents to unfold their right to compete. So, are we in front of an individualistic conceptualization or of a systemic conception of markets/competition? Well, individuality is precisely what competition on the merits includes in the equation (in my view) in detriment of the classical approach and, in some

[183] See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999) at 74-76, and 86-88; see also Arneson, supra note 100; see also Paul Gomberg. *How to Make Opportunity Equal - Race and Contributive Justice* (Malden: Blackwell, 2007) at 141-145.

way (partially of course), making the case for this deconstructive attempt. In other words, the contradiction that meritocracy brings to the classical approach consist of awarding merits based on individuality in an understanding that does not recognize difference stemming from individuals. This leads competition law and governance to be more in the field of ruling what will never happen (a sort of impossible "ought") and not of what is really happening or can happen.

Now, there are, in my view, two ways to approach this predicament that the (classic) meritocratic claim begets in a deconstructive fashion. One is focusing on the freedom to choose. This will certainly lead one to consider into law's rationale on those market agents that for being different cannot compete or cannot be successful enough in markets. Note, nonetheless, that in such a case the problem at stake will be people's lack of opportunity, not so much to enter and compete, but to have equal chances to conquer markets. The difficulty with such an approach, in my view, is that is almost impossible to avoid difference and hierarchies in the aftermath of markets and competition. As we said above, it is almost invariable that market economy produces winners and losers, so that there will always be somebody up and somebody down, somebody benefiting from winning and somebody being deprived because of her/his defeat.[184] For, focusing on freedom to choose, the solution would shape the outcome, which would lead in turn to the impractical solution of being always in need of redressing markets to let that those who lose today can win tomorrow.[185] This further denaturalizes difference and competition from the very essence of market economy.[186]

There is, however, an additional obstacle. The solutions in such a case would be unresponsive for some market agents, at least for some of the others that we have identified on this document. So, at first, focusing on this freedom to choose solution seems suitable for PBE, as the same aims to empower market agents to let them choose appropriately and adequately in order that they can improve their possibilities to win. Yet, we face in PBEs' case with a fundamental fact, their setback is not so much for not obtaining benefits from markets but from something (let's say) anterior to that. PBEs real problem seems to be accessing markets to compete. So, the fact of not-winning is not the problem per se. It seems instead that it is the impossibility of exercising their right to enter in markets and compete. Now, with respect to victims, the analysis is even more blurred as the trouble for them is not the impossibility of reaching a successful outcome in competition, but making (shaping if you will) their anticompetition claim successful when operating public or private litigation. In other words, to make their loss in markets a legitimate stand in the jurisdiction to more successfully challenge the allegedly competitive win

[184] See supra pages 31-32.

[185] In a way, such an approach will be closed to the levelling the playing field solution; see on this regard Arneson, supra note 100; see also Stucke, supra note 5, at 591-596 and 612-614.

[186] See supra pages 67-68.

of wrongdoers.

This leads us thus to the second way, that is, focusing on the right to compete. Such an approach would undertake a different assessment than the former going beyond simply semantics. Appealing to the right to compete to solve this (let's say) dilemma of the meritocratic claim places the discussion of who can get difference and hierarchies not on a specific point of the competition process but across it. This is so because the right to compete (as noted and as it happens with other freedoms and liberties) is structured by the sequence freedom/legal-duty/vinculum, which occurs at any point during the competition process. So, whenever an economic freedom could not become a legal duty obstructing in that way its materialization for a particular market agent, it becomes therefore necessary to make it enforceable and thus to redress whatever is blocking the legal duty from being unfolded. Now, if the freedom and the legal duty already exist and the problem lies in the materialization of the vinculum, then it would become mandatory, re-thinking the appropriate way on how the right is being enforceable and therefore being embodied throughout the legal system.[187]

More importantly perhaps, by centering the discussion on the right to compete, one is not necessarily denying the emergence of differences and hierarchies. Contrary to what happens when focusing on the freedom to choose, the right to compete does not oblige a sort of equalization of relationships in market economy as the analysis would not revolve around the outcome of the competition process. It is rather to make possible the right to compete for those for whom for some reason it is not. I have to say at this point, however, that I am not against the fact that markets and competition catalyze differences and hierarchies. My point instead is that the process from which hierarchies and differences emerge must assure first the right that is deemed to make the whole system works; i.e. the right to compete. In a sense, it is neither fair nor legitimate to determine who can reach power and hierarchies if the right to compete is enforced unequally, and with this I mean if its enforcement is out of the real proportions that reality imposes on each market agent in particular.

But let's see what happens when considering this point before PBEs and victims. As noted, for PBE the essential problem is not so much obtaining an outcome from markets and competition but rather surpassing the artificial barriers (directly or indirectly construed through markets) to take part fully in market competition's scheme. In this way, therefore, what is at stake for PBE is not a matter of lack of choices but of lack of opportunities to materialize their legal duty that stems from their right to compete. Reinvigorating their position in markets, thus, passes through a reactivation of their right to compete (so to speak). This, however, depends pretty much

[187] See Zimmer, supra note 148, at 496-501.

on what is causing their impossibility of enforcing their right to compete. Now, regarding victims, the analysis could perhaps be more essential (in a sense). The problem for victims, as we have been insisting, is that their position when reaching mechanisms of enforcement is affected by the fact that their subjective claim is not assessed by the jurisdiction appropriately. In other words, that despite the risks that anticompetition entails and the impact that it has for victims, at the time of judging it, none of this is taken into account, which compromises the feasibility of victims to successfully bring a claim before the jurisdiction, making impossible the materialization of their vinculum before wrongdoers.

Hence, looking at PBE and victims, one obtains different pictures of competition on the merits. In the case of PBE, the need to enforce their right to compete derives from the need to make PBE part of Colombian market economy. And, regarding victims, enforcing their right to compete becomes a pressing factor whenever they are facing the need to reach the jurisdiction as the asymmetrical position in which anticompetition leaves them and the further obstacles that the system imposes on them hinder the successful materialization of their right to compete. In this way, on a deconstructive approach, merits must thus be restated in terms of "for whom is more possible to compete or defend her/his stand" and not of "for whom is more possible to win" (considering the solution proposed of focusing on freedom to choose) or "to whom can merits be awarded" (in light of the competition on the merits formula). I am not saying, nevertheless, that merits should disappear from law's rationale. What I am saying is that under a deconstructive approach, before looking at merits, it is necessary to first look at possibilities. In a way, competition on the merits (at least in Colombian competition law) should pass first through an assessment of competition on the possibilities and, consequently, if it would be possible for market agents to compete.

PART 2:
VICTIMS AND PBE

The classical approach is built upon a propositional reasoning according to which, IF [competition is a general value] AND [markets agents are formally equal], BUT [winnings must be based on merits], THEREFORE [active legal roles should be held by those representing competition and winnings]. Accordingly, market authority (embodying competition) and competitors/wrongdoers (representing winnings) become the hub of competition law in Colombia. This explains why both wind up holding active legal roles and thus being benefit from empowerment/disempowerment dynamics.

Yet, in my view, this is not what would happen in a deconstructive approach wherein hierarchies and binarisms would be inverted. The deconstructive approach would instead bring a contradistinctive propositional reasoning in which, IF [all market agents have the right to compete], BUT [market agents are different] AND [merits must consider possibilities], THEREFORE [active legal roles should be held by those having the right to compete considering their differences and possibilities]. In a word, although the right to compete in deconstruction becomes central, it is nevertheless the differences and possibilities amongst its holders what end up mattering.[188]

The reasoning of the deconstructive approach, hence, would not only focus on a (let's say) more subjective angle of competition law (rather than a systemic one), but would bring forward a shift on where and to whom governance and law ought to be addressed.[189] In my view, this shift would lead to the incorporation of wider notions of active legal roles as law would be compelled to see the participation in competition law enforcement intrinsically and subjectively related to the fact of holding the right to compete being obliged law, by the same token, to actively integrate in its legal interplay not just losers (like victims), but also people aspiring to take part of markets (like PBE), and even winners (such as alleged wrongdoers).

[188] In propositional logic the premises that compose the reasoning are usually placed (or separated) with brackets and connected with conjunctions expressed in capital letters (e.g. AND, BUT or THEREFORE) to facilitate, in a sense, the identification of the conclusions that are being construed. We use here precisely such conventions (so to speak) to show (on a propositional fashion) how both "complex" conclusions (that of the classical approach and that of the deconstructive approach) ultimately arrive to different insights. See, for instance, the example provided by Klement cited above on supra note 22. See also Sartor supra note 22; see also Patrick Hurley, *A Concise Introduction to Logic* 11th ed. (Boston: Wadsworth, 2012) at 310-311.

[189] And with this I am referring to the point in which the whole reasoning would be ultimately shaped by the (conjunction) "BUT". In the classical approach the "BUT" is placed after considering that "competition is a general value" and that "all market agents are formally equal", meaning that, albeit what matters is the system (i.e. competition) and that all market agents must be seen equal before the law (i.e. formal equality), it is nonetheless merits that determine whether or not someone can become better off in markets and therefore better off for law (i.e. competition on the merits). In the deconstructive approach, however, the "BUT" is placed right after the first premise (of the right to compete) meaning that, though it is the right to compete that becomes essential, there are differences and possibilities what ultimately should make markets agents better off.

What about market authority? As noted, when market authority operates public litigation, it does not rely on its right to compete simply because there is no economic or political freedom at stake for it (although there might be some patrimonial consequences for SIC).[190] The vinculum that emerges comes rather from the legal prohibition of anticompetition and, consequently, from the exercise of SIC of its police powers. In other words, SIC's entitlement to operate public litigation seems more a legal mandate of channeling fundamentals, rather than a need of materializing a right to compete to which SIC is simply not entitled to.[191] This does not mean, however, that market authority should be out of a deconstructed reasoning and therefore out of governance and law in a deconstructed attempt. Quite the contrary, market authority becomes one of the many vehicles in materializing the right to compete either in its systemic dimension or in its subjective extent.[192]

So far we have been concerned with outlining contentions between the classical and deconstructive approaches, the dynamics of empowerment/disempowerment, binarisms and hierarchies, and constructs and sub-constructs. But, what would deconstruction look like in practice? Or, following the research problem proposed in the introduction, how can victims and PBE be empowered through Colombian competition law (through deconstruction)? To answer this question, this second part has been divided into two chapters. The first chapter addresses victims, while the second goes into PBE.

And, although both seek to explore what is needed to set the deconstructive approach in motion, both explore different ways to do so. For victims, the first chapter discusses the main difficulties that they face in both mechanisms of enforcement proposing deconstructed solutions to overcome such impediments. For PBE, on the other hand, the second chapter tries something different by elaborating on these others more casuistically by looking, briefly, over the situation of Afrocolombians to show how a typical case of PBE would look like and what could be done through a deconstructive approach of competition law.

[190] See supra note 166.

[191] Moreover, as noted, insofar as market authority embodies abstractions of competition law (systemic values), its role could not be seen or interpreted as representative of market agents. See supra note 188 and 145.

[192] Further, seen in this way the role of market authority, it would become impractical disregarding others' participation from public litigation's operability. As a matter of fact, it is instead in the coincidence of the need of policing markets (by market authority) and protecting the right to compete as individual claim (by others) wherein governance in public litigation may perhaps find its truly mandate in markets and competition, at least a more encompassing one. But let me reserve elaborations on this regard for latter.

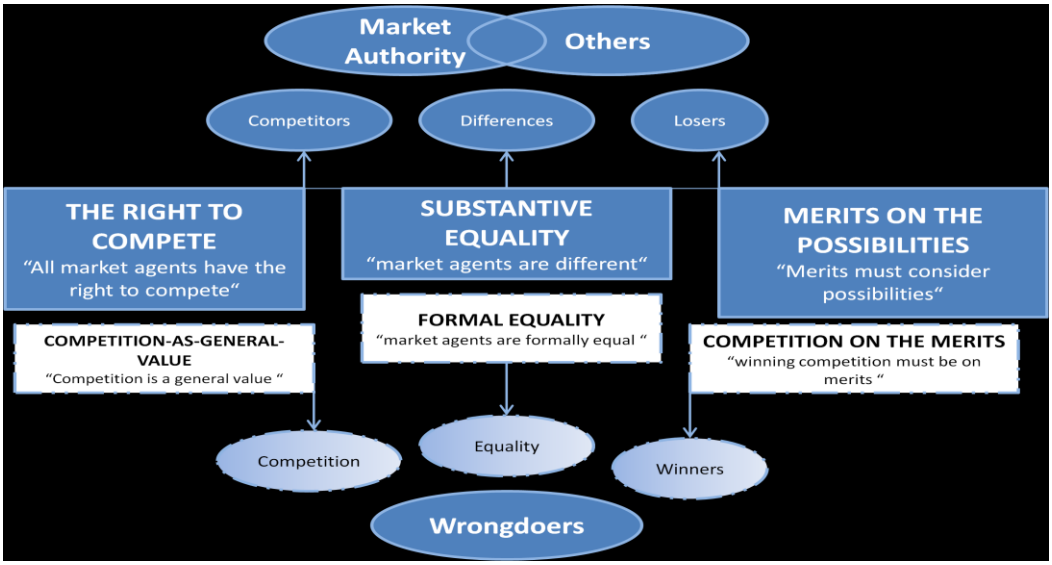

*****Figure 5 presents the diagram of deconstructed premises with market authority and others empowered (whence are they placed above the diagram with defined lines, a consistent color, and intersecting each other) and wrongdoers below in the same place where others were in the classical approach. Likewise, this figures shows the inversion of the binary confrontation of deconstructed premise and classical premises in which the formers subdue the lasts (i.e. competitors v. competition, difference v. equality, and losers v.

CHAPTER 1: VICTIMS

In the first part of this document, we centered our criticism towards the classical approach in the fact that this compels both mechanisms of enforcement to channel and revitalize dynamics of empowerment/disempowerment, as well as constructions of otherness amongst market agents (in the case of victims, through thirdness in public litigation and passiveness in private litigation). This enables us, moreover, to explain why others cannot effectively enforce their right to compete in both mechanisms of enforcement. In this chapter, as mentioned, we revisit the situation of victims. And although we go over similar criticism to those made in the first part, we nevertheless focus the analysis from the standpoint of what each mechanism of enforcement ultimately entails, that is, as an administrative law construct in public litigation and as a civil and commercial law construct in private litigation. The goal is thus relatively straightforward: showing what is needed for empowering victims before two different legal constructs and two different legal worldviews.

What we will do, hence, is divide this chapter into two sections. The first section briefly examines public litigation considering it from what it entails to understand competition law matters in general and the condition of victims in particular from an administrative law viewpoint and the second section does the same with private litigation but from a commercial law perspective. Each chapter seeks to present both the obstacles for victims (i.e. understanding the

scope and extent of otherness and dynamics of empowerment/disempowerment) and the deconstructed solutions necessary to surpass such difficulties. The aim is to address deconstructed solutions from the different rationales and realties that administrative law and commercial law impose on the jurisdiction and on competition law. However, despite the fact that this chapter addresses different types of legal constructs and, consequently, different kinds of legal understandings, the goal will always be the same; i.e. reverting constructs of otherness (thirdness/passiveness) and hierarchies (dynamics of empowerment/disempowerment).

2.1.1. Before public litigation

In the first part we discussed the fact that the main obstacle for victims in public litigation is a legal construct of thirdness, which leads to their disempowerment in the legal interplay, thereby blocking their chances for defending their position before market authority and wrongdoers. But we did not delve so deeply into what this entails or what it means to be a victim in public litigation. Our concern was simply to demonstrate otherness and empowerment/disempowerment phenomena with the aim to build upon deconstruction. Within this section, I intend to review some of the steps that victims are allowed (or limited) to take in public litigation to not only show how thorny, complex, and absent the defence of their individual right to compete can be under the current classical approach, but also to elaborate further on what a deconstructed solution to surpass such hindrances would entail.

As a legal construct, thirdness cannot be seen as a unique and distinctive feature of public litigation norms and much less as an isolated phenomenon of competition law in Colombia. Rather, thirdness is the materialization of a plain and straightforward interpretation of administrative law and, more specifically, of punitive administrative law.[193] One canno reach a different conclusion after considering the fact that public litigation as such is no different than a projection of police power policy that mirrors representations of authority in Colombian legalistic insight and its binary mindset through which third categories (like victims) are essentially

[193] The reason for saying that public litigation must be seen from punitive administrative law and not simply from administrative law is because of its corrective and coactive feature or extent that stands out from other capacities of market authority. Indeed, as noted above, SIC is legally and legitimately entitled to impose fines and injunctions on wrongdoers and can do so due to the police powers it attains via public litigation norms. So, saying that public litigation is simply ruled by administrative law misses and important element of the legal interplay, which is the possibility of SIC to punish and restrict freedoms and liberties of wrongdoers when it enforces public litigation. Regarding the phenomena of punitive administrative law in general see H E Bröring & A Tollenaar "Legal factors of legal quality" in K J de Graaf, J H Jans, A T Marseille et al. eds. *Quality of Decision-Making in Public Law. Studies in Administrative Decision-Making in the Netherlands* (Amsterdam: Europa Law Publishing, 2007) 53 at 61-65 [Graaf]. As per punitive administrative law in Colombia in competition law see supra note 108; see also Jaeckel & Montoya, supra note 56 at 34-38 and 41-45; see also de la Cruz, supra note 109; see also Toledo & Posada, supra note 76; see also Archila, supra note 59, at 25-26 and 33-34. Regarding examples of law case on both punitive administrative law generally and punitive administrative law in competition lawsee, for instance, C-595-10, supra note 126; see also SIC Resolución 14540, supra note 74.

disregarded and misrepresented in the legal and institutional framework.[194] Interestingly enough, however, by recognizing this (let's say) reality of the thirdness phenomenon (i.e. of being a late development of an anterior, larger, and in any case more complex administrative law reasoning), one realizes that the problems that thirdness produces (and therefore of the many impediments with which victims have to cope with as a result) cannot be explained from a juridical stance but from an institutional standpoint.

My point is that, in considering thirdness as a construct that comes from (punitive) administrative law and, thus, that it is not an autonomous elaboration of competition law in its public litigation dimension, one must acknowledge that the difficulties that thirdness provokes on victims (in the classical approach) are neither violations of law nor erroneous hermeneutical approaches.[195] They are, rather, the result of a lack of institutional recognition of the factual extent and truly perniciousness of anticompetition as well as of the importance of the role of individuality in itself. Accordingly, the classical approach in public litigation leads one to deal with institutional inconsistencies rather than legal discrepancies. The solution and therefore the scope of deconstruction do not pass through hermeneutics, but through what the institutional framework should become for the sake of the coexistence of systemic and individual values (i.e. competition and the right to compete). In elaborating, on some of the obstacles that victims experience in public litigation, we will see that the core of the problem lies not in mistaken legal interpretations, but in a lack of institutional recognition or representation.[196]

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[194] For legalism and binarism in Colombia see, supra note 64; see also supra note 96; see also supra note 131.

[195] With this I want to emphasize the fact that there is no such a thing as a special procedure behind public litigation. Colombian competition law simply reproduces a dispute between the State and private actors tying loose ends with general rules of administrative law. Now, I do not blame this need for applying or connecting public litigation with administrative law (i.e. with what we call here as tying looses ends with administrative law). What I do blame, however, is that the configuration of law has not taken into account certain specificities such as the particular position in which victims end up placed as a result of anticompetition. My point is that the phenomenon of thirdness in public litigation is not the result of a thorough and thoughtful analysis, but the result of simply having inserted a legal provision in the legal system letting the rest be governed by general rules that perhaps are not exactly suitable to the specific issues that are ultimately being governed (i.e. anticompetition). Now, this does not mean that public litigation has not incorporated some distinctive rules that stand out from general administrative law rules. Yet, none of them have been made to revitalize the victim's position before anticompetition. Their purpose has been simply to make coherent the existence of victims within the classical approach. In other words, the few special rules that exist in public litigation addressing the situation of victims seem to have been developed more to make the classical approach consistent rather than to protect victims or to recognize the existence of a victimization process that emerges from anticompetition. See Miranda Control Jurisdiccional, supra note 83; see also Miranda Indemnización prácticas restrictivas, supra note 83.

[196] What I mean by "institutional representation" is a very precise idea in which, furthermore, we have been insisting so far, namely, that victims, in spite of being victims, do not have the possibility of bringing their individual claims in public litigation as such inasmuch as the way on how this mechanism of enforcement is conceived (or framed), it only envisions a binary equation or conflict between (i) systemic concerns of competition (represented by SIC) and (ii) what can be seen as dubious and wrong projections of individuality (embodied in wrongdoers and expressed in terms of anticompetition). And, where are victims? In other words, where are in this equation the individual (non-systemic) expressions of competition that not being anticompetitive are nevertheless affected by anticompetition? One cannot bluntly say that this concern for individual representations of the right to compete in public litigation (as opposed to the individual representations of anticompetition embodied in wrongdoers) should not exist because victims are ultimately allowed to take part of public litigation as thirds. And, certainly, one can find in this idea of thirdness of public litigation as some kind of explicit (and in any case tangent) acknowledgement of the existence of something or someone who is beyond SIC and wrongdoers. Yet, this does not mean that full recognition of victims exists. And the reason is because victims lacks the essential possibility to speak up for their own sake in this mechanism of enforcement by, for instance, bringing their own individual claims (i.e. by defending their right to compete, their right to be compensated, or their right to access to direct remedies). Victims/thirds are placed thus in an odd position of being neither one nor the other. Though law enables them to take part as what they are (i.e. victims), it disregards their possibility of taking an active stand in shaping public litigation precisely for what they represent (i.e. an individual harm [the right to

For the sake of an argument, let's assume that one is a victim.[197] If so, one would have various ways to defend one's position. Public litigation is one indirect manner of defence,[198] and can, at a certain point, become an appealing option for a victim especially if one does not have solid proofs for bringing a claim against wrongdoers in private litigation or if one does not want to be the sole victim placing wrongdoers on trial; in other words, if private litigation is not an option or it is not at that point of the conflict.[199] According to public litigation norms, one way to

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compete] as opposed to a systemic one [competition as general value]). This is why we call this as lack of "institutional representation" because the probleml is not simply on the absence of victims in the legal interplay (or in the "institutional" framework through which public litigation is set in motion), but also in their inability for defending their position for their own sake (or "represent" what they are entitled to claim). For this idea of "institutional representation" in law and particularly in law enforcement see Douglas North, "Toward a theory of institutional change" in William Barnet, Melvin Hinich & Norman Schofield eds. *Political Economy. Institutions, Competition, And Representation* (New York: Cambridge University Press, 1993) 61 at 62-65

[197] Before making my point here, let me first make some annotations with respect to exhaustiveness and non-exhaustiveness of anticompetition list and the types or categories of anticompetition that exist in public litigation. SIC, case law, and most Colombian authors see on anticompetitive market behaviours list a non-exhaustive list. The conventional wisdom in Colombia is that throughout such a list public litigation norms simply set examples of what should be deemed as anticompetitive. In my view, this explanation is a desperate attempt for Europeanize Colombian competition law. The fact of the matter is that Colombia has an exhaustive list of what is and what is not anticompetition within public litigation norms. This is why, for instance, only market behaviours listed in public litigation norms are the ones that are in reality inquired by SIC and judges. It is true that D2153 seems to reproduce a non-exhaustive enumeration by including in some sections expressions that appears to suggest so (for example, the expression "*among others* [market behaviours]" of Art.47 of D2153). But, the fact that public litigation norms are projections of punitive administrative law (in which criminal law principles are most of the times applied, including of course the need for pre-determining the punishable conducts or acts to be banned) and, consequently, a development of a police power policy (which encompasses the need for pre-configuring conducts or behaviours as part of the core of fundamental rights like due process) leaves scarce room of manoeuvre for considering the list as non-exhaustive. Moreover, looking at most of the decisions of SIC in public litigation (and, surprisingly enough, in private litigation too), one realizes that, almost in all cases, SIC and judges (implicitly or explicitly) tend to use one or many of the market behaviours listed to either declare anticompetition or disregard claims or suits. Indeed, I would dare to say that not a single case in Colombia (in both public and private litigation) has used the list as though it were a simple set of examples. Both market authority and judges (I repeat in both mechanisms of enforcement) seem to consider almost in all cases that what we have is an actual normative mandate in the anticompetition list. From both a practical and a theoretical point of view, I believe this makes the analysis of what it is or is not anticompetitive is rigid and in any case restricted to the list that brings forward public litigation norms (and private litigation norms as well). Now, just in order to illustrate the point that I am making in this section, it is important to say that public litigation norms divide in the following three groups market behaviours that are deemed as anticompetitive; (i) agreements against free competition, (ii) acts against free competition, and (iii) abuse of dominance. On the list of public litigation see D2153, supra note 61, Arts. 46-50. Regarding exhaustiveness and non-exhaustiveness in public litigation see SIC, n.d., Concepto 02090247; see also SIC, 2001, Concepto 01049115; see also T-375-97, supra note 150; see also Tamayo, supra note 75 at 148 and 164; see also Vallejo, supra note 74; see also Miranda, supra note 54; see also Miranda Régimen General de la Libre Competencia, supra note 76; see also Jaeckel & Montoya, supra note 56 at 53-55.

[198] As noted in the first part, market authority does not represent any market agent as such. It embodies systemic concerns and therefore collective interests/benefits in markets and competition in which by default (and in any case indirectly) one can find individual interests/benefits. Thereby, its decisions (e.g. of imposing fines, injunctions or other administrative measures) are addressed precisely to deter anticompetition and redress (somehow) the systemic harms that wrongdoers provoke. Well, this is just the extent of the word "indirect remedies" that I use here. That is, that the measures taken by SIC on a specific case, despite not being addressed for the sake of specific market agents (like victims) can bring (somehow) some relief to certain market agents (like victims precisely) letting them in such a way to indirectlysurpass some obstacles and future harms that anticompetition may have caused them. On this impersonal condition and abstract extent of SIC's decision making see supra pages 47-48; see also supra note 145.

[199] Having access to public litigation before accessing private litigation or having the chance to set public litigation in motion may entail key reasons for victims. For instance, perhaps the most appealing one, surpassing information asymmetries. As we have been insisting, it is a fact in competition law litigation that finding information is not only pressing but ostensibly difficult as most of the times key information is controlled by wrongdoers. Additionally, anticompetition is usually deployed among market agents that know each other (e.g. suppliers, clients, and stakeholders in both upstream and downstream markets) and who, as a result, participate in the same market and with whom one usually must get along with. Consequently, getting into competition law litigation is not easy if one is a competitor. One must be cautious and thorough to prevent unexpected disagreements, future retaliations, and dangerous animosities. After all, the purpose is not to disappear from markets but to assert one's right to compete in them. What is more, litigating competition law, apart from being highly risky for one's business, can be extremely costly. All this of course becomes even more noticeable when one's position in markets is not as strong or powerful as one's counterpart (think, for instance, on Small and Medium Enterprises). Well, as noted (also in the first part), some features of public litigation can actually help to surpass most of these intricacies. For example, the fact that SIC holds police powers (given the nature of public litigation norms) and with that a strong and preferential position when collecting evidence (particularly before wrongdoers) is an entitlement that victims certainly do not have and can hardly ever poses despite of some tools offered by the jurisdiction in private litigation. Furthermore, SIC is, after all, a third party in business relationships. So, whenever it intervenes through competition law conflicts, at least through public litigation, it can safeguard (to a certain extent) the position of victims before wrongdoers, thus avoiding negative effects in markets. Likewise, altogether (i.e. SIC's police powers and its condition of third party as State agency) might imply reduction on litigation costs, which

set in motion public litigation (perhaps the only one) is informing on wrongdoers to SIC so that an inquiry can be opened and eventually wrongdoers can be punished through fines and remedies from which one might benefit from (at least indirectly).[200] However, filing a claim guarantees nothing. In fact, it is in these first steps precisely wherein one begins seeing dynamics of empowerment/disempowerment acting upon the entire logic of public litigation and ultimately of the legal interplay of both mechanisms of enforcement. Everything begins with one single and essential fact. Given that public litigation is framed plainly and without any sort of adaptation to what anticompetition entails (at least to victims), the decision of opening or refusing the inquiry is exclusively and autonomously made by SIC, as SIC can freely decide whether the inquiry can be opened or not.[201]

In theory, SIC's decision must follow the set of values established for public litigation. Therefore, the decision to open or reject an inquiry must be preceded by a kind of objective assessment of whether the market behaviour affects (i) free participation on markets, (ii) consumers' welfare, or (iii) economic efficiency.[202] Yet, paradoxically, the existence of this (let's say) link between SIC's entitlement in public litigation and the set of values of this mechanism of enforcement does not mean that, if any of such values is or can be threatened through anticompetition, victims (and I dare to say any market agent) could force SIC to open an inquiry. In fact, as a projection of the almost absolute power that SIC holds over public litigation, competition law places total discretion on SIC by stating that it is up to it to determine whether (systemic) harms are meaningful enough to operate public litigation.[203] SIC, in other words, not only declares anticompetition, but controls the definition of whether market behaviours, even being anticompetitive and harmful, are worthy enough to be inquired upon or policed.

From this stems the question of what follows if SIC decides that there is no need for public litigation? Can one question such a decision to not open an inquiry? In the current mindset of classical premises I would say that such a possibility is quite unlikely to succeed and in any case ineffective. Although debatable, rebutting SIC's decision could eventually face an

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can be appealing when one, as victim, does not have the means for funding competition law litigation. On information asymmetries see, for instance, supra note 125; see also George Cumming & Freudenthal Mirjam, *Civil Provedure in EU competition cases before the English and Dutch Courts* (Franklin: Kluwer, 2010) at 108-110 and 112-115; see also Bael, supra note 171, at 401-403; see also supra note 116; see also supra note 128.

[200] See Ibid, see also D2153, supra note 61, Art. 2.1. and 12.2.; see also L1340, supra note 108, Art.18 and 19; see also SIC Resolución 398, supra note 114.

[201] As noted in a previous footnote, there is no such a thing as a special procedure or a special set of rules governing public litigation in Colombia. Colombian competition law has simply certain norms addressing the entitlements of SIC for intervening when anticompetition takes places and the description of what should be deemed as anticompetitive (i.e. the anticompetition list). The rest is left to administrative law and, as such, to general rules of administrative law. This, as noted before as well, is bottom line what compels the current legal interplay for understanding in public litigation a fight of two (i.e. SIC v. wrongdoers) with a tangential, sporadic, and in any case absent participation of others who are by the same token seen simply as thirds (and therefore excluded of the equation). See Miranda Indemnización prácticas restrictivas, supra note 83.

[202] For the concept of set of values in this document see supra page 1-2 and 25-26; see also supra note 3.

[203] See D2153, supra note 61, Art. 2.1.; see also Ortiz Regla del Minimis, supra note 113, at 35; see also SIC02082486, supra note 107.

administrative law technicality as the administrative act with which the decision is issued could eventually be seen as an administrative act that is not subject to judicial control.[204] And even if it is seen as subject to judicial control, the fact that the decision is absolutely discretionary to SIC hinders all possibilities for questioning it before administrative judges. This is not only due to the fact that the discussion will always be centered on SIC' discretionary entitlement (which is absolute), but also because it would be difficult to frame the suit in some of the five events to ask for nullity.[205] There is, moreover, an interesting point to reflect upon here. Looking at public litigation norms, there is nothing explicitly impeding the rebuttal of SIC's decision before administrative judges. The existing impediment (i.e. the legal technicality mentioned) is rather a projection of general rules of administrative law within public litigation, which demonstrates, once more, the lack of specificity that these norms have (at least when looking at victims).

If we disregard this, and find that an administrative judge accepts a victims' suit against SIC's refusal of opening an investigation and decides that SIC should have opened the inquiry, such a decision would not entail direct remedies or compensation in the near term. It would provoke, at best, that SIC be compelled to open the inquiry to investigate anticompetition after three or four years of strenuous litigation in which one, as victim, has to convince the administrative judge that SIC should have investigated a market behaviour that one thinks might eventually be seen as anticompetitive. To wit, all efforts would be on discussing whether SIC

[204] I am referring here to what is known in the local milieu as *actos de trámite*, which can be translated as "procedural acts" or "prior acts". These *actos de trámite* do not solve or address at first the core of the decision on a specific case. *Actos de trámite,* rather, give way to the development of proceedings for issuing the administrative act. For instance, in pubic litigation, the administrative act is the (formal) act or decision through which SIC declares the existence of anticompetition. *Actos de trámite,* on the contrary, are the collection of decisions or steps that SIC took prior to rendering such a decision or issuing the administrative act. In other words, the administrative act is the formal decision of *via gubernativa* whilst *actos de trámite* are the set of decisions or acts through which *via gubernativa* is deployed to produce the administrative act as such at the end of *via gubernativa*. Consequently, *actos de trámite* do not have the extent to produce a vinculum between SIC/wrongdoers or to modify the scope of SIC's decision in a particular case. They are, instead, the means for setting in motion the proceedings (i.e. *via gubernativa)* in which such a vinculum will come into being (i.e. the administrative act). According to public litigation norms, apart from the administrative act as such (i.e. the act that declares the existence of anticompetition) and decisions rejecting evidence during *via gubernativa*, all acts or decisions of SIC are deemed *actos de tramite*. Based on Colombian administrative law, *actos de trámite* are not subject of judicial control. The implication of this is, at first, relatively simple. Only administrative acts or decisions regarding rejection of evidence (during *via gubernativa*) can be questioned before administrative judges. Now, does this mean that one cannot question *actos de trámite*? It depends. Questioning the validity of *acto de trámite* as such is not possible. What it is possible is questioning the validity of the administrative act demonstrating that *acto de trámite* is illegal and that such an illegality leads to one of the evens of nullity of the administrative act. Putting it differently, that *acto de trámite* affected the validity of the administrative act. Now, the decision through which SIC decides to open or not open an inquiry is neither the administrative act with which SIC decides the existence of anticompetition, nor a decision that deal with evidentiary matters either. It is solely an act or decision with which SIC (formally) decides to initiate or not an inquiry in public litigation. So, at first, one can say that, since such an act or decision does not fit in any of the two categories (for considering it as an act subject of judicial control), it would not be possible to bring an action against it before administrative judges. Nevertheless, based on case law, victims can eventually call into question the decision of SIC to not open the inquiry even when it is an *acto de trámite*. Indeed, again, according to case law, whenever *acto de trámite* blocks de possibility for reaching a final decision on the matter (i.e. for opening an investigation that decides whether or not there is anticompetition), it is possible to understand *acto de trámite* as definitory and therefore as subject of judicial control. See L1340, supra note 108, Art.20; see also CCA, supra note 114, Art.49; see also Burgos, supra note 112, at 81; see also SIC Resolución 7950, supra note 74; see also SIC, 2007, Concepto 07078215.

[205] See, supra note 111. In a previous footnote we said on this regard the following:

> " In practice, nonetheless, illegality is a qualified event (so to speak) insofar as it can only happen in five events (in which is deemed that plaintiffs may break presumption of legality and hence that they have cause of action for getting into the jurisdiction): (i) when administrative act violates or contravenes a higher rank norm (e.g. a constitutional provision, a law, or decree), (ii) when the State agency or the person who issued the act did not have jurisdiction or was simply not entitled for issuing it, (iii) when the act did not follow the forms or procedures for being (legally) issued, (iv) when there was a violation of due process, (v) or when the grounds that support the decision were false or due to abuse of power. "

should open the inquiry. Once this takes place and a judge accepts this position, SIC would just be obliged to open the inquiry wherein it can decide, later on, whther there was any event of anticompetition. It is then worth asking whether this is effective? In my view, it would not be. As a matter of fact, it would primarly be a waste of time in the attempt to deter anticompetition with the wrongdoers being (again) the sole beneficiaries as they would thus be able to strength their defence for future actions.

Continuing with our predicament and with this brief sketch or timeline of public litigation, let's assume that SIC simply takes the decision of opening the inquiry to investigate whether anticompetition exists within this case. If this occurs, it would be opened what could perhaps be seen as the sole space in which victims can eventually assert their right to compete; i.e. conciliatory hearings. Indeed, according to Colombian law, whenever SIC opens an inquiry (and before it takes a final decision), conciliatory hearings must be convened. This is, furthermore, one of the events in which public litigation takes a distinctive shift away from administrative law.[206] Yet, once again, it would be difficult to persuade wrongdoers to stop anticompetition and compensate for damages unless the victims have strong evidence and if this were the case, then the most probable line of action would have been using private litigation directly. The reason for this is simple. If wrongdoers do so, they would be confessing and therefore obliged to compensate, pay fines, and accept injunctions. These are steps that a wrongdoer would hardly ever take. The most probable line of action for wrongdoers would be to not settle during conciliatory hearings and wait until either SIC or victims collect enough evidence to prove anticompetition in trial.

So, let's say, as is often the case, that there is no settlement in conciliatory hearings and that SIC decides that there are no grounds for declaring anticompetition after considering the evidence collected by victims, wrongdoers, and SIC itself.[207] If so, again, I hardly doubt that victims could effectively question the decision before administrative judges as the same, I repeat,

[206] In almost all administrative law disputes, conciliatory hearings are obligatory before trial; including of course process of nullity of administrative acts. Hearings in such a case must be held once *via gubernativa* have finished and only when one aims to question the administrative act before administrative judges. Consequently, to bring their claim, plaintiffs (affected by an administrative act and aiming to question its validity) must convene beforehand with the State agency to determine whether or not there could be a settlement on the specific issue. In competition law matters, nonetheless, law says that such conciliatory hearings must be held in *via gubernativa* once the time for alleged wrongdoers to present evidence has passed. Furthermore, law explicitly states that victims should be part of such hearings. This slight difference, in a way, is what allows (to a certain extent) public litigation to be open, at least in this point, to other actors like victims. Similarly, it is this reason precisely for which we have said in this section that public litigation norms shift the typical rule of administrative law in these matters to incorporate sui-generis elements (so to speak) and make coherent the reasoning of the classical approach with the victimization process that anticompetition implies for other market agents. Regarding conciliatory hearings in Colombia see supra note 128.

[207] We are taking here the less problematic scenario. What would the problematic one be? In my view, it would be if SIC decided to not open the inquiry because in its opinion the effect of the market behaviour is meaningless or of no significance. As a result, SIC would not be saying whether or not there was an event of anticompetition thereby leaving all parties in indeterminacy. A decision of this sort, however, would contravene in my opinion not only constitutional provisions (e.g. fundamental rights like due process) but also administrative law principles (e.g. the efficiency principle, in light of which the State should avoid formalities by all means providing, as a result, a final decision in every case that is brought before it) Regarding the efficiency principle in the CCA and the impossibility for letting in indeterminacy *via gubernativa* see CCA, supra note 114, Art.3.

is seen as discretionary of SIC. But what if SIC decides that the market behaviour is anticompetitive? In the best case scenario, SIC would take some administrative measures against wrongdoers (e.g. fines or injunctions) seeking to stop and prevent the deployment of anticompetition (systemically). Such a decision, as noted, may benefit victims as such measures could eventually work as indirect remedies. Yet, the fact of the matter is that even in such a case victims would not have had the chance to materialize their right to compete and, consequently, their right to be compensated for the harms and damages that they might have suffered as a result of anticompetition.[208] So, even when public litigation results in declaring the occurrence of anticompetition (which would be the best case scenario), victims would, at best, have some evidence to prove anticompetition in private litigation (i.e. the administrative act) and the gurantee that wrongdoers, at least for a while, would stop anticompetition.[209]

[208] Still, what described is just but the first stage of public litigation (i.e. *via gubernativa*). Public litigation, as noted, does not stop here. Wrongdoers can indeed file a suit before administrative judges adducing the nullity of the administrative act repealing in that way SIC's administrative measures, which, moreover, are most of the times suspended till the administrative judge takes a final decision on the matter. Victims, if this happens, which usually does, would remain on their condition of thirds during the trial and, consequently, on their impossibility of being compensated for damages or accessing to direct remedies. And although victims can eventually participate (as thirds), their possibility to intervene (actively) is limited insofar the process would neither referred to their right to compete, nor to their right of being compensated, and much less to their right of accessing direct remedies. The best they can do is simply supporting SIC in its attempt for protecting the administrative act and with that the declaration of anticompetition as well as the effects derived from it (i.e. the indirect remedies imposed by SIC in *via gubernativa*). Moreover, As if it were not enough this almost absolute submission of victims in public litigation, their chance to participate in this mechanism of enforcement is preceded by a previous qualification given by SIC. A situation that, in my view, is quite debatable. Indeed, administrative law in Colombia (which, as insisted, rules public litigation almost entirely) does not impede that third parties (like victims) take part of administrative law litigation and much less that their participation be conditioned to some kind of formality. Yet, recent interpretations of SIC, supported by recent legal developments on the matter (2009 reforms), seems to approach the recognition of thirds differently. Indeed, according to SIC and 2009 reforms, if one, as victim, wanted to become a third in public litigation, one must be formally accepted as such beforehand. In other words, SIC holds the power of qualifying whether or not one can indeed be interested in the procedure, which in other words is more or less like saying that a victim, even being and recognizing her/himself as a victim, cannot be considered (in public litigation) in such a capacity if SIC does not allow s/he to consider her/himself as such. Yet a bit confusing and even incoherent, the fact is that, in order to take part of public litigation, one should have been previously accepted within public litigation proceedings. In brief, it does not suffice that one demonstrates one's interest in the process, it is necessary that SIC or judges accept that one's interest is indeed valid or legitimate for participating in public litigation. See, on this regard, L1340, supra note 108, Art.19; see also CCA, supra note 114, Arts.14-15 and 46; see also SIC Resolución 9842, supra note 114; see also SIC, 14 April 2004, Resuelve Recurso (2004) Resolución 7918; SIC Resolución 398, supra note 114. See also supra note 112.

[209] What I mean with this is that SIC's declaration of anticompetition is part of the evidence but not a (sort of) definitory proof at trial for private litigation. This is so because SIC's administrative act should be assessed by civil judges (or SIC whenever it performs as judge in private litigation) in tandem with other evidence and other arguments presented during trial. In other words, the decision of SIC in public litigation cannot be seen as an absolute and ultimate decision for private litigation purposes. SIC's declaration of anticompetition does not tie civil judges (or SIC itself in private litigation) who are no obliged to take a similar decision to that taken in public litigation. It would be indeed a strong evidence and most probably judges would support SIC's line of decision. Yet, there is nothing obliging judges to do such a thing. The reason is twofold; first, because Colombian CPC says so following a legal principle known in Spanish as *sana crítica* (of difficult translation but that more or less says that judges should take their decisions only following their best effort and judgement as well as with their constructive criticism using all trial evidence and independent from any other authority). Second, because the scope of both mechanisms of enforcement are of a different nature and therefore of different extents and effects. Moreover, there are other reasons (strategic reasons if you will) that may lead one to think that perhaps it would not be a good idea to push civil judges to ask SIC or administrative judges for public litigation evidence. Indeed, as most of the evidence of public litigation would be protected by legal reserve and therefore not revealed to victims, the only possibility that the civil judge (in private litigation) would have for incorporating that evidence into trial would be to ask for the evidentiary material to SIC directly. This is a decision that is always and in any case discretionary of judges. So, if the judge does not do it, what victims would have on trial would be just an administrative act that declares anticompetition without further evidentiary material to build up their case in private litigation. Now, if they are lucky enough to convince judges to ask for public litigation evidence, victims would never know what the content of the evidence that supported the administrative act could be, which certainly entails a risk because if the evidence is brought to private litigation they can actually be opening a Pandora's Box (so to speak) since they would never know what the judge is going to find. Now, a possible way for victims to curve this (let's say) risk is presenting their suit in private litigation with a petition for suspension of private litigation process till administrative judges take the final decision regarding the validity of the administrative act (i.e. till public litigation be decided). How successful and effective this move (known in the jurisdiction as *prejudicialidad*) can be is actually uncertain as the suspension of private litigation could last maximum for three years (two years in

All in all, victims are entitled to precipitate public litigation by informing on wrongdoers (supporting in such a way SIC's [classical] goal of policing markets), they can further help SIC in building its case (by presenting evidence for instance), suggest SIC's line of decision on the matter, and even support its claim before administrative judges. Yet, what victims cannot do is assert and protect their right to compete. And the question would thus be, why? As has been previously stated, thirdness and disempowerment are simply projections of an unelaborated, plain, and direct approach to (punitive) administrative law. And with this I mean that the main problem lies in the fact that public litigation mirrors a legal and institutional framework that only considers the existence of systemic concerns and, as a result, places the phenomenon of anticompetition between two binary extremes; i.e. SIC representing the system (competition) and wrongdoers representing individuality (anticompetition). A reasoning that lacks wide notions not only of what individuality means but of what competition entails failing, for instance, to include the holders of the right to compete affected by anticompetition (i.e. victims) who not being the system or wrongdoers are nevertheless an expression of competition and the most affected market agents by anticompetition.

Indeed, looking at administrative law straightforwardly and without much elaboration (i.e. on the specificities that anticompetition supposes), one would come to the conclusion that administrative law is only concerned with disputes wherein what is at stake is the power of the State and individual rights of those affected by such a power (i.e. wrongdoers). And, certainly, looking at public litigation, such a scheme fits perfectly since, after considering the classical approach and its three classical premises, one is obliged to understand that there are only two parties, wrongdoers and SIC, who are struggling to determine the extent of a market behaviour and the scope of State's intervention before such a behaviour. The reality of markets and of what they provoke publicly and individually, nonetheless, should lead the discussion to a completely different stand. The impact of anticompetition at all levels of markets should not be dismissed bluntly by simply inserting public litigation into administrative law or just creating some special rules to make the classical approach coherent with the victimization substrate of anticompetition. When dealing with fundamentals, we said this precisely. Particularly when referring to the acknowledgment that both, public and private interest, surpass the simple state of coexistence to reach a dimension of cohabitation. More importantly perhaps, that it is by recognizing the need to defend one and the other what at the end it winds up reproducing the entire system as a whole.

This is the reason why we insisted that the problem in public litigation does not lie on a misleading legal interpretation at the beginning of this section. Law, in this mechanism of

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the new CPC) whereas public litigation can eventually take five years (at best). For *prejudicialidad* see Old CPC, supra note 124, Art.172; see also New CPC, supra note 124; see also see also Miranda Indemnización prácticas restrictivas, supra note 83.

enforcement, only follows an institutional design that was structured over a typical administrative law conflict thought in general terms, rather than to govern certain types of conflicts and the many quandaries that they reproduce. And it is here precisely where one finds the main error of public litigation; i.e. understanding that competition law and the many phenomena at stake in it (being anticompetition the hub) are typical administrative law conflicts where there are only two actors in the scene dealing with State actions and its decision making on a particular case. The truth of the matter is that competition law embodies multiple concerns, therefore law and governance cannot be reduced to two market agents or to two realities of what it is (the system) and what it is not (individuality).

It is possible to think that the existence of private litigation eliminates the need to insert victims into the equation of public litigation. Yet, saying this (i.e. that because of private litigation, public litigation should disregard the right to compete) only misleads the role of law and of legal enforcement. The fact is that either in markets or competition (more so when considering the phenomenon of anticompetition), we are before an individual reality that does not seem to be perceived by the dichotomic scope that public and private litigation is bringing forward.[210] Indeed, the difference between public and private litigation seems to exist eminently because Colombian competition law understands that individuality is out of systemic concerns and, therefore, that it should be seen alongside other individualities when anticompetitive harms are at stake (i.e. with wrongdoers' individuality).[211] Yet, the fact that there is a second mechanism of enforcement like private litigation would not prevent public litigation from incorporating individuality in its logics (e.g. empowering victims in its legal interplay). Colombian competition law must surpass its legal taboo of considering that dealing with systemic values implies a rejection of individuality or that exploring individuality implies disregarding systemic concerns. The fact of the matter is that neither mechanisms of enforcement is exclusionary as they both deal with a similar reality; i.e. anticompetition.

In fact, in Colombia, there are other types of conflicts that encompass systemic and individual concerns (at the same time) as well and in which there have been (let's say) sui-generis institutional developments and designs to let multiple interests (i.e. systemic and individual) interact with each other for the sake of the number of interests that a particular situation has affected. Let me briefly refer to two that have an inherent relationship with competition law. The

[210] A dichotomy that is fundamentally a direct result of the binary/legalistic insight of the jurisdiction that, with the time, has become key to explain two phenomena that from the perspective of administrative law and commercial law are mutually excluded; to wit, the legal nature of the conflict (i.e. systemic and individual) and of the legal nature of the parties of such a conflict (i.e. SIC v. wrongdoers and victims v. wrongdoers). Yet, if one looks at both for what they truly rule or govern (i.e. markets and competition systemically [administrative law] and individually [commercial law]), they are intrinsically correlated and therefore necessarily tied with each other.

[211] Hence why the forum (for discussing individuality) must apparently be restricted to commercial law (i.e. to private litigation) and not to administrative law (i.e. public litigation)

first is criminal law, which, by the way, has a relatively strong connection with punitive administrative law as most of the principles and values of criminal law are replicated in it given that both (i.e. criminal and punitive administrative law) affect individual rights and freedoms.[212] Although anticompetition in Colombia is not a criminal offence, criminal law nevertheless punishes behaviours that can be seen as anticompetitive and therefore can be part of public and private litigation proceedings.[213] Now, notwithstanding most of these criminal offences are related to systemic values, criminal law allows victims to ask for compensation and remedies in the same criminal procedure thereby opening the door for the interaction of two legitimate interests (those of the State and society [i.e. of the system] and those of victims [i.e. of individuals]). So, even though such criminal offences emerge from anticompetition, competition law and criminal law treat the outcome of such offences differently. While competition law impedes the recognition of harms and compensation to victims, criminal law permits them and even enhances them by regulating a special forum for victims who are, after all, the holders of such rights.[214]

The second example is consumer law. Albeit its primary goal is to systemically protect consumers, in some cases it allows consumers to ask for compensation within the same administrative procedure, which by the way is also conducted by SIC.[215] Though this door that consumer law opens to victims is limited to some types of damages (*damnum emergens* and eventually *lucrum cessans*), it is nonetheless quite enlightening for what we are discussing here

[212] On the overarching relationship of criminal law and punitive administrative law see Graaf, supra note 193; see also Mireille Hildebrandt, "Justice and Police: Regulatory Offenses and the Criminal Law" (2009) 12:1 New Criminal Law Review: An International and Interdisciplinary Journal 43. Regarding Colombian administrative law and the correlation with criminal law see Daniel Jiménez, "Responsabilidad Objetiva", Superintendencia Bancaria de Colombia, 2003; see also de la Cruz, supra note 109; see also Torrado, supra note 109; see also Jaeckel & Montoya, supra note 56 at 36-46. As per case law see C-595-10, supra note 126; see also Corte Constitucional, 6 September 2000, Acción de Inconstitucionalidad (2001) C-1161-00; see also Corte Constitucional, 1 February 2012, Acción de Inconstitucionalidad (2012) C-030-12; see also Corte Constitucional, 9 August 2005, Acción de Inconstitucionalidad (2005) C-818-05; see also Consejo de Estado, 18 April 2002, Acción de Nulidad (2002) 1999-0202; see also Consejo de Estado, 21 April 1986, Recurso de Súplica (1986) 0007; see also Consejo de Estado, 24 June 1999, Acción de Nulidad (1999) 5244

[213] For example, in Colombia, the following are criminal behaviours that, as such, can be linked with anticompetitive market behaviours listed in both public and private litigation norms: hoarding, speculation, misleading or deceptive offering of products, counterfeit of patents and trademarks, manipulation of pricing, and bid-rigging. Interesting enough, in none of these the legally protected right is competition as such (as it is the case of public litigation norms), but the so-called socioeconomic order and public administration. I must say, however, that there isa close connection between the first category (i.e. the socioeconomic order) and competition as systemic value, which furthermore links even more this (let's say) institutional similarity of criminal law and competition law (in public litigation at least). Regarding these legal provisions in Colombian criminal code see Ley 599, Diario Oficial 44.097, 24 July 2000, Arts. 297-298, 300-301, 306, and 410-A. Regarding the relationship between criminal law and competition law, in general, see Adán Nieto, "Aspectos de la protección penal y sancionadora de la libre competencia" in Luis Arroyo & Klaus Tiedemann eds., *Estudios de Derecho Penal Económico* (Castilla-La Mancha: Universidad Castilla La Mancha, 1994) 111

[214] Indeed, according to Colombian criminal law, victims harmed by criminal offences (like the ones mentioned in the previous footnote) can ask for compensation within the same criminal proceedings in which victims can actually bring their claim before the judge and get compensation for damages. This is what is known in the jurisdiction as *incidente de reparación integral* that can be translated as "motion for compensation". See on this regard Ley 906, Diario Oficial 44.658, 1 September 2004 Arts.102-108.

[215] I want to focus on two events in particular where consumers are allowed to ask for a sort of compensation from wrongdoers. The first one is when wrongdoers have sold on credit to consumers with higher interest rates than those permitted in Colombia. The second is when the wrongdoer has lent money to the consumer without having an authorization to do so. In both cases, SIC can ask wrongdoers, within *via gubernativa,* to give back the money that victims paid them (i.e. to wrongdoers), either because the interest rate was too high or because wrongdoers did not have the authorization for lending money. The second event is the possibility that SIC has (in *via gubernativa)* of asking wrongdoers to pay back to victims the excess price that they pay when there is a difference between the price announced by the wrongdoer and the price paid by the victim. See, on this regard, Ley 1480, Diario Oficial 48.220, 12 October 2011 Arts. 3 and 59

for different reasons. First of all, because while it is true that consumer law is different from competition law and that both deal with different phenomena as a result, one cannot ignore the fact that both emerge from markets and even from similar situations. This is why some consumer law infringements may have a close relationship with market behaviours deemed anticompetitive. Second, because this possibility that consumer law opens acknowledges (somehow) the need of recognizing consumers' individuality for their sake and at the same time prosecuting wrongdoers for system's sake.[216] Similarly, because it shows how it may coexist a punitive administrative law regime with a sui generis type of procedure that deals with matters that are not necessarily related with punitive administrative law issues. In brief, both criminal law and consumer law show how, in tandem with the protection of the system itself, it can become paramount as well individual claims to correct not only breaches of law but individual harms and the perpetuation of victimization processes.

Now, what would a deconstructive approach for public litigation entail? Deconstruction would provoke in my view the need for redressing institutional dynamics in public litigation.[217] The main reason for this is that deconstruction would invert hierarchies so that the core of the reasoning would become the right to compete and individuality, as opposed to competition and systemic values. Yet, this does not mean that deconstruction would make market authority disappear from legal dynamics. It would rather involve the need to insert individual claims in the legal interplay so that public litigation dynamics can be allocated between competition in its systemic dimension and as an individual right, on the one hand, and, on the other hand, anticompetition as a catalyser of systemic and individual harms. Putting it differently, deconstruction would lead to a redistribution of hierarchies by inserting individuality as a valid stand in the configuration and setting in motion of public litigation.

The first change would be to replicate similar forums to those that criminal law or consumer law have for victims. In other words, opening a space in public litigation wherein victims can ask for compensation or direct remedies. The second change would be to recognize in the legal interplay that, alongside with systemic concerns, there should exist individual concerns as part of systemic assessments of market authority. This is, as such, a projection of the first

[216] Indeed, the former are simply the events in which consumer law allows direct remedies and compensation to consumers. But consumer law has as well other administrative measures that apply in those cases and in other cases that entail also infringements of consumer law. Such administrative measures are quite similar to those of public litigation in the sense that they basically consist of fines and injunctions that are also paid to SIC by wrongdoers and that they look for the protection of markets and competition for consumers as a systemic abstraction (i.e. of non-figurative representation). Quite similar with what we have called here as the classical reasoning of competition law.

[217] For deconstruction I mean incorporating what we have called here as the deconstructive approach in the legal interplay of public litigation; to wit, addressing competition law (and with that market's governance) towards the three deconstructed premises of (i) the right to compete, (ii) substantive equality, and (iii) merits on the possibilities as opposed to the three classical premises of (i) competition as general value, (ii) formal equality, and (iii) competition on the merits. For the extent of the word deconstruction in this document see supra note 141.

fundamental of cohabitation of interests and, by the same token, a recognition of the second fundamental of market competition as the State must acknowledge the need to be involved not only in the perpetuation of the market economy but also in the reproduction of the right to compete as individual entitlement. And by this I mean the recognition that compensation and direct remedies are manifestations of an individual claim and part of a personified, subjective, and in any case individual assessment that must coexist with impersonal, objective, and systemic ones. In brief, awarding victims with the right to take part in public litigation to assert their individual right to compete for what they are in reality, namely, victims of anticompetition and holders of an individual right to compete.

Consequently, with a deconstructive approach, public litigation would lead towards the institutional incorporation of two main pillars that revolve around victims. The first is the need to regulate the intervention of victims to ask for compensation. In my opinion this should be made at the end of *via gubernativa* (once public litigation has concluded and based on whether or not there was in the specific case an event of anticompetition)[218] and would imply a sort of motion for compensation (similar to those in criminal law or consumer law) wherein victims can demonstrate the existence of damages and with that of their individual harm.[219] The second pillar would be harmonization with private litigation. Insofar as victims would be allowed to ask for compensation in public litigation, their access to private litigation should be somehow restricted. Otherwise law would be opening the possibility for events of unjust enrichment amongst wrongdoers and victims.

2.1.2. Before private litigation

The main obstacle in private litigation is a legal construct of passiveness that essentially disempowers victims from the legal interplay blocking as result their chances for effectively enforcing their right to compete and accessing remedies and compensation for damages. This

[218] Indeed, if SIC decides that there was anticompetition, victims would have to prove in a subsequent stage their harms and therefore the amount of compensation they require for damages. But this would also entail (and that is what I mean with "whether or not there was a declaration of anticompetition") the possibility of victims claiming nullity before administrative judges, which, as insisted, they cannot do today because (once more) they are seen as thirds for litigation purposes.

[219] One may think that allowing SIC operating in such a capacity to award damages would be against the Constitutional Court ruling that we mentioned in the first part in which the Court decided that SIC cannot be judge and party when dealing with the same issue in public and private litigation. In my view, however, we would not be dealing with the same dilemma by incorporating a (sort of) "motion for compensation" in public litigation. The core of the reasoning of the Constitutional Court was that the capacity of SIC as police market (in public litigation) and of judge (in private litigation) was disrupted, constituting a violation of fundamental rights like due process. The problem for the Court, however, was through both (i.e. inquiring and attempting to act as judge) SIC would wind up affecting its position of police market (in public litigation) and judge (in private litigation). In a deconstructive approach, though, SIC would hold its position as police market and, in the end, would have the possibility for determining the existence of some damages derived precisely from the market behaviour that has just declared anticompetitive. Niether capacities, in my opinion, would be disrupted. See on this point what we mentioned before in supra note 124. For a similar proposal in Colombia see Miranda Indemnización prácticas restrictivas, supra note 83.

occurs because victims find that their position is not as advantageous as that of wrongdoers when they operate private litigation. To elaborate more on this idea of passiveness as well as on the scope of deconstruction in private litigation, let me first finishing the (sort of) timeline that we began before to show what victims can do in this mechanism of enforcement and what they have to deal with when setting it in motion.

Regardless of whether or not SIC has declared anticompetition in public litigation, the problem for one, as victim, is that neither SIC nor administrative judges (if public litigation gets its adversarial stage) would refer to one, to remedies, or compensation. Yet this does not mean that one cannot assert one's right to compete in the jurisdiction or that one cannot ask for remedies and compensation. What it means, instead, is that the question of whether or not wrongdoers are liable (before other market agents apart from the State) remains open. For, the jurisdiction is able to examine the same issue (one more time) and determine whether or not anticompetition took place and whether or not wrongdoers must compensate for damages or be subject of remedies.[220] The conflict, though, would no longer be between State and wrongdoers, but between other market agents (like victims) and wrongdoers. And while it would refer to systemic interests/benefits, these would nevertheless be assessed from an individual perspective (i.e. that of victims and that of wrongdoers).[221] Similarly, the conflict would no longer be seen as an administrative law matter but as a civil or commercial law issue, which further entails that the jurisdiction would not be on administrative judges but on civil judges from this point onwards,.

Now, contrary to public litigation, private litigation may seem to be a more straightforward mechanism. For example, it only deals with two actors and not with the three or more of public litigation. Moreover, as previously noted, it does not refer simply to systemic interests/benefits, but also integrates these within the (let's say) individual spheres of the market agents in conflict. In theory, this facilitates the protection of individual rights. Besides, private litigation holds, from the beginning to the end, its adversarial nature; quite different with public litigation and the many intricacies that *via gubernativa* and the subsequent stage before administrative judges may bring forward. All in all, private litigation mechanics, once again at first, seem relatively simple. One basically has to demonstrate damages/causation/anticompetition

[220] The duplicity and coexistence of the two mechanism of enforcement entails a number of problems for victims. Although I address some in this section, there is one in particular that can be at certain point more pressing than others in practice, namely, the effect that fines and injunctions of SIC may have on wrongdoers' patrimony and, consequently, the effect that this may have on paying future compensation for damages to victims. Indeed, Colombian law (neither in public litigation nor in private litigation norms) protects victims on this regard by impeding, for example, the fines and injunctions of SIC (i.e. imposed on public litigation) that could have a material effect on the obligations that may emerge on future obligations for wrongdoers in private litigation (most notably perhaps the obligation to compensate for damages). Thus, in the current state of affairs, it can happen, as it has happened, that because of the fines and injunctions that SIC have impose on wrongdoers, these get to private litigation without the means for compensating for damages, which entails for victims the actual impossibility for redressing the damages that anticompetition may have provoked on their patrimony.

[221] See supra note 145

to access direct remedies and compensation. Putting it differently, by demonstrating this sequence, it would emerge a vinculum between one and wrongdoers justifying thus one's claim for remedies and compensation. It would be fair to say, therefore, that private litigation essentially revolves around proving that the losses that one has suffered (the same that wrongdoers would defend as competitive winnings) can be claimed as compensation for damages or direct remedies insofar one, as victim, is not obliged to bear them as wrongdoers are not entitled to claim them as legitimate or legal winnings.[222]

Now we will examine what is involved in structuring a claim that shows a sequence damages/causation/anticompetition from the victims' perspective. Proving damages is, in a way, the least of the problems since one is more or less aware of what one has lost or of what one has not won. When it comes to causation, however, things begin to get a bit difficult as proving causation not only depends on damages, but also on whether or not one can demonstrate the existence of anticompetition. In any case, yet, one at certain point may build upon circumstantial evidence and thus proving the existence of (market) patterns that somehow reveal a link between anticompetition and damages. Still, demonstrating anticompetition is a different matter. In fact, the difficulties in doing so are often the stumbling block for succeeding in private litigation and hence for getting remedies and compensation.[223]

Indeed, collecting evidence to prove anticompetition (regardless the mechanism of enforcement) is full of barriers and hindrances. The reason stems from the very nature of anticompetition as these behaviours usually involve the deployment of actions that are (let's say) not so evident in markets or for market agents keeping therefore wrongdoers' intentions or attempts of deceiving either in secret or hidden in demeanours that seem legal in appearance but that either entail the use of anticompetitive means or lead to anticompetitive effects. It is thus of the very essence of anticompetition that anticompetitive market behaviours give the impression of being competitive, even when they are not.[224] In some cases, of course, the anticompetitive dimension is more easily detected than in other cases, especially when the conduct materializes its deceptiveness or deceitfulness making anticompetitiveness self-evident and relatively easy to

[222] Ortiz2 supra note 127; see also ABA Section of Antitrust Law, *Proving Antitrust Damages. Legal and Economic Issues* 2nd Ed (Chicago: ABA, 2010) at 17-20

[223] See supra note 116; see also supra note 133; see also supra note 134; see also supra note 197.

[224] See, for instance, Burke, Genn-Bash & Brian Haines, supra note 148, at 151-153, 157-158, and 166-168; see also Carlo Petrucci, "Beyond Microsoft: an international agreement on abuse of market power?" in Luca Rubini Ed. *Microsoft on Trial. Legal and Economic Analysis of a Transatlantic Antitrust Case* (Northampton: Edward Elgar Publishing, 2010) at 468; see also Phillip Landolt, *Modernised European Community Competition Law in International Arbitration* (The Hague: Kluwer, 2006) at 93; see also Kevin Marshall, *The Economics of Antitrust Injury and Firm-Specific Damages* (Tucso: Lawyers & Judges, 2008) at 50-51 and 57; see also Juris Erling Hjelmeng, *Consumers' right of action in antitrust cases* (Copenhagen: Norden, 2006) at 19-20; see also Keith Hylton & Haizhen Lin, "Optimal antitrust enforcement, dynamic, competition, and changing economic conditions" (2010) 77:1 Antitrust L J 247

prove.[225]

One of the effects of the secrecy and appearance of competitiveness in which anticompetition is deployed is that it leaves victims with scarce wiggle room for proving anticompetition and therefore for completing the equation damages/causation/anticompetition. One certainly can structure one's claim around circumstantial evidence, but this could eventually be seen insufficient or subjective. What do I mean with this? Given the hidden and veiled nature that surrounds anticompetition, it is quite possible (not saying almost certain) that whereas for one, as victim, anticompetition may be barely a perception from what one thinks might explain the losses that one is having, for wrongdoers the act of anticompetition is a clear fact, after all, they know what they have done right or wrong. My point is that, although one can be sure that what occurs in markets is abnormal and unusual (i.e. due to anticompetition), one usually does not have at hand the actual and acceptable evidence to prove that the losses that one has suffered come specifically from anticompetition.[226]

In a way, in private litigation one, as victim, almost irremediably gets to the point of structuring one's anticompetition claim over what one thinks is wrong when the fact is that those knowing what in reality is happening are wrongdoers themselves.[227] The question of course would be if civil judges (immersed in a [let's say] classical legal understanding of equating evidence with notions of objectivity and, moreover, who deal with laws that are anchored in such a belief) would be more prone to accept such subjective stands of victims or to dismiss them declaring instead that there are no grounds for considering the existence of anticompetition (objectively). Furthermore, I hardly doubt that judges would accept subjectivity so straightforwardly. Doing so

[225] I am referring here particularly to three infringements; when anticompetition arises from the breach of intellectual property (e.g. use of trademark to imitate the victim in the market without having been licensed or authorized); second, when anticompetition arises from the breach of legal permits or government authorizations (in Colombia this competition law infringements basically consist of performing activities that can only be done by certain market agents previously authorized by the government [e.g. banking, telecommunications, mining, etc.]. The violation happens whenever the wrongdoer acts in the market without the authorization or permits harming, as a result, those market agents who are entitled for doing that specific activity). Finally, when anticompetition consists of acts in which the wrongdoer (or her/his products or services) appears to have some connection with the victim. See on this regard L256, supra note 62, Arts.10, 11, 13-15, and 18.

[226] This idea of "acceptable" evidence is linked with tensions between objectivity and subjectivity over which I will go over later on this same section. But, for the time being, let me explain it in this way. With the word "acceptable" I mean both the kind of information brought forward as evidence and the way on how such information is presented before judges to have (let's say) a strong private litigation case. In this way, thus, "acceptable evidence" is that evidence considered proper for judges to demonstrate anticompetition. Of course, the word "acceptable" itself encapsulates a number of events, like the legality of the evidence or its relevancy. Yet, what I seek to address with it is what in my opinion is a conditioning factor when setting in motion private litigation (and I dare to say almost all legal procedure in a jurisdiction like Colombia), that is, the need for demonstrating, through evidence, that the claim I am making is supported objectively with information with which anyone could arrive at the same conclusion that is being claiming before the judge (e.g. that the market behaviour that I am claiming as anticompetitive bring about indeed anticompetitive effects). As regards this idea of objectivity/subjectivity in evidentiary matters see Thomas Kelly, "Evidence" in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2008) (Stanford Encyclopedia of Philosophy); see also Harold Berman, *Law and Revolution. The Formation of Western Legal Tradition* (n.d.: Harvard University Press, 1983) at 157-159; see also Tristan Layle, "Narrative Jurisprudence: The Remystification of the Law" (1989) 7:1 J L & Relig 105; see also Maarten Henket, "Taking Facts Seriously" in Anne Wagner, Wouter Werner & Deborah Cao Eds. *Interpretation, Law and the Construction of Meaning* (Dordrecht: Springer, 2007) 109 at 111-113 and 116-118

[227] This is what we called before the subjective predicament of private litigation. See, on this regard, supra note 116; see also supra note 133; see also supra note 134.

would not only mean going against a traditional and deeply-rooted legal mindset (almost a supra-construct), but also rejecting an emblematic civil law reasoning that binds judges themselves.[228] I do not think, thus, that a subjectivist approach (so to speak) could be even plausible for civil judges in Colombia.[229]

But going back to our timeline, what if SIC declares anticompetition? If so, one can use SIC's decision to build up one's anticompetition claim supporting in such a way the evidence that one is bringing in to trial, thus strengthening one's (subjective) claim inasmuch as the administrative act presented as evidence would be deemed to follow the objectivistic rationale of civil judges since it was issued by a third and impartial party (SIC) who is bringing forward, by the same token, and at least before the sight of civil and commercial law, an independent, impartial, objective, and by all means verifiable conclusion (i.e. before any market agent and not simply before victims).[230]

Yet, presenting SIC's decision as evidence does not mean that civil judges should declare anticompetition. Civil judges make independent decisions and SIC's decision would thus be one of many pieces of evidence. In other words, once again in theory, civil judges can perfectly arrive at a different conclusion that that of public litigation, declaring instead competition (i.e. that the market behaviour is not anticompetitive). Although it is hard to imagine a civil judge sentencing differently from public litigation, judges are entitled and permitted to do so.[231] In any case, the odds of this occurring (i.e. that judges decide differently from public litigation) are ostensibly lesser than the odds that one's subjectivist approach be rejected for not having been adequately proved anticompetition (i.e. objectively).

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[228] See, for instance, Dennis Lynch, *Legal Roles in Colombia* (New Jersey: Rutgers State University, 1981) at 19-20, 22-24, 26, 63-65, and 80-83; see also Rosario Serra, *La Libertad Ideológica del Juez* (n.d.: Tirant Lo Blanch, 2004) at 27, 29, and 31-33; see also Elio Gallego, *Fundamentos para una Teoría del Derecho* 2nd Ed. (Madrid: Dykinson, 2006) at 160-161; see also Corte Constitucional 28 April 2011, Acción de Tutela (1996) T-302-11; see also Corte Constitucional 28 August 2009, Acción de Tutela (1996) T-599-09; see also Corte Suprema de Justicia, 3 September 2010, Recurso de Casación (2010) 2006-00429; see also Corte Suprema de Justicia, 2 November 2011, Recurso de Casación (2011) 2003-00428.

[229] As a matter of fact elaborating on this argument, I myself am dealing with a similar dilemma of whether relying on subjectivity or on objectivity to prove my point as what I am saying here is nothing different that my perception as practitioner in Colombia; in other words, my subjective approach to competition law's operability. And it is precisely this kind of dilemmas what in my view both, victims and judges, might experience in private litigation.

[230] In addition to the argument of being consistent with the objectivistic rationale, moreover, by following SIC's decision in public litigation, judges would also be coherent with the binary/legalistic insight of the jurisdiction, which, further, is the reason for which we are talking here about the existence of (almost) a supra-construct. And the reason is relatively simple, if one is immersed in a binary understanding, it would be illogical that something be and not be at the same time; to wit, that something be anticompetitive but competitive in the same jurisdiction. In binary forms there would simply be something that is competitive or something that is anticompetitive; otherwise, judges would be contravening the very grounds in which they are deemed to be performing as such. And, by the same token, the fact that judges replicate SIC's decision would also be consistent with the legalistic insight of the jurisdiction insofar the decision would be just but reproducing the same reasoning and decision making of market authority.

[231] Another option (over which we went over before as well) is that the evidence collected in public litigation be sent to civil judges (either by one's previous request or because the judge in private litigation has decided so). But, as noted in the first part, one of the biggest obstacles for victims in public litigation is the legal reserve that protects wrongdoers' information. For, it is quite possible that one does not know what the information (or evidence) that was part of public litigation says or does not say, which is why I find difficult that one would take the risk of depending, almost exclusively, on a set of evidence in which one does not know what the judge is going to find and therefore in which s/he would be influenced to decide. See on legal reserve supra note 106; see also supra note 206.

Another even more difficult option is if SIC declares market behaviour competitive, that is, that for public litigation purposes, wrongdoers did not act anticompetitively. Similarly to what would happen if SIC declared anticompetition, this decision would not impede civil judges from arriving at a different conclusion and declaring instead anticompetition. Still, once again, the odds of this dissagrement happening are certainly low. In fact, a previous declaration of competition in public litigation would practically end any possibility of success for one's anticompetition claim as it would mean that wrongdoers would be (somehow) protected not only by the secrecy of their anticompetitive action and by the asymmetrical situation in which anticompetition has benefited them already, but also by the favourable outcome of public litigation; in brief, wrongdoers would be able to present SIC's decision to support (objectively) their defence.

The last option is to set in motion private litigation before anything else and without any consideration with respect to public litigation, namely, operating private litigation before filing an inquiry or in any case before SIC initiates a formal procedure against wrongdoers in public litigation. This, however, would not change things drastically for victims either. Asymmetries would continue as well as one's subjective predicament. Althoguh the dichotomy of living in between both mechanisms of enforcement and therefore between two decisions that stem from two different authorities would be eliminated, one would still need to prove anticompetition, to face one's subjective predicament, and, with that, to revert the disadvantage in which one has already been placed as a result of anticompetition.

In sum, the best possible option for one, as victim, is if SIC declares anticompetition in public litigation and, once that happens, to precipitate private litigation. This option, however, is paradoxical as it involves waiting for and relying on a mechanism of enforcement wherein one, as victim, has already been disempowered through a legal construct of thirdness.[232] We have

[232] This, moreover, without taking into account that public litigation is time consuming and a final decision (considering both *via gubernativa* and the stage before administrative judges) can take between four to five years. Now, one can say that there is no need for waiting for administrative judges to take a final decision in public litigation and, therefore, that one can bring a suit before civil judges from the very moment that SIC has issued the administrative act (i.e. once *via gubernativa* ends); more even after considering that SIC's administrative act would just be evidence in private litigation. The problem with such a strategy, however, is that wrongdoers usually ask for (i) the suspension administrative act's enforceability in public litigation until administrative judges take a final decision and, at the same time, (ii) the suspension of private litigation till a decision in public litigation is rendered, this last in particular, by the way, is commonly accepted by civil judges, in my view, wrongly as I explain below. The problem with these two typical responses of wrongdoers is that both might affect private litigation in this hypothesis (i.e. when victims initiating private litigation with an administrative act that is or will be questioned in public litigation). Let me go over both briefly. If wrongdoers ask for the suspension of the administrative act in public litigation and one has brought it into private litigation as evidence (assuming of course that the administrative act declares anticompetition), if the administrative judge decides (in public litigation) that the administrative act is null, private litigation would have had accepted illegal evidence. Even more worrisome, if the civil judge has already made a final decision by then, the sentence would have been based on evidence that (again) has been declared void. In other words, private litigation would have based the sentence declaring wrongdoers liable on an illegal administrative act. Which, further, wrongdoers could eventually use to say that there has been a violation of due process in the eventual appealing. But let's see what happens with the second strategy, that is, with private litigation's suspension (which in my opinion could only happen to avoid the abovementioned violation of due process). This would place private litigation and its parties (victims particularly) in indeterminacy as the process would be frozen for three years (two years in the new CPC) or up until a decision is reached in public litigation (whatever happens first), which means for victims, in practical terms, more delays to obtain remedies and compensation and of course higher litigation costs. Now, the problem in both events would not certainly be if the administrative judge decided that the administrative act is valid (dismissing wrongdoer's claim of nullity and confirming SIC' declaration of anticompetition), but if the judge decided that

established that the word "legal roles" could be broken down into three categories: active, passive, and nonexistent legal roles. Moreover, by "passive legal roles" we understand the phenomenon by which some market agents end up disempowered from the legal interplay as they depend from somebody else or their claim is restricted in form or in context.[233] In line with this definition of passive legal roles, due to the dynamics of private litigation from a victims' perspective (and from what they have to pass through when operating it), one realizes that to be successful in private litigation victims either depends on somebody else (i.e. on SIC) or else their claim is restricted formally or contextually. Indeed, in the first two scenarios, victims depend (explicitly or implicitly) on SIC's decision, as the administrative act that declares competition or anticompetition winds up (in some way or another) conditioning the extent and final resolution of private litigation.

The main reason this happens is that SIC's decision ultimately counters the subjective predicament. What is more, even excluding SIC's decision (in the third scenario), victims' claims continue being restricted by it. From which one can say, hence, that perhaps the subjective predicament never disappears from private litigation's legal interplay, even when its influence is abated by the (let's say) halo of objectivity that SIC decision may bring forward. In consequence, one can say that the dependence on SIC is symptomatic of the power that the subjective predicament ultimately has over victims. What makes one think (me at least) that perhaps if it were possibly neutralizing the influence of the subjective predicament, victims' claim could eventually not be conditioned by passiveness, strengthening in such a way their position in private litigation and with that the role and importance of individuality when enforcing law. Well, it is at this point precisely wherein the other two components of passive legal roles (i.e. restrictions in form and context) come to play a key role in understanding the extent and perniciousness of victims' disempowerment and with that of the subjective predicament as such.

Restrictions in form condition victims to prove anticompetition objectively, notwithstanding their possibilities for doing so are most of the times reduced to do it subjectively. As insisted, the very nature of anticompetition usually impedes to objectivise the existence of the misleading behaviour that benefits wrongdoers. But, despite of this almost incontestable effect

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SIC's decision is null. As mentioned, both (the suspension of the validity of the administrative act in public litigation and the suspension of private litigation till public litigation is decided) increase the indeterminacy for all the parties especially for victim given their impossibility for participating in public litigation more actively and effectively. Nevertheless, it is important to make note that this strategy of asking for private litigation's suspension might change with the new CPC (which goes into effect in 2014) as the new rule on this regard not only excludes administrative acts for the suspension of civil procedures (which in the Old CPC was explicit), but it also emphasises on the fact that there is no possibility for suspension when the reasons for which the process aims to be suspended can be discussed on trial. In other words, inasmuch as either in public or private litigation the substratum is determining whether or not the wrongdoer acted anticompetitively and as such a defence could be presented by the wrongdoer in both public and private litigation thereby there would not be grounds for declaring private litigation's suspension. Of course, as the new CPC has not come into force yet, it is unknown whether the judiciary and case law will keep the current interpretation or if they will give a new extent to this new rule.

[233] See supra note 1; see also supra note 135; see also supra pages 6363-64 and 71.

derived from the very nature of anticompetition, law imposes on victims the need to demonstrate through objectivity what they are sure of by means of their intersubjective approach to anticompetition.[234] This is precisely why we define this as a "restriction in form" because the way victims unfold their claims does not correspond to the way it should unfold according to law. Thereby, whereas for one, as victim, anticompetition becomes a subjective experience (because of one's individual condition before anticompetition), for law it must be an objective materialization of a systemic mismatch that, although experienced individually, to become objective and legally or judicially acceptable, one must demonstrate that markets and competition have or could have perceived as well.[235]

As per the second one, restrictions in context, by the word context I am referring to the surroundings in which anticompetition is deployed and wherein law seems to understand that anticompetition should have taken place. Simply put, by restriction in context I seek to highlight a disconnection between the way law treats anticompetition and what anticompetition constitutes in reality; i.e. a threat to markets and competition dynamics and, consequently, the source of a deep asymmetrical relationship between wrongdoers and markets agents. This assymetry must be understood not systemically, as the classical reasoning goes, but individually, undertaking a deconstructive approach. Restriction in context, though, is supported by two underlying ideas that provoke the abovementioned distortion. The first idea assumes that markets and competition always entail tolerable risks and losses (i.e. competition) so that non-tolerable risks and illegal or illegitimate losses (i.e. due to anticompetition) are exceptions or contingencies at best. The second idea, somehow related with the former, takes for granted that all winnings are competitive, so are victims who must demonstrate that their losses are due to anticompetition and not wrongdoers proving that their winnings stem from competition. Let me address these two points of passive legal roles (i.e. the dependence on SIC and restrictions in form and context) elaborating on

[234] What I mean is precisely what mentioned before with respect to the subjective predicament, that is, that one as victims has perceived that something is wrong in markets and competition, that one does not have any other mean apart from one's own experience to make it evident and visible before judges, but that nonetheless for law such an experience should be a perceivable, observable, and in any case material phenomenon that must transcend the actual experience that one has had as victim (subjectively). In brief, that despite of being subjective, it must become objective for legal purposes.

[235] Now, this restriction in form does not come from nowhere. Private litigation norms and general rules of civil and commercial law reproduce a similar pattern here to that followed by public litigation norms and general rules of administrative law in the sense of tying looses ends with general rules of law. Indeed, when speaking of public litigation, we said that norms in this mechanism of enforcement do not develop all procedural or substantive aspects but some special matters, letting the rest to be governed by general rules of administrative law. This sort of implicit link to cover the whole operability or enforceability of law is replicated as well by private litigation with general rules of civil and commercial law. Thereby, in the same way that we criticized public litigation for not fitting some special features that anticompetition reproduces, private litigation also fails to fully address the underlying conflict that is at stake in anticompetition. Private litigation norms, thus, lack special rules that address differently a conflict that is per se different from a typical civil or commercial law dispute, wherein asymmetries might be less noticeable or at least wherein the imbalances provoked by defendants could have a lesser impact on the actual legal interplay. As private litigation does not have a general or special rule on this regard, it governs it through general rules of civil and commercial law according to which the party claiming the existence of a fact must present evidence proving what s/he claims (objectively). It is here precisely wherein passiveness (as well as dynamics of empowerment/disempowerment) begins acting upon the entire reasoning of private litigation, affecting the position of victims by pushing them into passiveness.

deconstruction and on what a deconstructive approach would provoke in private litigation.

Regarding the dependence on SIC, empowering victims in private litigation should somehow entail decoupling, once and for all, the two mechanism of enforcement, thus eliminating overlaps we see today. Indeed, as we have been insisting, the independence that public and private litigation supposedly have is today theoretical at best and in any case barely perceivable in some bureaucratic quagmires. In reality, both mechanisms are dangerously intermingled. Thereby, assessments made in public litigation (directly or indirectly) ends up conditioning private litigation blocking as a result any possibility for decoupling individuality from systemic values.[236] Of course, introducing a space in public litigation in which victims are recognized puts individuality on the radar and revitalizes the right to compete as an individual entitlement. Yet this measure would not suffice. Private litigation must be either eliminated or rethought from the perspective of individuality. How? In my opinion, tackling the subjective predicament by reinterpreting (i) the form in which anticompetition claims are unfolded and (ii) the context in which law understands anticompetition stems from; to wit, by reinterpreting what provokes restrictions in form and in context. This reshaping would entail breaking up hierarchies and dynamics of empowerment/disempowerment which are benefiting wrongdoers. And, once again, how? First, shifting procedural burdens so that private litigation would revolve around proving competitiveness instead of anticompetitiveness; second, understanding markets as catalysers of asymmetries and risks and thus as more prone to be captured by anticompetition than by competition.[237]

Looking at restrictions in form and restrictions in context, one realizes that law (directly or indirectly) reproduces the sequence of the classical approach of competition/formal-equality/merits. Take restrictions in form, for instance. By limiting the extent of subjectivity (i.e. the subjective predicament), law is saying that in order to consider something anticompetitive, it must transcend individuality and become perceivable by markets and competition: in other words, by the system itself. Of course, this has the effect of tying loose ends with general rules of civil and commercial law. Yet, the fact that competition law has not been adapted from a victims' perspective but from a typical rule that governs typical civil and commercial law conflicts shows, in some way, the need for impeding the imbalance of a supposedly symmetrical relationship in which both parties (plaintiffs-victims/defendants-wrongdoers) are deemed to be equal.

[236] Which, further, is perfectly consistent with the classical approach inasmuch as both mechanism of enforcement finally reproduce classical premises insofar as law winds up (in all scenarios) pursuing systemic values (in light of the first classical premise of competition as general value) and pushing individual entitlements into what market authority understands should be the extent of anticompetition and thus the scope of competition (following in such a way the other two classical premises of formal equality and merits).

[237] This, in my opinion, can only be done by undertaking the second fundamental; i.e. the Veblian notion of market competition.

Furthermore, the fact that the burden of objectivity is placed on victims and not on wrongdoers reveals what mentioned above regarding the implicit assumption that law must see wrongdoers' winnings as legitimate and therefore as meritocratic unless victims demonstrate otherwise.

Deconstruction, on the other hand, would make the reasoning to revolve around competitors/differences/possibilities, which, in my view, and as insisted, would center the debate on the affectation of right to compete as an individual entitlement and not simply on markets and competition as aggregate/systemic values. Of course, one can say that private litigation ought to lead towards individuality; after all it is a mechanism framed in civil and commercial law. Yet, as noted, individuality has been conditioned by the classical approach by virtue of the legal construct of passiveness (through SIC's decision making and restrictions in form and context) which has certainly had an effect on how it is ultimately unfolded. Through deconstruction, yet, one would be in need to understand that the relationship between victims and wrongdoers is unequal before law and that the asymmetries that emerge between them are precisely what should be discussed so that it would be necessary to neutralize the very source that is producing differences by letting each party (victims and wrongdoers) prove what they are in reality able to prove. This, in my opinion, would change the way on how merits are unfolded on trial insofar private litigation dynamics would focus on whether or not wrongdoers can show the merits of their winnings and not if victims can demonstrate if these were unmeritocratic; in other words, imposing on wrongdoers the need for demonstrating that they acted competitively.[238]

An approach of this kind would not be certainly troubled-free. Shifting the burden of proof is not uncommon in competition law and, moreover, it is usually criticised due to the perils that it may entail for rights and freedoms such as due process.[239] Even simply acknoweldging that

[238] As mentioned in a previous footnote, the new CPC introduces new evidentiary rules that would ultimately shift procedural burdens so that it would be possible for judges reverting information asymmetries. But, worth asking then, is there some difference with what we are proposing here? In my opinion there is a fundamental difference from what we are proposing. In the first part we said that the word "asymmetries" should be understood in a wide sense that must go beyond the concept "information asymmetries", which, furthermore, as noted, is in our opinion just but one of many manifestations of the asymmetrical and unbalanced substratum that ultimately anticompetition provokes between victims/wrongdoers. And this is precisely the reason (i.e. the wide sense that the concept "asymmetries" must have in private litigation) for which our proposal here is that the shift of procedural burdens be the general rule of private litigation and not the expectation as it happens with the new evidentiary rules of the new CPC. The reason for saying this is relatively simple; anticompetition (which is, after all, the main reason of private litigation) produces a whole asymmetrical environment that unbalances the parties that intervene in the process, for who should carry on with the benefit of assumption are wrongdoers themselves insofar they are, ultimately, the responsible for having performed competitively in markets or the main beneficiaries of their anticompetitive actions, if anticompetition has taken place. Conversely, in the new CPC, shifting evidentiary burdens is the exception to the general rule of the burden proof that continues being on plaintiffs' shoulders. In other words, the general rule for the CPC is that the plaintiff (i.e. the victim) demonstrates the existence of the sequence damages/causation/anticompetition and the exception is shifting the burden of proof to whom the information be more accessible and after a previous debate on this regard in trial. This, in my opinion, would have in practice any effect in the attempt of reinvigorating subjectivity in private litigation which is, ultimately, the sole way for challenging the subjective predicament that, as insisted, is the backbone of passiveness, thus of hierarchies, and therefore of dynamics of empowerment/disempowerment. In any case, however, since these rules have not gone into effect yet, there is no possibility for knowing or anticipating what is going to be the way on how judges would interpret this new rule of the new CPC. See supra note 116; see also supra note 125; see also supra note 126.

[239] See Andreas Scordamaglia, "Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees" (2010) 7:1 Comp L Rev 5 at 11-12, 14, 27, 31, and 39; see also Fernando Garcia, "A critical assessment of the European Commission's Green Paper, highlighting its main problems and confronting the Commission's view with the US experience on damages", (Paper delivered at Wrokshop on Damages, June 6 2006),

is the defendant (i.e. wrongdoers) who bears the burden of proving entails a number of challenges and risky consequences such as supporting what can be seen by many as a legal contradiction, presuming bad faith on defendants. Yet, these types of solutions are not completely extraneous to law or absent from competition law. The fact that the defendant be obliged to prove the lack of wrongdoing most of the times responds to the special position in which the defendant is with respect to her/his plaintiff or by the special significance that the activity deployed by the defendant may entail for society. In fact, there are a number of examples in Colombian law in which a similar solution has been adopted precisely for redressing asymmetrical relationships or distributing responsibilities in society.[240] What is more, this phenomenon is not only true in other kind of laws but also in Colombian competition law itself.[241] I think, however, that the eventual reactiveness for recognizing the whole asymmetrical environment of anticompetition and therefore the need for imposing on wrongdoers procedural burdens is derived precisely from awarding to markets a reality and condition that they do not currently enjoy; to wit, due to the so-

(2006) online: European Parliament - Committee on Economic and Monetary Affairs of the European Parliament <http://www.europarl.europa.eu >, 21 at 29-30; see also at 77; see also Emili Paulis, "Policy Issues in the Private Enforcement of EC Competition Law" in Jürgen Basedow Ed. *Private Enforcement of EC Competition Law* (Frederick: Kluwer, 2007) 7 at 12; see also Wulf Roth, "Private Enforcement of European Competition Law - Recommendations Flowing from the German Experience" in Jürgen Basedow Ed. *Private Enforcement of EC Competition Law* (Frederick: Kluwer, 2007) 61 at 77; see also Ralf Boscheck, "Competitive Advantage and the Regulation of Dominant Firm" in Ralf Boscheck Ed. *Strategies, Markets and Governance. Exploring Commercial and Regulatory Agendas* (Cambridge: Cambridge University Press, 2008) 35 at 51.

[240] Although there are a number of examples in Colombia, I want to highlight two in particular. One is the so-called hazardous activities regime (historically developed through case law in Colombia) according to which defendants must prove that there was no negligence in the harm that a risky or hazardous activity (controlled by them) caused to plaintiffs. For, insofar the benefit of assumption is on defendants, if s/he (the defendant) does not prove that there was not negligence or that the harm was due to victim's fault or by major force, s/he (the defendant) must compensate for damages. Even though there is consensus on how this hazardous activities regime must be addressed (in the sense of placing procedural burdens on defendants), it has been largely debated whether this is a strict liability regime or simply a presumption of culpability. Despite comings and goings, in recent years the majority of Supreme Court judges have upheld the position that we are before a presumption of culpability. Though we are proposing here a similar solution to hazardous activities (in the sense of interpreting markets as catalyser of risks [the Veblian market competition] and therefore wrongdoers as guardianships of such risks), as mentioned above, I share the opinion of some Colombian authors that competition law (in private litigation) reproduces a strict liability regime and not a presumption of culpability. The reason is relatively straightforward; there is no need in private litigation for proving defendant's intent or fault in anticompetition. It suffices thus to prove that the market behaviour was anticompetitive (either because its means were anticompetitive or because it produced anticompetitive effects) to make wrongdoers liable. Another example is the recent legislation regarding land restitution for land grabbing cases. While this is of course a very exceptional case that responds to the sad reality of Colombian internal conflict, it is interesting seeing however how the legislator has implemented a set of rules through which s/he aims to acknowledge the impossibility for peasants (who have been victims of land grabbing by irregular forces) to demonstrate the illegal dispossession that they suffered. Furthermore, law redresses such a special reality by recognizing precisely the asymmetrical situation in which these peasants have been placed as a result of the difficult circumstances of Colombian internal conflict. This is particularly enlightening for the point that we are trying to make here regarding restrictions in context. Up until this legislation came into effect, law solved cases regarding land issues and possession without any differentiation whatsoever. Consequently, it was on plaintiffs (i.e. the person who had been disposed) the burden of proving that there had been an event of violence or of bad faith. Consequently, cases of land grabbing were often unsuccessful due to plaintiffs' difficulties in proving becoming law and the State, as a result, part of the victimization chain of the internal conflict. The new law, yet, brings forward new rules on this regard which aims to redress peasants' uneven situation caused by internal conflict and land grabbing. One of which, as mentioned, was shifting the burden of proving to defendants so that if they cannot demonstrate that they acquired the land (let's say) rightly, they have to return the possession and pay compensation for damages. Regarding hazardous activities see, for instance, Corte Suprema de Justicia, 18 December 2012, Recurso de Casación (2012) 2006-00094; see also Corte Suprema de Justicia, 26 August 2010, Recurso de Casación (2010) 2005-00611 [Corte Suprema 2005-00611]. As per strict liability and competition law see Ortiz2, supra note 127, at 41-46. Regarding land grabbing new Statutes see Ley 1448, Diario Oficial 48.096, 10 June 2011 Art.78.

[241] According to private litigation norms, in the following three events the burden of proof must be shifted to defendants (i.e. to wrongdoers): when anticompetition is deployed through acts of comparison, misleading the market, or imitating the victim. Interesting enough, taking a sample of the information that SIC has uploaded in its web page (which, by the way, is almost the sole information available with respect to private litigation), since 2005, in almost 42% of the cases sentenced, one of the charges was related with one of these infringements mentioned. Moreover, more than half of these cases were solved in favour of the plaintiff (i.e. of the victim). See, on this regard, L256, supra note 62, Art. 11, 13, 14, and 32; see on http://www.sic.gov.co/sentencias.

called restrictions in context. So let me go over this point briefly.

When referring to fundamentals, we said that one of the mainstays of competition regulations was the Veblian notion of market competition wherein markets are essentially depicted as places that are far from being peaceful and unproblematic spaces in which people simply trade stuffs. Similarly, we also said that it was precisely because of the propensity of markets to fail and become concentrated that competition regulations do ultimately exist. Indeed, it is in my view difficult to challenge today the belief that markets have become the very source of injustice, inequality, and many more infirmities. And it is because of this very same reason that law cannot continue refusing such a fact disregarding the many hazards and threats of markets depicting and pursuing an almost romantic and unrealistic approach to them. But let me make here a sort of paragon between anticompetition and the way on how law has historically addressed problems arising from industrialization and technological processes.

Industrialization and technology have imposed many challenges. One of which, the dilemma of dealing with conflicts wherein the parties involved are far from being equal and, further, in which the asymmetrical position in which they have been placed is precisely the result of the risks and threatens that the particular activity may have produced on them. Consider traffic issues, for instance. In Colombia, as in other jurisdictions, driving a car entails deploying a risky activity that may harm others. For, as noted in a previous footnote, case law has structured what is known as the hazardous activities regime which main feature is imposing on the defendant the burden of proving that s/he performed diligently and is therefore not liable for damages. This does not mean of course that plaintiffs are not responsible of proof (i.e. damages and causation). It means, instead, that law changes the procedural hierarchies (so to speak) and the way on how legal dynamics are unfolded not just for the sake of plaintiffs, but essentially aiming to recognize a particular reality that cannot be explained in the typical understanding of law and which, by the same token, ought to be addressed by imposing the risks that such conflicts brings forward on those benefiting from such risks.[242]

Now, Veblian market competition is ultimately a depiction of the many phenomena that industrialisation and technological advancements have imposed on society and economy. As Veblen demonstrates using the idea of efficiencies, the particular way in which competition unfolds today constitues a substantial threat to free markets and, therefore, to the equal distribution of economic power and advantages that may at certain point rearrange opportunities and possibilities in markets and competition. This is why competition law, in my opinion, must undertake an understanding of markets and competition in which the phenomenon of

[242] See Corte Suprema 2005-00611, supra note 240.

anticompetition be understood not only for what it really represents but also for what in actual terms provoke, namely, the concentration of economic power, the reproduction of unequal and unjust schemes of allocation of merits and possibilities, and, further, the generation of asymmetrical economic and social interactions.

But, contrary to public litigation wherein redressing thirdness entails redressing a lack of institutional representation of victims, in private litigation what is at stake is eminently hermeneutical or of legal interpretation. What I mean is that the legal construct of passiveness in private litigation does not come from the absence of institutional recognition of victims, but from the erroneous understanding of the risks that anticompetition entails for victims individually and, consequently, the many impediments anticompetition places on them (i.e. the dependence on SIC and restrictions in form and in context). The source of this hermeneutical problem is a failure to acknowledge the nature of anticompetition (i.e. its veiled and secret substratum) that essentially compels private litigation to place objectivity on victims and not on wrongdoers. Deconstruction would make Colombian competition law to focus the debate on the impact that anticompetition may have on the right to compete and would address conflicts stemming from the differences and lack of possibilities losers (or victims) face as a result of the asymmetrical reality that anticompetition has provoked in benefit of winners (or alleged wrongdoers). Deconstruction would change legal dynamics in private litigation, compeling wrongdoers to demonstrate that they acted competitively and consequently that the losses that victims are claiming are legal and legitimate (i.e. due to competition). In practical terms, victims would be obliged to complete a sequence of damages/causation and the burden of proving competition (and by default anticompetition) would be on wrongdoers.

CHAPTER 2: PBEs - AFROCOLOMBIANS' CASE

Taking as starting point the perspective of people who are out of competition law's reasoning, this concept of potential but excluded actors in the market (or PBE) encapsulates the notion of nonexistent legal roles to explain otherness and empowerment/disempowerment dynamics.[243] PBE essentially refers to events of discrimination which not only have an effect on but stem from markets and competition and that, as such, provoke the reproduction of unspoken and at times unperceivable situations of exclusion and segregation in all layers of social, legal,

[243] See supra note 1. Regarding legal roles we said in the first part the following:
"By "role" I mean the degree of legal empowerment that allows someone to participate effectively in the enforcement of competition law [...] For [...] [nonexistent legal role] I mean that the market agent is absent in both the configuration of law and law enforcement; in other words, a market agent that is out of law's radar

cultural, political, and economic interplay.[244] Briefly, PBEs are people or groups of people who, due to a particular feature or condition inherent to them rahter than a market reason, end up having a weak position in markets and competition. In other words, due to non-market reasons,[245] PBEs wind up not as well positioned as other market agents to vanquish markets or to succeed when competing.[246] But these phenomena of exclusion and segregation should be seen from multiple angles as they are not only the origin of the disadvantageous position of PBE, but also catalysts that perpetuate, ground, and even justify the same roots of discrimination.[247]

The aim of this chapter is briefly addressing two points; (i) who PBEs are and (ii) how, through deconstruction, PBEs can become a competition law concern.[248] What I propose for doing so is elaborating on the case of Afrocolombians. In prior researches, I have had the chance to review these two topics of competition law and Afrocolombians; in fact, the source of inspiration for this thesis was precisely this previous research, which resulted in two papers. In one of those

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[244] There is a close connection between this idea of PBE and the concept of systemic discrimination. For systemic discrimination see Sheppard, supra note 153, at 21-23; see also, Carol Agocs, "Surfacing Racism in the Workplace: Qualitative and Quantitative Evidence of Systemic Discrimination", (Paper delivered at Conference Race Policy Dialogue - Ontario Human Rights Commission, December 2004), (2004) [unpublished] online: Ontario Human Rights Commission <http://www.ohrc.on.ca > at 2; see also Ronald Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality* (Leiden: Martinus Nijhoff, 2007) at 302. Further, as noted in a previous footnote, PBE "replicates, to a certain extent, the concept "historical disadvantage groups" of South African law and particularly of South African Competition Law"; see on this regard supra note 18; see also Fox South Africa, supra note 18.

[245] With the word "non-market reasons" I want to highlight the fact that these phenomena of exclusion and segregation do not steam plainly and simply from market forces and competition dynamics (e.g. supply and demand). With this, however, I do not mean that these non-market reasons do not have an impact on markets and competition as such. Quite the contrary, they shape the extent and scope of markets and competition dynamics as these two (i.e. markets and competition) are ultimately part of a wide and more complex social and cultural macro-phenomena (so to speak). This word "non-market reasons" appears in reflections by authors like Polanyi or Mauss; see, for instance, Gareth Dale, *Karl Polanyi: The Limits of the Market* (Malden: Polity, 2010) at 91-92, 114-118, and 130-131; see also Alain Callé, "Anti-utilitarianism, economics and the gift-paradigm" online: La Revue du M.A.U.S.S. <http://www.revuedumauss.com.fr/>; see also Mauss, supra note 33, at 3 and 76

[246] The concept PBE has, moreover, a direct and close connection with the idea of economic empowerment. See on this regard, for instance, OECD Report, Secretary-General, *Poverty Reduction and Pro-Poor Growth: The role of empowerment*, (2012) at 23-28; see also Meshack Khosa, "Empowerment and Transformation in South Africa" Meshack Khosa ed. *Empowerment Through Economic Transformation* (Pretoria: African Millennium Press, 2001) 1 at 3, 5, and 8-10.

[247] See Juan Mendoza, "Afro-Colombians and Competition Law: insights from a transformative perspective" (2012) at 2 [unpublished] [Mendoza Afro-Colombians and Competition Law]. What I mean with this is that while PBEs emerge as consequence of systemic discrimination, their weak and passive position in markets and competition (which is a direct of effect of the fact of being discriminated against) impedes them to ameliorate their socioeconomic position which, in turn, reinforces the stereotypes through which they are already being discriminated against. In a paper that I prepared on Afrocolombians and competition law precisely I explain this point as follows.

> "One of the effects of systemic discrimination is that Afro-Colombians cannot participate in markets on equal terms with Latino/Whites. As a consequence, Afro-Colombians cannot improve their socioeconomic situation. This deepens their deficit relative to the rest of the country, contributes to the reinforcement of the false assumption that their problems and difficulties are due to their inability to take an active role in the economy, and ultimately feeds the grounds of systemic discrimination." [Footnotes omitted]

[248] Yet, using competition law for addressing (the so-called) non-economic issues is not new. There has been indeed a wide and very well-known debate on this regard. And, of course, such a debate is ultimately the backdrop of what this idea of PBE has sought to develop in this document. Nevertheless, as noted in the introduction, this thesis explores competition law from and for and ontological perspective by looking at market agents that have resulted privileged (so to speak) in the configuration of law (through active legal roles) and market agents that in some way or another have been placed in passive or inexistent legal roles. For, as insisted also in the introduction, the purpose with this thesis (and therefore of this chapter) is not explaining why non-economic goals ought to ground Colombian competition law, but rather explaining how law should insert in its logics market agents who have been excluded from the legal interplay or that in one way or another are out of its radar. So, insofar in the previous chapter we went over victims who hold passive legal roles, the plan now is developing, very briefly, the idea of inexistent legal roles through this concept of PBE. For non-economic goals and competition law or, in any case, for similar concerns on this regard see Fox South Africa, supra note 18 at 580-583; see also Fox The other Path, supra note 100; see also Stucke, supra note 5, at 559-562, 609-611; see also Maurice Stucke, "Should Competition Policy Promote Hapiness?" Fordham Law Rev [forthcoming in 2013] at 5, 7-9, 12, 35 and 50; see also Abayomi, supra note 133, at 267-268, 270, and 273; see also Diawara A social approach, supra note 180; see also Bakhoum Economic Freedom, supra note 51, at 420-421 and 424; see also Bakhoum Dual Language, supra note 23.

papers, for example, I looked at passive economic roles of Afrocolombians as a case of systemic discrimination and how competition law can eventually be used to battle against such problems.[249] The second paper dealt with Colombian mining markets, the cultural and anthropological roots that ground the attitude that Afrocolombians in the Pacific coast have towards mining, and how such roots should be reconciled in markets and competition through competition law precisely.[250]

Now, during the preparation of both papers, the main difficulty that I found was that, although the issues I was addressing had a close connection with markets and competition and that in many ways the solution could be addressed through competition law, something always prevented law from taking part of the debate and therefore becoming part of the solution. And it was working precisely on this thesis that I realized that what prevents law from doing so was just what we have called here as the classical approach of competition law. This is why I would like (very briefly) to go over some of the findings, reflections, and thoughts that I made on both papers seeking to explain why Afrocolombians can be seen as PBE (covering in such a way the first point of who PBEs are) and elaborating on how, through deconstruction, (the second point that we proposed) Afrocolombians' (and therefore PBEs') problems can become central for competition law.

The first finding seems obvious initially. Most of the social and economic difficulties that Afrocolombians experience today are the result of social and historical constructs that, altogether, have built up with the time the passive economic role that Afrocolombians hold today in markets and that, as such, is preventing them from accessing the means to improve their socioeconomic position.[251] Indeed, Afrocolombians' history has always been, directly or indirectly, tied to the Colonial slave economy and, consequently, with brutal and violent historical processes of subordination, humiliation, and acculturation.[252] As it happened in other countries, Afrocolombians were brought to play an instrumental role as slaves in the colonial economy.[253] The interaction with other ethnic groups, particularly with Latino/Whites who have historically been the majority ethnic group of the country, was violent and always preceded by logics of domination and distrust. Not just because their socioeconomic interaction was always mediatized by their condition as slaves and therefore by their instrumental role in the economy, but also

[249] See Mendoza Afro-Colombians and Competition Law, supra note 247.
[250] See Mendoza cross-cultural approach to mining-markets, supra note 97.
[251] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 2-3. See also, in this regard, as well as on the concepts historical and social constructions Luis Castillo, *Etnicidad y Nación. El desafío de la diversidad en Colombia* (Cali: Universidad del Valle Programa Editorial, 2007) at 3, 31, 62, 169, 209, and 235 [Castillo]; see also Eduardo Restrepo, *Políticas de la teoría y dilemas en los estudios de las colonias negras* (Bogotá, Universidad del Magdalena, 2005) at 120, 150; see also Sheppard, supra note 153, at 20 and 22.
[252] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 4-6.
[253] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 4; see also Jorge Palacios, *Nueva Historia de Colombia. La esclavitud y la sociedad esclavista* (Bogotá: Planeta Colombiana Editorial, 1989) at 168-171; see also, William Sharp, "La rentabilidad de la esclavitud en el Chocó 1680-1810" (1976) 8 ACHSC 19 [Sharp].

because the political environment of the time was rarified due to the many uprisings and revolts that many Afrocolombian ancestors deployed against the Colonia. These two factors ultimately provoked a socioeconomic disruption that created (in a way) two solitudes, two different worldviews, and two different paths with two different paces.[254]

The abolition of slavery around mid-19th century did not alleviate or change Afrocolombians' passive economic position. In fact, the vast majority still carry the many historical, social, economic, and cultural stigmas of slavery.[255] What is more, there seems to be a close link between these historical and social constructs and the dire socioeconomic situation that the regions historically inhabitteed by Afrocolombians (and where they are currently the majority ethnic group) experience.[256] This link explains, for instance, why in all these regions and areas of influence of Afrocolombians, one finds the lowest standards of human development of the country, the highest rates of poverty and destitution, a worrying situation of illiteracy, and poor educational performance (for only naming a few).[257] Even more enlightening perhaps, all these regions have four common features (apart from their perturbing standards of development amongst Afrocolombian population). First, all of them are strategically important to Colombia due to their location and natural richness. Second, the most important economic activities are controlled (somehow) by Latinos/Whites that live in other regions or areas of the country (where

[254] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 4-5. See also, on this regard, Marshall Wolfe, "Rural Settlement Patterns and Social Change in Latin America" (1966) 1 Latin American Research Review at 12; see also Jaime Jaramillo, "La población africana en el desarrollo económico de Colombia" (2003) 24 Historia Crítica Universidad de los Andes 1 at 1; see also Yhara Zelinka, "The evolution of the Afrocolombian Social Movement" (2009) 9 Cuadernos de Literatura de Hispanoamerica y el Caribe 107 at 108-110 [Zelinka]; see also Thomas Morton, "Palenque Awe/Palenque Hoy/Palenque Today: The Spanish Caribbean, the African Creole Perspective and the Role of San Basilio de Palenque, Colombia" (2000) 30 Black Scholar 51 at 51; see also Corte Constitucional de Colombia, 10 Decembre 2009, Acción de inconstitucionalidad (2009) C-931-09 - Clarification made by Justice Maria Calle; see also Alfredo Vanin, "Cultural del litoral pacífico. Todos los mundos son reales" in Pablo Leyva ed. *Colombia Pacífico* (Bogotá: FEN, 1993); see also Nina Friedemann, "Cabildos Negros Refugios de Africanía en Colombia" (1990) 23:1 Caribbean Studies 83 at 88.

[255] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 5-6. See also Ibid, C-931-09; see also Jacqueline Blanco, "Derechos civiles y políticos para negros e indígenas después de la independencia" (2010) Precedente 121 at 125; see also Marco Palacios, "La fragmentación regional de las clases dominantes en Colombia: una perspectiva histórica" (1980) 24:4 RMS 1663 at 1674 [Palacios]

[256] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 6-7. See also Castillo, supra note 251, at 74, 175, and 263; see also Ibid Palacios at 1674; see also Zelinka, Ibid, at 108-110, and 117; see also Jaime Bonet, "Por qué es pobre el Chocó?" (2007) 90 Banco de la Republica - Documentos de Trabajo sobre Economía Regional at 2, 4 and 13 [Bonet]; see also Luis González, "Sirio-libaneses en el Chocó, cien años de presencia económica y cultural" (1997) 34 Boletín Cultural y Bibliográfico - Banco de la República [González]; see also Carlos Viáfara, *Movimiento Nacional por los Derechos Humanos de las Comunidades Afro-Colombianas CIMARRON, Informe Anual: Estado de Derechos Humanos de la Población Afrocolombiana 2010* (Bogotá: NGO, 2010) [CIMARRON] at 42, 46, 50, 54, 55, and 61-62

[257] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 7-13; see also Margarita Rodriguez, "Visibilidad estadística etnico-racial negra, afrocolombiana, raizal y palenquera en Colombia: lecciones aprendidas y nuevos retos en el Censo Nacional de Población del año 2015" (2009) Instituto Republicano Internacional IRI at 6-8; see also Colombia, Programa de las Naciones Unidas para el Desarrollo (PNUD), *Políticas Públicas para el avance de la población afrocolombiana: revisión y análisis* (2010) at 13-15; see also Colombia, Departamento Nacional de Estadística-DANE, Informe de Coyuntura Económica Regional -ICER- 2010 online: DANE <http://www.dane.gov.co>; see also Inter-American Commission on Human Rights, "Observaciones Preliminares de la Comisión Interamericana de Derechos Humanos tras la visita del Relator sobre los Derechos de los Afrodescendientes y Contra la Discriminación Racial a la República de Colombia."Inter-American Commission on Human Rights (2009) online: Inter-American Commission on Human Rights < http://www.cidh.org>; Colombia, Departamento Nacional de Estadística (DANE), *Análisis regional de los principales indicadores sociodemográficos de la comunidad afrocolombiana e indígena a partir de la infomación del Censo General 2005* (2010) at 25; see also Fernando Urrea-Giraldo et al, "Las desigualdades raciales en Colombia: un análisis socio demográfico de condiciones de vida, pobreza e ingresos para la ciudad de Cali y el Departamento del Valle del Cauca" (2010) in Claudia Mosquera & Luiz Barcelos eds., *Afro-reparaciones: Memorias de la Esclavitud y Justicia reparativa para negros, afrocolombianos y raizales*, (Bogotá: Universidad Nacional, 2007) 691.

they are in turn the majority ethnic group). Third, Afrocolombians remain in all these regions and areas in the workforce in low-paid jobs, informal employment, or, best case scenario, in bureaucratic positions. Finally, despite their natural riches and their economic potential, these regions or areas do not have a developed market (if one compares them, for instance, with regions or areas where Latinos/White are majority).[258] This dissimilar and illogical development suggests that perhaps these regions or areas of Afrocolombians influence reproduce not only historical logics of extractive economies but also historical and social logics similar to the Colonial slave economy.[259]

The second finding is that it is almost impossible to understand markets and competition as homogeneous phenomena without taking into account the historical and social constructs in which market agents are immersed.[260] The point is that, one cannot say that because one is dealing with markets and competition, there is a standardized and static concept (of what markets and competition mean) on which all markets agents agree. We rather deal in heterogeneous and dynamic elaborations that cannot be understood throughout one single worldview. For, when speaking of markets and competition, one must use a more inclusive understanding of what both represents and becomes at certain point for some market agents.[261] Indeed, when exploring mining markets of Pacific Colombia, one finds that there is no consensus of what it means to be a market agent or what entails to take part of markets and competition. For instance, we identified two understandings colliding; one that sees markets and competition under typical capitalistic logics that revolve around notions of efficiency, profits, capital, and substitutability.[262] The other understanding sees markets and competition as the means for satisfying survival needs in which strong attachments to family, ancestors, and land are at the center.[263]

These dissimilar approaches come from the many cultural and historical constructs that have compelled each understanding to use markets and competition for different purposes and in different dimensions. In this way, thus, both, markets and competition are not an end in

[258] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 7 and 10-13.See also Odile Hoffmann, *Comunidades negras en el pacifico colombiano. Dinámicas e innovaciones étnicas* (Lima: Instituto Francés de Estudios Andinos, 2007) at 24 and 56; see also Thomas Sanders, "Economía, educación y emigración en el Chocó: informe de un funcionario del American University Field Staff" (1978) 2 Revista Colombiana de Educación at 8; see also González, supra note 255; see also Bonet, supra note 255, at 8 and 11; see also Sharp, supra note 253.

[259] See Peter Wades, *Blackness and Race Mixture: The Dynamics of Racial Identity in Colombia* (Baltimore: John Hopkins University, 1993) at 130-132.

[260] See Mendoza cross-cultural approach to mining-markets, supra note 97, at 3-5.

[261] See Mendoza cross-cultural approach to mining-markets, supra note 97, at 3-4. See also Radka Neumannova, "Multiculturalism and cultural diversity in modern nation state" (Conference delivered at Turin University 2007) online: <turin.sgir.eu>; see also Jon Stratton & Ien Ang, "Multicultural Imagined Communities: Cultural difference and national identity in USA and Australia" in David Bennett ed, *Multicultural States. Rethinking Difference and Identity* (London: Routledge, 1998) 135 at 139; see also Juan Lugo, "La jurisprudencia como campo de reflexión de la diversidad cultural: apropiación jurídica de nociones culturales" (2006) 62 Universitas Humanística 205 at 209 and 232; see also Edgar Lopez, "La tarea de reconocer el multiculturalismo colombiano" (2009) 30:100 Cuadernos de Filosofía Latinoamericana 97; see also Fraser, supra note 69.

[262] See Mendoza cross-cultural approach to mining-markets, supra note 97, at 5-7.

[263] See Mendoza cross-cultural approach to mining-markets, supra note 97, at 8-13

themselves but channels through which market agents transmit their particular worldview to their surroundings.[264] Problems arise of course when law takes a side and tries to impose on the rest of market agents a particular understanding of markets and competition, becoming in that way law a mechanisms of normalization that ultimately seeks to acculturate (so to speak) those market agents that are not part of the dominant logic that law aims to promote; in other words, when law obliges all markets agents to see markets and competition under one single logic and worldview and not as a manifestation of their particular culture and idiosyncrasy.

Both papers, as noted, undertake different approaches to comprehend Afrocolombian understanding towards markets and competition. Indeed, whilst the first one delves into the social and historical reasons for which Afrocolombians have been historically discriminated against and how that have had a direct effect on their role in markets and competition, the second tries to weigh up markets and competition as social and cultural phenomena and therefore as means for developing a particular worldview of a particular group of people. Consequently, insofar both papers address different problems arising from markets and competition (the first one from the socioeconomic difficulties arising from Afrocolombians' passive economic role and the second one from the sociocultural problem that entails the lack of recognition of their worldviews in markets and competition), both develop different solutions.

Thereby, whereas the first paper proposed a legislation awarding differential treatments to Afrocolombians for participating in markets (replicating, to a certain extent, the South African experience),[265] the second addresses the problem using competition law as a mechanism to recognize the particular worldview of some Afrocolombians in markets.[266] Both solutions,

[264] See Mendoza cross-cultural approach to mining-markets, supra note 97, at 2 and 5; see also Pape, supra note 24, at 439 and 440; see also Jan Pieterse, *Globalization and Culture: Global Mélange* (Lanhman: Rowman & Littlefield Publishers, 2009) at 141; see also Arjun Appadurai, "Disjuncture and difference in the Global Cultural Economy" in Jana Braziel & Anita Mannur eds., *Theorizing Diaspora* (Malden: Blackwell, 2003) 25 at 30

[265] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 18-21, 26, and 29-30; regarding the solutions proposed on this regard we said the following:

> "The recognition of the dissimilar development of Afro-Colombians before the markets in Colombian competition law would impose the recognition of two essential elements: first, that Afro-Colombians can create monopolies or oligopolies in markets where they are the majority or in markets where they represent a significant portion of the population; and second, the possibility for them to deploy anti-competitive actions or agreements that may foster their socioeconomic development over the majority ethnic group."

[266] See Mendoza cross-cultural approach to mining-markets, supra note 97, at 19-20. As per the second paper, the following solution was proposed:

> "There is another possible instance of dialogue [between the capitalistic tribal market and Afrocolombians tribal market]: competition law. The cause of action in this case is what is known as "unfair competition for violation of the law". According to Colombian competition law, if a market agent obtains an advantage from a violation of the law, such an act is deemed to be "unfair competition" and therefore an anticompetitive conduct. Based on this, the claim in the case of Afro-Colombian illegal miners would be based in the unfair competition that mining right holders deploy against Afro-Colombian miners. In this way, the debate lying before competition law would be between the positions that members of the tribal market of the government have obtained in violation of the constitutional right of Afro-Colombians to deploy their culture and identity throughout markets (i.e. using their own tribal market as a manifestation of their culture and identity). Thus, since the holders of mining titles have taken an [illegal] advantage from the impossibility of Afro-Colombians to access markets, the activities of these holders of mining-titles - particularly when they exercise their mining-titles in Afro-Colombian territories - could be seen as an act of unfair competition, even more so when considering the ruling of the Constitutional Court that obliges the process of prior consultation for all mining-titles. Now, although the competitive advantage is due to the obstacles created by the law, the fact is that the advantage that the members of the tribal market of the government have obtained is against the

however, face a major challenge. The current understanding of law is limited to see competition but not competitors (hence why it is almost impossible to address concerns that correspond to the particularities and specificities of Afrocolombians), to understand all market agent as equals (which is why understanding Afrocolombians as different would not be the proper course of action to follow), and markets and competition are seen only a matter of merits (therefore passive economic roles or different worldviews are not competition law concerns).[267]

Of course, all this leads one to see that, indeed, Afrocolombians' concerns are not a competition law problem being their worries thus part of a debate that escapes competition law's purview. Yet, if one looks at both problems carefully, one realizes that not only both stems not only from Afrocolombians impossibility for accessing markets and competition for what they are and represent in reality, but also from the obstacle that law is imposing itself of seeing Afrocolombians differently from the rest of market agents. And it is here precisely where one gets to the need of understanding competition law deconstructively (so to speak).

Hence, situating the debate in a formula that sees competition law from competitors/difference/possibilities would provoke a different conclusion. Indeed, understanding competition law from the premise of the right to compete and not from competition as a general value would focus the problem on whether Afrocolombians, as potential active market agents, can in fact exercise their right to compete based on their actual chances for taking part of competition. For, insofar their position in markets and competition, in an important number of cases, is affected by the many constructs that feed a process of systemic discrimination, it would be necessary to protect first their right to become actual competitors of the market and then to determine how to successfully assess their position in the competition process. This entails, for instance, using mechanisms of recognition that acknowledge not only their weak position, but, similarly, the need for reinvigorating their potential as markets agents (i.e. of competitors).

But this would lead to ponder two elements that in the classical approach would be just impossible to assess due to the classical premises of formal equality and competition on the merits; first, the fact that Afrocolombians are different from the typical (legal) archetype of

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constitutional provision of protecting and respecting the culture, traditions, and identity of ethnic groups (i.e. their tribal market). In other words, as the Constitution of Colombia obliges both the government and market agents to respect the tribal market of Afro-Colombians, gaining an advantage from the violation of their rights, expressed by the impossibility for them to take part in mining markets, could indeed be seen as an act of unfair competition." [Footnotes omitted]

[267] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 23-26. When dealing with competition law solutions for Afrocolombians we said on this regard the following:

"To sum up, so far this document has proposed two scopes on the structure of Colombian competition law. First, instead of applying the principle of formal equality, it applies the principle of substantive equality to recognize the impediments that Afro-Colombians face when participating in markets. Second, instead of recognizing market concentration (e.g. monopolies and oligopolies) solely as promoting 'efficiency', it accepts concentrations to promote the socioeconomic advancement of agents that cannot 'compete on the merits' or to boost the efficiency of markets that are itself inefficient. The purpose is, therefore, for Colombian competition law to recognize the 'ethnic variable' as a source of differentiation when enforcing its competition regulations."

market agents and, second, that the many obstacles that prevent them from having an active economic position in markets is a matter of possibilities but not of merits. Thereby, awarding a differential treatment that focuses on the right to compete and not in the mere process of competition, competition law (under a deconstructive approach) would give way to a wide understanding of Afrocolombians as market agents that are part either of a different reality or of a different worldview that as such must be acknowledged and integrated in the legal interplay differently. This would lead, further, to see the need for providing a special legal stand for Afrocolombians through wich it would be ultimately ensured that they can get the necessary means to make certain their possibilities and thus develop their individuality and their differences when accessing markets and competing.

A deconstructive approach, consequently, would provoke in competition law the need for adequating some particular concerns of Afrocolombians as PBE and therefore as distinctive market agents such as, for instance, the weak position that some of them have in certain areas or regions of the country or the socio economic difficulties that they face in those areas or regions where they are the minority ethnic group. What this means, in practical terms, would be that competition law becomes a mechanism to channel a reinvigoration of Afrocolombians' economic role in markets and competition. After all, the core of the problem for many of them is their actual impossibility for accessing markets and for succesfully taking part of competition for reasons that they cannot control and that, as such, are extraneous or artificial from market forces and competition dynamics, which, moreover, is precisely, in many ways (directly or indirectly), one of the main reason for competition law to exist. To what I am refering here is letting competition law to frame policies of inclusion or of transformation (i.e. transformative actions) for Afrocolombians sake.[268]

This is the case, for instance, of some of the proposals that I made briefly in my previous researches on the matter and that I took from the South African experience precisely as I mentioned above;[269] for instance, awarding the possibility of creating monopolies in their regions

[268] See Fraser supra note 69. On this regard Nancy Fraser notes:
"This distinction can be applied, first of all, to remedies for cultural injustice. Affirmative remedies for such injustices are currently associated with mainstream multiculturalism. This proposes to redress disrespect by revaluing unjustly devalued group identities, while leaving intact both the contents of those identities and the group differentiations that underlie them. Transformative remedies, by contrast, are currently associated with deconstruction. They would redress disrespect by transforming the underlying cultural-valuational structure. By destabilizing existing group identities and differentiations, these remedies would not only raise the self-esteem of members of currently disrespected groups. They would change everyone's sense of belonging, affiliation, and self. [...] This approach is self-consistent. Like affirmative redistribution, transformative redistribution generally presupposes a universalist conception of recognition, the equal moral worth of persons. Unlike affirmative redistribution, however, its practice tends not to undermine this conception. Thus, the two approaches generate different logics of group differentiation. Whereas affirmative remedies can have the perverse effect of promoting class differentiation, transformative remedies tend to blur it. In addition, the two approaches generate different subliminal dynamics of recognition. Affirmative redistribution can stigmatize the disadvantaged, adding the insult of misrecognition to the injury of deprivation. Transformative redistribution, in contrast, can promote solidarity, helping to redress some forms of misrecognition." [Footnotes ommited]

[269] See Mendoza Afro-Colombians and Competition Law, supra note 247, at 18-21, 26, and 29-30.

or areas of influence; simiarly, deploying market behaviours that in general terms are seen as anticompetitive due to the advantage that they might provoke over the rest of the market (e.g. cartels or unilateral refusals to deal) in areas or regions controlled by Latino/Whites and through which Afrocolombians may obtain a clear advantage over their counterparts; likewise, shaping policy-making and even decision making in the mechanism of enforcement to ensure that their socioeconomic and cultural differences be recognized as legitimate when market governance arises, that is, including the "ethnic variable" as a legitimate stand for solving competition law cases for their sake.[270]

[270] See supra note 265 and 266.

CONCLUSION

This thesis aimed to discuss why victims and PBE do not have active legal roles in Colombian competition law and how they can be empowered. We delve into a simple yet complex question, namely, for whom competition law has been intended. This entailed, further, determining who participates in the legal interplay and, similarly, delineating the way different legal roles that emerge throughout competition law in Colombia ultimately work. With this in mind, this thesis was divided in two parts. The first part tried to unveil the legal dynamics that compels law to understand that someone can take part of competition law (what we called as the classical approach) and to propose a way to invert the hierarchies and dynamics of empowerment/disempowerment that currently govern competition law and that affect victims and PBE using a deconstructive approach. In the second part, we explored, in particular, the way on how victims and PBE have resulted disempowered as well as the mechanism through which their position can be reinvigorated in competition law. In what follows, I will go over, very briefly, the different conclusions to which we have arrived in this work.

First of all, in the attempt to understand the common grounds of competition laws from the perspective of market agents (i.e. developing an ontological explanation for competition laws), we found that these laws exist first and foremost because there is in markets and competition a cohabitation of private interests (as a projection of individuality) and of public interests (as a projection of collective and systemic expressions). Furthermore, we also arrived to the conclusion that through competition law precisely not only are both interests in a reconciliation, but also that cohabitation of interests (as we called it) feeds and reproduces competition laws as such. In addition, using Veblian elaborations on the matter (primarily his idea of market competition), we concluded that, alongside with this cohabitation of interests, the existence of competition laws implies a recognition of markets' fallibility. To wit, the sole fact that competition laws exist involves for itself the acknowledgement that markets can fail and that they are, in some way, naturally prone to failure. Hence concentration of economic power, the affectation of market forces (e.g. over/under supply and irrational consumerism), elimination of competition across markets and amongst market agents, and other infirmities explain, ontologically speaking, competition laws as such.

Secondly, a local and idiosyncratic reasoning works as a sort of communication vessel through which each jurisdiction materializes fundamentals and links market agents with law. Now, the rhetorical structure (so to speak) of the (so-called) current and classical approach that supports competition law in Colombia is built upon a reasoning that follows a sequence wherein

what matters is the protection of competition, the understanding that all market agents are (formally) equal, and the belief that all victories in markets and competition should be based on merits. Therefore, what it is important for competition law in Colombia is the protection of systemic values and, consequently, individuality becomes somehow relegated to a second role. What is more, that competition law paradoxically limits active legal roles to the State (or market authority which represents anybody and speaks for nobody) and wrongdoers (who are being investigated for breaching competition law precisely).

Thirdly, we concluded that by relying on systemic values and dehumanizing legal reasoning, law has displaced victims and PBE from law through legal constructs of otherness that essentially stems from or are grounded in a binary/legalistic insight of the jurisdiction (one of many local and idiosyncratic manifestations that, as such, underpin the classical approach). Now, this displacement of these two market agents and therefore the materialization of these legal constructs of otherness happen in different ways. In the case of victims, for instance, we identified this phenomenon in the two mechanism of enforcement: public and private litigation. So, whereas in public litigation victims are disempowered through a legal construct of thirdness, in private litigation they experience a state of absolute passiveness. For PBEs, however, the analysis is perhaps more worrisome. They have been excluded from law due, in part, to the same reasoning of classical premises according to which all market agents have to be seen as equals and thus no possibility remains for considering PBEs stance as valid insofar as the same does not emerge, as such, from a breach of competition law or from lack of meritocracy. The situation of victims and PBE, yet, opens the door to consider a contradistinctive reasoning to counter classical premises.

Our fourth and last conclusion is that the position of victims and PBE can indeed become revitalized only if hierarchies and dynamics of empowerment/disempowerment are inverted. This can be done using a deconstructive approach that focuses competition law on the right to compete and, in so doing, to acknowledging two essential elements; (i) the recognition of differences amongst market agents and (ii) awarding possibilities before getting to merits. Furthermore, this deconstructive approach involves understanding competition law (and with that markets and competition) not exclusively from systemic values but essentially from individuality. Thus, competition law would be compelled to see the right to compete as well as differences and possibilities as the main reason for operating or unfolding legal dynamics and hierarchies. This means, in practical terms and in the Colombian case in particular, that the asymmetrical position in which anticompetition has placed victims and the need for understanding that PBE (at least in the case of Afrocolombians) have been prevented from accessing markets and competition due to reasons that are extraneous to them and therefore to their own merits must be recognized.

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